



COST AND DELAY REDUCTION PLAN

UNDER THE CIVIL JUSTICE REFORM ACT OF 1990

**THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS**

OCTOBER 24, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NOV 1 - 1991

Jesse E. Clark, Clerk
By Deputy: *Mascanella/Kuback*


RE: ADOPTION OF CIVIL JUSTICE §
REFORM ACT COST AND DELAY § GENERAL ORDER NO. 91-24
REDUCTION PLAN §

ORDER

The Court Meeting in Executive Session on October 24, 1991, considered the Report and Recommended Cost and Delay Reduction Plan by the Civil Justice Reform Act Advisory Group for the Southern District of Texas. Following discussion and modification, the attached Plan is ADOPTED, as amended.

DONE October 24, 1991, at Houston, Texas.

FOR THE COURT:


James DeAnda, Chief Judge
United States District Court

PLAN

COST AND DELAY REDUCTION PLAN

SOUTHERN DISTRICT OF TEXAS

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SOUTHERN DISTRICT OF TEXAS

The Advisory Group for this District has completed its statutory tasks under the Civil Justice Reform Act of 1990. This Court adopts the measures, rules, and programs incorporating the six principles of litigation management and cost and delay reduction mandated for inclusion by pilot courts and contained in the Advisory Group's Report for implementation in this district beginning January 1, 1992.

THE PLAN

1. Differential Case Management¹

Existing differential case management of asbestos cases through a Special Master, Veteran's Administration and Student Loan cases through assignment to a single Senior Judge, and prisoner civil rights and habeas corpus cases through Staff Attorney screening and processing (see Chart, Appendix E) will be expanded as follows:

The Court will coordinate a team of three (3) additional Staff Attorneys for court service district-wide to screen and review new case filings for placement in appropriate case management tracks and to perform an evaluation of individual cases eligible for expedited handling, curing any defects by recommended action early on, quickly recommending appropriate dismissal or remands. This screening structure is to assist the judges, and it is not to restrict a judge from directly or indirectly applying the judge's case-specific processing for the prompt disposition of a case.

A. Bankruptcy Appeals

Cases will be monitored from their filing by Staff Attorneys, who will review briefs filed pursuant to Bankruptcy Rule 8009 and prepare recommendations for prompt disposition, and in cases where there is failure to timely file briefs--preparation of proposed orders of dismissal for want of prosecution under Rule 8009.

¹28 U.S.C. § 473(a)(1) (Supp. 1991) "systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity"

B. *Social Security Appeals*

Cases will be monitored from their filing by Staff Attorneys through joining of issue or Motion for Summary Judgment with recommendations for disposition on the record or motions within 140 days of the filing of the complaint.

C. *FDIC, RTC, FSLIC Cases*

Cases involving these parties will be screened by Staff Attorneys for early disposition on remand, dismissal, or summary judgment, with cases not qualified for early disposition referred immediately to the assigned judge for scheduling of the initial pretrial conference.

D. *Pro se Plaintiff Cases*

These cases will be screened by Staff Attorneys for defects with procedural instructions being forwarded to *pro se* plaintiffs as necessary, and preparation of proposed dismissals of frivolous complaints as appropriate. These cases will be monitored in the same fashion as are prisoner civil rights cases by existing staff attorneys.

E. *Removed Cases*

Expedited review of these cases will be accomplished by Staff Attorneys to determine the propriety of the removal and subsequent referral to the assigned Judge for setting of the initial pretrial conference. Recommendations for remand will be forwarded to the assigned Judge. In appropriate cases, the general order requiring a discovery case management plan will be immediately distributed. Motions to remand will be referred to Staff Attorneys for recommendation.

F. *All Other Cases*

As these cases are filed, counsel for plaintiff will be served with a General Order requiring that counsel meet and prepare a joint discovery/case management plan for presentation at the initial pretrial conference.

2. Magistrate Judges²

Each Judge in the Houston Division, consistent with the criminal and civil assignments currently in place, will assign five to ten percent of his/her new civil case filings to his/her assigned Magistrate Judge for handling of all pretrial responsibilities, and, on consent of the parties,³ through disposition. Judges will attempt at all times to maintain approximately fifty civil cases under the supervision of each Magistrate Judge in these divisions. Judges in the Brownsville, Corpus Christi, Galveston, Laredo, and McAllen Divisions will not be affected but are encouraged to maximize utilization of Magistrate Judges in the civil area where feasible.

3. Initial Pretrial Conferences⁴

The Advisory Group's proposed revision of Local Rule 8 "Initial Pretrial Conference; Scheduling Orders" is adopted as follows:

* * *

Rule 8. Initial Pretrial Conference Scheduling Orders

Within 140 days after a party files a complaint or notice of removal the judge to whom the case is assigned will conduct an initial pretrial conference under Fed. R. Civ. P. 16 and enter a scheduling order, except in the following types of cases: (a) prisoner civil rights actions; (b) state and federal habeas corpus actions; (c) student and veteran loan actions; (d) social security

²28 U.S.C. § 473(a)(2) (Supp. 1991) "early and ongoing control of the pretrial process through involvement of a judicial officer" and (3) ". . . careful and deliberate monitoring through a discovery-case management conference or a series of conferences"

³Former 28 U.S.C. § 636(c)(2) (1988) amended 28 U.S.C. § 636(c)(2) (Supp. 1991) by the Judicial Improvements Act of 1990.

⁴28 U.S.C. § 473(a)(2) (Supp. 1991) "early and ongoing control of the pretrial process through involvement of a judicial officer in -- (A) assessing and planning the progress of a case; (B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint"

appeals; (e) bankruptcy appeals; and (f) complaints to forfeit seized assets.

A judge may in his discretion conduct an initial pretrial conference and enter a scheduling order in any of the types of cases excepted.

* * *

The Rule 16 Scheduling Order setting cut-off dates for new parties, motions, expert witnesses and discovery, setting a trial date, and establishing a time framework for disposition of motions will be entered at such conference. Should there be a prior request for a Rule 26(f) discovery conference, the Scheduling Order may be entered at that conference.

Additional pretrial/settlement/discovery conferences will be scheduled by the Court as the need is identified in specific cases.

By individual notice, the Court will require attendance at all pretrial/settlement conferences "by an attorney who has the authority to bind that party regarding all matters . . .", 28 U.S.C. § 473(b)(2), and require "that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request." 28 U.S.C. § 473(b)(3).

4. Discovery/Case Management Order⁵

A general order requiring the preparation of a discovery/case management plan by counsel prior to the initial pretrial conference will be entered in each case which is not placed in differential case management tracks 1. A through E under this plan.

5. Complex Cases

Cases identified by the Court as complex in nature following the initial pretrial conference will be managed by the Court as follows:

⁵See 28 U.S.C. § 473 (b)(1) (Supp. 1991) "In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court . . . shall consider and may include . . . (1) a requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference" and 28 U.S.C. § 473 (a)(3), *id.*

A. *Discovery*

In cases so identified, consideration will be given to necessary discovery conferences and sequencing of discovery in "waves" identified in the *Manual for Complex Litigation, Second*, § 21.421 (1985).

B. *Bifurcation*

Consideration of the applicability of Rule 42(b) and its application will be given at the initial pretrial and subsequent conferences held by the Court.

6. **Voluntary Disclosure**⁶

Each Judge will order discovery to proceed under the proposed federal rule on voluntary disclosure⁷ in a minimum of twenty cases each year in the Houston Division and a minimum of ten cases each year in the remaining divisions. This practice will be evaluated annually to assess its effectiveness and to consider expansion or discontinuation.

7. **Alternative Dispute Resolution**⁸

While the Court is currently engaging in individual selective referral of cases to arbitration and special masters, the Local Rule on Alternative Dispute Resolution proposed by the Advisory Group is adopted as follows:

⁶28 U.S.C. § 473(a)(4) "encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices."

⁷See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, Rule 26, pp. 87-106 (Aug. 1991). A copy of the rule as adopted is attached.

⁸48 U.S.C. § 473(a)(6) "authorization to refer appropriate cases to alternate dispute resolution"

* * *

Alternative Dispute Resolution

This court recognizes that alternative dispute resolution procedures may facilitate settlement or narrowing of issues in certain civil actions. Therefore, the court adopts the following ADR procedures:

A. Timing of ADR Decision.

1. Before the initial conference in a case, counsel shall discuss the appropriateness of ADR in the litigation with their clients and with opposing counsel.
2. At the initial pretrial conference the parties shall advise the court of the results of their discussions concerning ADR. At that time and at subsequent conferences, if necessary, the court shall explore with the parties the possibility of using ADR.

B. ADR Referral. The court may refer a case to ADR on the motion of any party, on the agreement of the parties, or on its own motion. If the parties agree upon an ADR method or provider, the court will respect the parties' agreement unless the court believes another ADR method or provider is better suited to the case and parties. The authority to refer a case to ADR does not preclude the court from suggesting or requiring other settlement initiatives.

C. Opposition to ADR Referral. A party opposing either the ADR referral or the appointed provider must file written objections with the court within ten days of receiving notice of the referral or provider, explaining the reasons for any opposition.

D. ADR Methods Available. The court recognizes the following ADR methods: mediation, mini-trial, summary jury trial, and arbitration. The court may approve any other ADR method the parties suggest or the court believes is suited to the litigation.

- E. List of Providers. The court shall have a standing panel on ADR providers. The court will appoint three members and designate one member as chairperson. The panel will review applications from providers and annually prepare a list of those qualified under the criteria contained in this rule. A provider denied listing may request a review of that decision.
1. To be eligible for listing, providers must meet the following minimum qualifications:
 - a. Membership in the bar of the United States District Court for the Southern District of Texas;
 - b. Licensed to practice law for at least ten years;
 - c. Completion of at least forty hours training in dispute resolution techniques in an alternative dispute resolution course approved by the State Bar of Texas Minimum Continuing Legal Education department.
 2. A provider must submit a completed application which contains:
 - a. The ADR method(s) in which the provider seeks to be listed;
 - b. A concise summary of the provider's training, experience, and qualifications for the ADR method(s) in which the provider seeks to be listed;
 - c. The subject matter area(s) in which the provider has particular expertise;
 - d. The provider's fee schedule;
 - e. A commitment to accept some cases for no fee or a reduced fee.
 3. Annually after listing the provider must participate in at least five hours of ADR training.

4. Each provider shall remain on the list for five years. After a five-year term the provider may apply for relisting.
 5. The court may approve any other provider the parties agree upon even though the provider is not listed.
- F. Attendance; Authority to Settle. Party representatives with authority to negotiate a settlement and all other persons necessary to negotiate a settlement, including insurance carriers, must attend the ADR session.
- G. Fees. The provider and the litigants will determine the fees for the ADR. However, the court reserves the right to review the reasonableness of fees.
- H. Binding Nature. The results of ADR are non-binding unless the parties agree otherwise.
- I. Confidentiality; Privileges and Immunities. All communications made during ADR procedures are confidential and protected from disclosure and do not constitute a waiver of any existing privileges and immunities.
- J. Disqualification. All providers are subject to disqualification pursuant to 28 U.S.C. § 455 (1988).
- K. Conclusion of ADR Proceedings. At the conclusion of each ADR proceeding the provider, parties, and the court will take the following action:
1. The ADR provider will send the court clerk a memorandum stating the style and civil action number of the case; the names, addresses, and telephone numbers of counsel; the type of the case; the method of ADR proceeding; whether ADR was successful; and the provider's fees.
 2. The court clerk shall submit a questionnaire to the parties and will require counsel and their clients to complete and return the questionnaire for reference by the court, attorneys, and public.

3. The court clerk annually shall tabulate, analyze, and report on the disposition of ADR proceedings. The clerk shall keep on file the questionnaire from closed ADR proceedings.

L. Sanctions. The sanctions available under Fed. R. Civ. P. 16(f) shall apply to any violation of this rule.

* * *

8. Trial Procedures

A. Jury Education

Where appropriate, the Court will use techniques to enhance jury understanding, including, but not limited to, tutorial media to explain complex concepts to jurors, joint statements of stipulated facts in complex cases, and the use of videotaped depositions. The use of such techniques will be constrained by the Federal Rules of Civil Procedure.

B. Timing Orders

Where appropriate, the Court will impose orders limiting the time allowed for examination and cross-examination of witness, and/or presentation of cases in trials.

C. Expert Witness Testimony

The Court as a whole deals with limitation of expert witness testimony on a case by case basis, tailoring any limitation of testimony to the individual case. By joint pretrial order, Local Rules Southern District of Texas at ¶11A, counsel are required to list names and addresses of witnesses, including qualification of expert witnesses with a brief statement of the nature of their testimony.

9. Conservation of Judicial Resources⁹

Southern District of Texas Local Rule 6 A.4.a.b., reads in pertinent part "Opposed motions shall: . . . [c]ontain an averment that (a) The movant has conferred with the respondent

⁹28 U.S.C. § 473(a)(5) "conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion"

and that (b) Counsel cannot agree about the disposition of the motion."

10. Resources¹⁰

In order to implement the Cost and Delay Reduction Plan enumerated, the Southern District of Texas is requesting additional resources with an anticipated total first-year budget of \$697,924.00. These positions are as follows:

A. *Three Staff Attorneys.*

These positions shall perform the tasks enumerated in part (1) of this Plan. Based on the current 350 case standard for staff attorney allocation, the Court contemplates that planned addition of 1000+ case filings demanding close attention,¹¹ together with an anticipated 1400 removed case filings¹² requiring expedited, cursory review will necessitate three staff attorneys. Accelerated attention will be given to over half of the annual civil filings under this plan by the staff attorney team.

B. *Two Secretaries*

These two positions are required to aid in preparation of proposed orders, memoranda, etc., and to serve as an overload secretarial pool for utilization by Article III judges, with flexible working hours as determined by the Clerk to meet the needs of the Court.

C. *Eighteen Courtroom Deputies*

Each judge (18) will have a deputy district clerk serving as a courtroom attendant performing courtroom support functions thereby relieving the case manager from these responsi-

¹⁰28 U.S.C. § 473(a) (1) ". . . differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as . . . resources required and available for the preparation and disposition of the case."

¹¹During the twelve-month period ending May 31, 1991, there were 156 bankruptcy appeals and 59 social security appeals in the Southern District of Texas. During the twelve-month period ending June 30, 1991, there were 226 non-prisoner *pro se* filings, and 609 filings with the FDIC, FSLIC, and RTC as parties.

¹²During the twelve-month period ending June 30, 1991, there were 1466 removals from state court to the Southern District of Texas.

bilities. This clerk will assist the case manager when not performing duties in the courtroom.

D. *Three Case Managers*

Three case managers are required to manage the accelerated civil case trial docket for magistrate judges to be centrally located in the Houston Division.

E. *Two Alternative Dispute Resolution Clerks*

The two positions, serving district-wide, will maintain the ADR-provider list, prepare, distribute, and evaluate ADR questionnaires, and perform other clerical functions anticipated by the ADR rule included in this Plan.

F. *Four Electronic Court Recorder Operators*

In order to accommodate the anticipated increase in courtroom activity by magistrate judges under this plan and to aid the overburdened court reporters, four (4) positions will be added. This will provide a ratio of one recorder operator for each two magistrate judges and will permit the comfortable scheduling of civil cases without the delay often caused by attempting to locate a contract court reporter with either electronic or traditional training.

G. *Justification*

Having accepted the Congressional mandate to adopt a plan, the Court now requests that Congress accept its own charge for "significant contributions," and authorize the necessary funding.

The Court recognizes that this request is, on its face, substantial. The Court would therefore like to point out that, during the last fifteen years, the Southern District of Texas has experienced 156.7 vacant judgeship months,¹³ the equivalent of thirteen (13) United States District Judges sitting for one full year. In a court with an already acknowledged shortage of authorized judgeships, the lag between judicial vacancies and judicial confirmations has contributed more than its share to cost and delay in the district. The judicial vacancies in this district over the past ten years have resulted in an estimated total savings in

¹³Federal Court Management Statistics, Twelve Month Periods Ending June 30, 1976 through 1990.

annual judicial support of \$4,297,218.20.¹⁴ The district is imploring Congress to provide a small portion of this savings to help the district remedy the problems that judicial vacancies have caused.

Expressed in another way, the total anticipated first-year cost of the requested personnel, subtracting equipment and furniture costs, is \$519,574.00. An additional United States District Judge costs \$938,332.00 in the first year, and \$605,242.00 thereafter, including equipment, office costs, and personnel. The Judicial Conference of the United States recommended that this Court receive seven (7) additional judgeships in 1990, but Congress only authorized five (5). The court will attempt to operate in an efficient manner without these judicial resources, an estimated savings of \$1,876,664.00, more than twice the anticipated budget for the additional personnel resources requested to implement this plan.

This Court has long known what resources were necessary to manage the litigation more expeditiously in the district. Budget constraints have made these resources scarce. Congress, having made the commitment to just, speedy, and less expensive resolution of civil litigation manifested in passage of the Civil Justice Reform Act should honor its commitment by providing the resources necessary to achieve its stated goals.

¹⁴Vacant judgeship statistics from *Federal Court Management Statistics* for the relevant statistical years. Information on the annual support cost of a United States District Judge was obtained from Mr. David F. Spinelli, Budget Development Section Chief in the Administrative Offices of the United States Courts.