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Telephone:
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January 16, 1991

TO ALL CHIEF JUDGES, U.S. DISTRICT COURTS

RE: Civil Justice Reform Act of 1990

To assist you and your court in implementing the Civil Justice Reform Act of 1990, the Center has prepared the enclosed memorandum, containing an analysis of the Act and suggestions for its implementation. The analysis and suggestions reflect the Center's best judgment at this time, taking into account all available information, but do not purport to be an authoritative or official position. They have been reviewed by the Committee on Court Administration and Case Management of the Judicial Conference and the Administrative Office, but do not necessarily reflect the position of those bodies or of the Judicial Conference or the Center's Board. Experience under the Act may lead us to supplement or revise and in any event, additional materials to assist your district's advisory group will be provided in the near future.

Each district court must, of course, make its own decisions concerning the manner of implementing the Act. We hope that you will find the memorandum, along with the December 20 recommendations of the Court Administration Committee, helpful in arriving at those decisions.

Opinions vary concerning the desirability and utility of this Act. It is now law, however, creating an obligation to implement it. The enclosed memorandum proceeds from that assumption, but also suggests that the Act offers an opportunity to improve the administration of justice in your courts.

William W. Schwarzer

Enclosure

cc: Chief Judges, U.S. Courts of Appeals
Circuit Executives
Clerks, U.S. District Courts

FEDERAL JUDICIAL CENTER

Implementation of the Civil Justice Reform Act of 1990

The Federal Judicial Center prepared this memorandum in an effort to provide initial assistance and guidance to the district courts as they approach the task of implementing the Civil Justice Reform Act of 1990, which was signed by the President on December 1, 1990.

The memorandum summarizes the legislation and includes designated sections of "Comment" when appropriate. Some of the Comment in Part III includes suggested local rules. Even courts that are unprepared now to develop and implement a plan may find the suggested rules helpful in analyzing the Act's application to their particular situation.

The analysis and suggestions in this memo reflect the Center's best judgment at this time, taking into account all available information, but do not purport to be an authoritative or official position. They have been reviewed by the Committee on Court Administration and Case Management of the Judicial Conference and the Administrative Office, but, except as noted, do not necessarily reflect the position of those bodies or of the Judicial Conference or the Center's Board.

Contents

I. Introduction

The Act seeks to bring about reduction in the cost and delay of civil litigation in the U.S. district courts through "significant contributions" by the courts and by "the litigants, the litigants' attorneys, and by the Congress and the executive branch." It thus contemplates a community effort and requires each district court to develop and implement a civil justice expense and delay reduction plan (the plan) as the primary means of mobilizing that effort. It would be counterproductive to view the plan as a device to add burdens for district judges or to shackle their discretion. Instead, the plan should serve as a practical document that will—by incorporating principles, guidelines, and techniques suitable for each court's circumstances—focus the contributions of the entire legal community on the improvement of the civil litigation process.

Each district should see the implementation process as an opportunity to strengthen its control over the civil litigation process. The Act provides a statutory tool for the courts to use in asserting this control. Moreover, it encourages districts that are able to implement plans quickly to do so, while providing time for more study and analysis in districts that believe they need it. At the same time, courts should have in mind that the advisory groups, which must be appointed by March 1, 1991, can be expected to recommend the early adoption and implementation of a meaningful plan. This is so because they will principally represent user interests and because the Act leaves it to the advisory groups to organize themselves and structure their work. Indeed, some districts are already receiving expressions of interest in advisory group participation.

Courts should have in mind that there are no funds in the current courts budget earmarked to fund implementation of the Act. It remains to be seen whether Congress will appropriate funds (authorized by the Act) for this purpose.

The Act consists of secs. 101–106. Section 103(a) of the Act adds a new Chapter 23 ("Civil Justice Expense and Delay Reduction Plans") to Title 28. Chapter 23 contains §§ 471 through 482. The subject matter of the Act that is relevant to the district courts deals with two general areas: the process of implementation and the content of the plan. This memorandum addresses the principal issues within each of these areas. Whenever possible, it relies on the statutory language. Where the statutory text is unclear or leaves relevant questions unanswered, the memorandum suggests an interpretation consistent with the stated purposes and the legislative history.

This memorandum does not purport to be authoritative; experience under the Act may shed further light on its interpretation and implementation. Moreover, courts and advisory groups will no doubt generate ideas, approaches, and programs in addition to those suggested here. We hope, however, that this memorandum will serve as a useful source of guidance, offering procedural and substantive ideas worthy of consideration as districts embark on the task of implementation.

The Center and the Administrative Office will provide further implementation assistance to the courts, including written materials and conferences and seminars.

II. Implementing the Act

The Act imposes implementation duties on the courts, the Judicial Conference, the Administrative Office, and the Federal Judicial Center. This memorandum deals mainly with implementation duties of the courts. Those duties involve appointing an advisory group and perhaps a reporter or reporters, and developing and implementing a civil justice expense and delay reduction plan based on the work of the advisory group.

The Act imposes these implementation duties on all districts, but it also contemplates that some districts will serve as demonstration districts and others as pilot districts to allow tests of specific case management techniques, and that some will elect to be early implementation districts (EIDs).

The table below shows the main implementation deadlines for the courts. The Act's requirements for plan implementation (§§ 471-478) will expire on December 1, 1997 (sec. 103(b)(2)).

	3/1/91	12/31/91	6/1/92	12/1/93
EIDs (also includes pilot districts and demonstration districts who elect to be EIDs)	Appoint advisory groups	Implement plans		
JCUS			AO to distribute EID plans, reports, to all courts along with JCUS report on same; JCUS may prepare model plan(s)	
Other Courts	Appoint advisory groups			Implement plans

A. Timing of Implementation

The Act divides the district courts into four categories, to which different timing requirements apply or may apply.

1. Pilot districts (sec. 105)

Ten districts, which will shortly be designated by the Judicial Conference, MUST implement plans by December 31, 1991. Those districts MUST include in their plans the six principles and guidelines specified in § 473(a) (discussed in Part III, memo p. 11). These districts will also be included among the EIDs.

2. Early implementation districts (sec. 103(c))

Any district that develops and implements an approved plan between June 30 and December 31, 1991, will be designated by the Judicial Conference as an EID.

As such, it becomes eligible to apply for supplemental funds, which at this date have been authorized but not appropriated.

Districts that wish to become EIDs should contact either Duane Lee or Abel Mattos of the Court Administration Division of the Administrative Office (FTS/202 633-6478).

3. Demonstration districts (sec. 104)

The statute designates five districts (WD-MI, ND-OH, ND-CA, ND-WV, WD-MO) to experiment with specified programs. They may become EIDs if they elect. They must, in an any event, implement plans under the general provisions of sec. 103(b).

4. Other districts (sec. 103(b))

All districts that are not pilot districts or EIDs must implement plans by December 1, 1993.

B. Scope of District Plans

Although the Act is silent, the Report of the Senate Judiciary Committee states that the Act is not intended to apply to cases pending in the bankruptcy courts. (S. Rep. No. 101-416 on S. 2648, Aug. 3, 1990, Senate Report, p. 51)

The Act presumes that a district will have only a single group and plan and the Court Administration Committee has so recommended. If divisions of the district have distinct types of litigation and distinct needs that make a single plan impractical, those divisions may form separate groups and develop separate plans. (Senate Report, p. 51)

C. Appointment of Advisory Groups (§ 478)

1. Timing (§ 478(a))

By March 1, 1991, the chief judge of each district, after consultation with the other judges of the court, must appoint an advisory group.

2. Composition (§ 478(b))

The Act requires the group to "be balanced and include attorneys and other persons who are representative of major categories of litigants in such court, as determined by the chief judge." The U.S. attorney for the district, or his or her designee, shall be a permanent member. No other member may serve longer than four years.

Comment

(1) The House Report discusses membership as follows:

> Subsection (b) . . . mandates that each advisory group be balanced, and that each include attorneys and other persons who are representative of major

> categories of litigants in the particular court in which the advisory group will work. The process for selecting members of an advisory group ensure [*sic*] that each of the major categories of litigants in the district are represented. Lawyers who represent the Federal, State, and local governments in the district court should typically be included. It is anticipated that the U.S. Attorney or his or her designee will be a member of the advisory group, and to ensure that this is possible, an exception to the four-year limit on membership terms is provided for the U.S. Attorney or his or her designee. It is important that lawyers practicing in law firms of diverse sizes, in corporations, and for public interest groups representing different philosophic positions, should be represented. (House Report, pp. 18-19)

The group should be representative so it can mobilize contributions from the entire community. Selections should reflect the profile of litigation in the district and represent major categories of litigation to the extent feasible. Additionally, the Judicial Conference Court Administration Committee recommends, based on discussion at its January 3-4, 1991, meeting, that one or more non-attorneys serve on the group.

Section 472 (discussed below at memo p. 6) charges the group with difficult, complex, and time-consuming tasks. To discharge them, its members must have sufficient knowledge, experience, skill, interest, time, and resources to analyze, for example, the demands of various kinds of litigation, common causes of cost and delay in litigation, discovery, motion, and trial practice, means of alternative dispute resolution, and lawyers' and clients' practices affecting cost and delay.

(2) The Act is silent as to membership by judges of the court. The group's need for experience and knowledge, however, coupled with the need to enhance mutual understanding between the group and the judges of the court who must eventually vote on its recommendations, argue for including at least some of the court's judicial officers as non-voting members of the group, and the Court Administration Committee has so recommended.

(3) The Act is also silent as to size, but the House report states:

> The size of the advisory group should be left to the appointing authority, but it is anticipated that the group will be sufficiently large to accommodate the major categories of litigants in the district. Balance is also relevant to the successful operation and functioning of an advisory group. It is anticipated that an equivalent number of plaintiffs', defendants', corporate and public interest lawyers representing different philosophic positions will be included. Drawing upon this kind of expertise will enable each district court to maximize the prospects that workable plans will be developed and will stimulate a much-needed dialogue about methods for improving the fairness of the civil justice system and for streamlining litigation practice. (House Report, p. 19)

It seems unlikely that a group of fewer than ten members can respond to the Act's requirements. Because of the wide interest already being expressed by various parties, it will not be easy to keep these groups small, but courts should not permit the groups to become unwieldy. The Court Administration Committee recommends groups of from ten to fifteen members, but recognizes that in the larger districts fifteen- to twenty-member groups may be appropriate.

D. Advisory Group Reporter

1. Appointment and Compensation (§ 478(e))

- The chief judge MAY designate a reporter for the group.
- The reporter MAY be compensated in accordance with guidelines established by the Judicial Conference.

2. Duties

The Act does not specify the reporter's duties.

Comment

(1) The Act does not require appointment of a reporter, but the magnitude and complexity of the group's task militate in favor of appointing at least one. The reporters' duties are likely to fall into two categories.

First: the reporter may serve as secretary and facilitator, providing the group with statistical and other information about the court, keeping minutes, providing logistical support, etc. The clerk of the court, or his or her designee, could perform these duties and therefore should serve the group in some capacity, whether as reporter, co-reporter, or secretary; the Court Administration Committee has suggested that the clerk also might serve as an ex officio member of the advisory group.

Second: the reporter could serve the group as an expert. Without expert support, the group is likely to produce little more than generalities and may indeed flounder. Expert assistance would be useful—if not essential—for the required assessment and analysis of the court's dockets, identification of causes of delay and cost, the development of solutions, including the design of court programs for alternative dispute resolution and the drafting of local rules or forms of case management orders, etc. In some districts, the clerk of court may be able to provide this expertise. Other districts may be able, and may prefer, to enlist the services of a law professor, a retired judge or court administrator, or other person with the requisite expertise.

(2) Although no funds have as yet been appropriated, funds may become available through supplementary appropriation. Even if no funds are immediately available, a qualified person may be willing to serve the group on a pro bono basis, perhaps in return for appropriate use of data in the reporter's own research projects.

E. Duties of Advisory Group

1. Contents of report to the court (§ 472(b)); timing of report

The Act directs each group to provide the court a public report, which shall include

- an assessment of the matters discussed in para. 2 below (memo p. 7);
- recommended measures, rules, and programs for the plan;
- the basis for its recommendations;

- an explanation of how the recommendations comply with the Act's provision regarding the content of the plan.

The Act does not specify when the group is to submit the report but it does require that the group "shall PROMPTLY complete a thorough assessment of the state of the court's civil and criminal dockets." (§ 472(c)(1) (emphasis supplied))

Comment

The group's report might adopt a format along the following lines:

First, a statement of the problem(s) or condition(s);

Second, recommended solution(s) for each problem or condition, supported by specific statements of the method of implementation, such as the text of proposed rules or forms of order (see discussion of plan's content in Part III, memo p. 11).

Third, elaboration of the basis for the recommendations, including specific references to the assessments made and the supporting evidence or findings.

In the EIDs, the group must submit the report in time for the court to give the required consideration to its recommendations and develop and implement a plan by December 31, 1991. Because the plan may require changes to local rules, the group would probably have to submit its report by the end of July 1991 to allow time for public notice and comment; note, however, that 28 U.S.C. § 2071(e) allows a court to prescribe rules without notice and comment if there is an "immediate need" for the rule and the court "promptly thereafter" provides a notice and comment period. Other districts would have more time since their implementation deadline is December 1, 1993.

2. Duty to assess court's dockets (§ 472(c))

a. In making "a thorough assessment of the state of the court's civil and criminal dockets," the group is to:

(1) "determine the condition of the civil and criminal dockets"

(2) "identify trends in case filings and in the demands being placed on the court's resources"

(3) "identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and ways in which litigants and their attorneys approach and conduct litigation"

(4) "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts." (§ 472(c)(1))

Comment

Determining the condition of the civil and criminal dockets should involve, among other things, analysis of court-wide and per judge caseload data, case aging, times to termination, and the semi-annual reports on judicial statistics mandated by § 476(a).

Analysis in filing trends could include not only general trend data but also identification of categories of cases creating special burdens (e.g., death penalty, asbestos, prisoner, complex criminal, and RICO cases). The advisory group may also want to explore the causes underlying filing trends, such as conditions giving rise to particular kinds of civil

litigation, charging and plea practices of the U.S. attorney, etc. The Senate Report notes that this would also include a determination of whether the court lacks sufficient resources, including judicial personnel and administrative staff or space, facilities, and equipment (Senate Report, p. 52).

Identifying "the principal causes of cost and delay" is a tall order and probably not something the advisory groups will be able to do with precision. They can, however, undertake a broad review of litigation practices and procedures both in and out of court with a view to how they could be modified to reduce cost and delay. The group could assess the rules, orders, and practices of the court for processing litigation; examine practices of lawyers and clients, including pleading of excessive claims and defenses; the conduct of discovery; motion practice; the degree of cooperation and communication between lawyers, including voluntary sharing of information; clients' expectations and instructions; billing practices; the use of stipulations; settlement practices by private litigants and governments; etc.

The reference in § 472(c)(1)(D) to "a better assessment of the impact of new legislation" addresses a role for Congress in reducing civil delay and expense. The group should study the impact of legislation on court dockets and burdens (such as, e.g., existing statutory sentencing schemes; and the creation of new causes of action, e.g., RICO, Financial Institutions Reform, Recovery, and Enforcement Act of 1989), procedural rules that encumber the courts and encourage litigation, failures of Congress to enact legislation that would ease the burden on courts (e.g., authorizing mandatory court-annexed arbitration) or to clearly express its intent (e.g., with reference to private causes of action). It should also consider steps that the judicial branch as a whole, or individual courts, can take to improve their ability to adapt to new legislation.

The Center and the Administrative Office will shortly furnish further information for the specific guidance of advisory groups.

b. "In developing its recommendations, the advisory group . . . shall take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys." (§ 472(c)(2))

Comment

The group will need to do more than come up with generalized findings and conclusions. It should draw from its assessments significant findings that identify the particular circumstances of the district affecting cost and delay and the resulting needs.

c. The group "shall ensure that its recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts." (§ 472(c)(3))

Comment

The assessment and recommendations of the group may fall into two categories:

First, recommended practices for judges to follow

- narrowing issues early in the case

- controlling discovery
- limiting motion practice and encouraging dispositive motions
- controlling the scope and length of the trial
- preventing satellite litigation over discovery and sanctions.

Second, recommended practices for attorneys and clients to avoid

- conducting excessive discovery
- failing to narrow issues and use stipulations
- failing to communicate effectively and cooperatively
- abusing motion practice
- failing to make sufficient use of mediation and alternative means of dispute resolution
- failing to exhaust settlement possibilities early
- conducting excessively long trials.

F. Development and Implementation of the Plan

1. Development of plan by district

The Act requires each district to implement a plan "developed by such district . . . or a model plan developed by the Judicial Conference." (§ 471)

a. **Timing** - see para. A, memo p. 3.

b. **Model plan** - (see § 477(a)(1)). The Judicial Conference may develop one or more model plans based on the plans developed and implemented by the EIDs. Because the EIDs' plans will not begin to operate until the end of 1991, no model plans can be expected until some time after that date.

2. Process of plan development

In developing and formulating a plan the court must

- CONSULT with the advisory group (§ 473(a))
- CONSIDER the recommendations of the group (§ 472(a))
- CONSIDER all of the principles, guidelines, and techniques set forth in § 473(a) and (b).

(See discussion in Part III, memo p. 11)

Comment

The Act provides no additional direction concerning the formulation or adoption of the plan. It leaves the manner of adoption of the plan to the court's internal governance. Presumably, courts will vote on the adoption of a plan as they would on a general order or local rule; that is the view of the Court Administration Committee.

The Act does not call for public comment on the plan. However, it is likely that many plans will involve the adoption of local rules, in which event the public notice provisions of 28 U.S.C. § 2071 and Fed. R. Civ. P. 83 will apply (see Comment to para. E.1, memo p. 7).

3. Implementation (§§ 471, 472(a))

The Act contains no additional directions for implementation. Once the plan has been implemented, the chief judge must transmit copies of the plan and the group's report to the Administrative Office, the circuit judicial council, and the chief judge of each district in the circuit.

4. Review

The chief judges of the districts in a circuit and the circuit chief judge—or judges they designate—as a committee, shall review each plan and make appropriate suggestions for additional or modified actions as the committee considers appropriate. (§ 474(a))

The Judicial Conference shall review each plan and request additional action if a plan does not adequately respond to relevant conditions or to the advisory group's recommendations. (§ 474(b))

5. Annual district assessment (§ 475)

Each district shall annually assess dockets and consult its advisory group to determine appropriate additional actions that may be taken.

III. Content of the Plan

The statutory purpose of the plan is "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." (§ 471)

A. Overview

1. What must the plan include?

Congress did not specify (except in the case of the ten pilot districts—see sec. 105) what a plan must include. What a court decides to include in its plan will depend on what it finds to be the needs and circumstances of its district, after considering its advisory group's report and recommendations. Congress did, however, specify certain principles, guidelines, and techniques of litigation management and cost and delay reduction that courts are required to *consider* in formulating a plan (and, except for the techniques, that pilot districts are required to include). This part of the memorandum analyzes and discusses those principles, guidelines, and techniques and suggests approaches for addressing them in a plan.

While the Act does not require any plan to incorporate specific provisions (except as stated above), Congress clearly expects courts to adopt plans that reflect a significant commitment to bringing about reductions in cost and delay. The commitment, of course, as previously discussed, is not limited to the court but includes the entire legal community, Congress, and the executive branch. A plan should call for significant contributions by all of them; if courts are to succeed in the effort the Act contemplates, attorneys and litigants will have to play a major role. Nor need such contributions be limited to matters touching directly on the processing of litigation. A plan might also, for example, call for bar sponsorship of periodic training programs for lawyers in federal practice, and of panels to provide representation to pro se litigants.

2. Will the plans curtail judicial discretion?

Nothing in the Act suggests that judicial discretion should be displaced or that judges should be regimented in the way they manage litigation. The House Judicial Committee said it was "unwilling to impose the Congress' view of proper case management upon an unwilling judiciary." (House Report, p. 14) Rather, the Act calls for a plan that will energize and guide the exercise of discretion to advance the purposes of the Act. A soundly constructed plan, while establishing guidelines, checklists, and procedures aimed at cost and delay reduction, will leave room for the exercise of individual judgment and discretion in their application in the light of the needs of the particular case and the parties.

3. What if a court has an effective civil case management system in place already?

Implementation of a plan does not necessarily require a court to change methods and techniques employed by judges of that court that have been effective in controlling cost and delay. The Act requires the advisory group to assess those methods and techniques to see if they are found wanting in any respect. To the extent ex-

isting methods or techniques are found to be effective, a plan should incorporate those methods and techniques to ensure that they become and remain a part of the court's established procedures. Congress viewed the problem of cost and delay as a national problem. But once the state of dockets is examined at the level of discrete districts, the assessments can be expected to differ widely. A problem may exist in some districts but not in others. Whether there is a problem at all in a district may be disputable; there may often be a question of "compared to what." And certainly the causes of a problem may not be obvious and may be much in dispute. For these and other reasons, it is important that courts, rather than adopting simplistic approaches, assess the dockets and examine the circumstances and needs of their districts with great care. The resulting decisions concerning the content of the plan should reflect the court's best judgment of a constructive, workable program to bring about improvements in the administration of justice in the district.

B. Elements of the Plan

The discussion that follows is intended to help the courts begin to think about the content of their plans. It is, of course, not intended to dictate what courts should do or to imply that it is the only, preferred, or official solution. The decision how to develop its plan is for each court to make.

With respect to the ten pilot districts, the Act provides that their plans "shall include the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a)." Other courts "shall consider and may include" in their plans the principles and guidelines in § 473(a), as well as the techniques in § 473(b). The Act leaves it to each district how and in what form to include those principles and guidelines. Hence, the discussion that follows applies to pilot districts as much as to other districts.

Paragraphs 1 through 6 that follow encompass those six principles and guidelines, as well as the techniques. (Paragraph 7 adds a principle and guideline implicit in the Act.) For ease of understanding, this memorandum aggregates the statutory provisions relevant to each of the major principles and guidelines under a single descriptive heading. Thus the memorandum does not track the statute's sequence provision by provision.

The principles and guidelines discussed below are not legislative innovations. They are, rather, well known to most federal judges and have formed the backbone of effective case management for many years. The Act reflects Congress's recognition of those principles and a legislative requirement that all courts consider their application.

1. Differential case management

The Act requires a court to consider "systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case." (§ 473(a)(1))

Comment

Differential case management was one of the key proposals in the Brookings Institution report *Justice for All,* which was a precursor of the Act. As described in that report, it took the form of tracking. However, as stated in the House Report, case tracking "is clearly not the only method . . . and . . . many districts may already have in place methods for systematically tailoring the level of judicial case management to the needs of the case." (House Report, p. 14)

The Senate report further states

> A differentiated case management system combines three core elements. First, it is "event-oriented," so that certain events in each litigation are viewed as important benchmarks in ascertaining case progress. Second, it controls the periods of time between case events and incorporates methods to supervise and control these intervals in order to make them more predictable. Third, it recognizes that while cases may be classified by broad definitions, each case is unique; thus, procedures are accommodated to fit the characteristics of each case. (Senate Report, p. 24)

Differential case management therefore is characterized by flexibility and necessarily involves the exercise of judicial discretion in its implementation. It "is designed to make an early assessment of each case filed in terms of the nature and extent of judicial and other resources required for preparation and disposition of the case." (House Report, pp. 10-11) It could be incorporated into a plan through a local rule which could, among other things, provide the following:

- that a case management conference be held before a judicial officer within 60 days of the filing of the action:
- that in advance of the conference counsel confer and prepare and submit to the court a case management plan conforming to the requirements described in the Senate Report (quoted above) and tailored to the needs of the particular case, stating each anticipated litigation event in the case and the scheduled time for each, and addressing in appropriate fashion the matters discussed in the following paragraphs 2 though 7, below. (See § 473(b)(1).)
- that the case management plan, and any objections to it, would be considered by the court at the conference and incorporated in a case management order.

A differential case management rule could also recognize certain categories of cases that involve little or no discovery and ordinarily require no judicial intervention, such as government collection cases, and establish an appropriate procedure for such cases. Similarly, appropriate procedures could be established for other categories of cases which generally fall within a standard pattern, such as prisoner, civil rights, and habeas corpus cases.

Courts with heavy asbestos dockets may establish specific management procedures for specified categories of asbestos injury claims, separating, for example, those in which no significant disease has manifested itself from those involving serious diseases.

2. Early and ongoing judicial intervention

The Act requires a court to consider "early and ongoing control of the pretrial process through involvement of a judicial officer in assessing and planning the progress of a case." (§ 473(a)(2)(A))

Comment

Enhanced case management through early and ongoing involvement by a judicial officer was among the key objectives Congress sought to achieve (Senate Report, pp. 16-18). Such involvement is generally considered an essential element of case management, though its frequency and extent should be tailored to the needs of the particular case. (See para. 1, memo p. 12.) Active judicial involvement in the litigation is, of course, time consuming and needs to be managed to ensure that it results in a net gain to the courts and the litigants, i.e., that the gains from investing judicial time in a particular case can reasonably be expected to justify the cost. Judges who engage in such active management have generally found that the resulting savings have justified the investment of time.

Judicial involvement may address a number of different aspects of the case. The subjects of judicial involvement are scattered through § 473; this memorandum aggregates in paras. 3-6 those specified in the Act, and adds para. 7 on final pretrial conferences (see memo p. 18).

One way in which a plan may make provision for early judicial involvement, and ongoing involvement as needed, is through a rule providing for case management conferences in all cases except those exempted by rule, in accordance with para. 1, memo p. 12.

- Such conferences would be bifurcated. The first stage of the conference would be conducted by the attorneys without the presence of the judicial officer, but with representatives of the litigants authorized to make decisions in the case. The attorneys would be required to address each item on the conference agenda prescribed in the rule and submit to the court a case management conference report stating the matters agreed on and those on which no agreement was reached. (See § 473(b)(1).)
- The second stage of the conference would be conducted by the judicial officer on the basis of the attorneys' report, again with an authorized representative of the litigants present. The attorneys representing the parties would be required to have authority to bind their client regarding all matters on the agenda. (See § 473(b)(2).) The items on the agenda would include the following:
  - (1) identifying, defining and clarifying issues of fact and of law genuinely in dispute (see § 473(a)(3)(B));
  - (2) making stipulations of fact and law and otherwise narrowing the scope of the action to eliminate superfluous issues;
  - (3) scheduling cutoff dates for amendment of pleadings;
  - (4) scheduling filing and, if necessary, hearing dates for motions, and, where appropriate, providing for the management of motion practice pursuant to para. 4, below;
  - (5) scheduling discovery cutoff dates and, where appropriate, providing for management of discovery pursuant to para. 5, below;
  - (6) scheduling dates for future management and final pretrial conferences, pursuant to para. 7, below (see § 473(a)(3)(B));
  - (7) scheduling trial date(s) and providing, where appropriate, for bifurcation, pursuant to para. 3, below;
  - (8) adopting procedures, where appropriate, for the management of expert witnesses, pursuant to para. 7, below;
  - (9) exploring the feasibility of initiating settlement negotiations or invoking alternate dispute resolution procedures, pursuant to para. 6 below;

(10) determining the feasibility of reference of the case, or certain matters, to a magistrate judge or master;

(11) providing that all requests for continuances of discovery deadlines or trial dates be signed by counsel and the client (see § 473(b)(3)); and

(12) considering and resolving such other matters as may be conducive to the just, speedy, and inexpensive resolution of the case.

3. Setting early and firm trial dates

The Act requires the court to consider "setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint, unless a judicial officer certifies that (i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or (ii) the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases." (§ 473(a)(2)(B))

Comment

Congress considered the setting of early and firm trial dates one of the most effective tools of case management. To implement this guideline, a plan could provide for a rule along the following lines:

- Counsel shall provide in their case management plan (para. B.1, memo p. 12) or in their case management conference report (para. B.2, memo p. 13) for a trial date not more than eighteen months after the filing of the action. If a later trial date is proposed, counsel shall explain the circumstances which preclude an earlier trial.
- The court shall set a trial date to occur within eighteen months of the filing of the action. If the court determines to set a later trial date, it shall issue an order stating its reasons why the case cannot be tried earlier, grounded on the complexity of the case or the state of the court's docket.

4. Control of discovery

The Act requires the court to consider:

- "controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion" (§ 473(a)(2)(C))
- for complex or other appropriate cases, preparation of "a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to (i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and (ii) phase discovery into two or more stages" (§ 473(a)(3)(C))

- "encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices" (§ 473(a)(4))
- "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" (§ 473(a)(5)).

Comment

Congress found a "compelling need for judicial officers to control discovery and its attendant costs." (Senate Report p. 22; House Report, p. 10) There is wide agreement that excessive discovery and protracted discovery disputes are a major source of cost and delay in civil litigation. The limited resources of the courts, moreover, mandate that a system of judicial control be structured so as to minimize the burdens on the court and avoid imposition of costs exceeding the resultant gains. These objectives could be realized through a three-pronged approach in a rule, along the following lines:

Suggested Local Rule

a. Prediscovery disclosure

Before any party may initiate any discovery, that party must submit to the opponent (1) the identity of all persons known or believed to have substantial discoverable information about the claims or defenses, together with a summary of that information; (2) a description, including the location, of all documents that are reasonably likely to bear substantially on the claims or defenses; (3) a computation of any damages claimed; (4) the substance of any insurance agreement that may cover any resulting judgment; and (5) a copy of any report of an expert who may be called at trial. The disclosure obligation is reciprocal and continues throughout the case. [*Note:* Local rules incorporating the substance of this proposal are now in use in the Central District of California and the Southern District of Florida, and the Advisory Committee on Civil Rules is considering a similar proposal.]

b. Joint discovery plan

Counsel shall as part of their case management conference report or case management plan prepare and submit a joint discovery plan, scheduling the time and length for all discovery events. [See § 473(b)(1)] The plan shall conform to the obligation to limit discovery under Fed. R. Civ. P. 26(b). Discovery events shall, unless the court for good cause orders otherwise, be limited for each side (or grouping of parties with common interest) to

5 depositions 15 interrogatories 2 requests for production.

Counsel's plan shall consider the desirability of conducting phased discovery, limiting the first phase to developing information needed for a realistic assessment of the case. If the case does not terminate, the second phase would be directed at information needed to prepare the case for trial. [Senate Report, p. 22]

c. Resolution of discovery disputes

Counsel shall meet and confer to resolve discovery disputes. Any dispute not so resolved shall be presented by telephone call to a judicial officer. No motion may be filed without leave of court.

5. Controlling motion practice

The Act requires the court to consider "setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition." (§ 473(a)(2)(D), (3)(D))

Comment

Congress identified as a problem the undue delay often associated with the resolution of motions. (Senate Report, pp. 26-27; House Report p. 15) This problem is a result of several factors: the filing of too many, often unnecessary motions, the excessive volume of papers involved, the failure to file appropriate dispositive motions and to file them at the proper time, and the occasional delay in the resolution of motions. To address these problems, a rule along the following lines could be adopted:

- Counsel shall submit as a part of their case management plan or their case management conference report an agreed schedule for the filing of motions, which may from time to time be amended as required by the progress of the case. No motion shall be filed unless counsel certify that they have conferred and in good faith attempted to resolve or narrow the issue. Memoranda in support of a motion (including a reply) shall not exceed twenty-five pages and the response twenty pages, unless otherwise ordered. Motions may be decided without hearing.
- Whenever the court is unable to decide a motion within sixty days of submission, it shall issue an order reporting the motion under submission.

6. Alternative means of dispute resolution, including settlement

The Act requires a court to consider:

- "[in appropriate cases, having the judicial officer] explore[ ] the parties' receptivity to, and the propriety of, settlement . . ." (§ 473(a)(3)(A))
- "authorization to refer appropriate cases to alternative dispute resolution programs that—(A) have been designated for use in a district court; or (B) the court may make available, including mediation, minitrial, and summary jury trial" (§ 473(a)(6))
- "a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation" (§ 473(b)(4))

Comment

Congress intended the courts to institute alternative dispute resolution techniques that best suit the preferences of the bench, bar, and interested public in the district. (Senate Report, p. 28) Achieving early termination of a case without resort to the panoply of litigation procedures is a major step toward reduction of cost and delay. Many different means to that end have been developed. Although they are not necessarily appropriate for every case and not

invariably successful when employed, a plan should make provision for judicial consideration of the employment of an appropriate alternative dispute resolution procedure in a case (see para. 2, above), and means for facilitating resort to such procedure.

Such provisions fall into two categories: (2) court-wide programs, and (2) case-specific measures. Provision could be made by a local rule along the following lines:

Suggested Local Rule

1. Case-specific measures

a. At every conference, the court shall inquire as to the receptivity of parties to settlement negotiations, explore means of facilitating such negotiations, and offer such assistance as may be appropriate in the circumstances. Assistance may include reference of the case to another judicial officer for settlement purposes.

b. Whenever a settlement conference is held, a representative of each party with settlement authority shall attend or be available by telephone [see § 473(b)(5)].

2. Court-wide programs

[The rule should inform of the operation of one or more means of alternate dispute resolution established by the court, such as early neutral evaluation, mediation, arbitration, minitrial or summary jury trial and the procedures for invocation.] [Models are available from a number of sources, including the Federal Judicial Center.]

7. Final pretrial conferences

The Act contains no express requirement concerning final pretrial conferences, but a comprehensive plan for the progress of a case should cover this aspect of case management if it is to be effective in controlling cost and delay.

Comment

1. Trial Management. Although relatively few civil cases go to trial, implementation of a program of cost and delay reduction requires judicial control of the length, scope and complexity of trials. The longer and more complex the trial, the more expense and delay it entails and the more it obstructs other litigants' access to the courts. Final pretrial conferences can be an effective means of exercising control over the trial.

A rule could provide the following agenda for preparing and conducting the final pretrial conference:

(a) Final and binding definition of issues to be tried;

(b) Disclosure of expected and potential witnesses and the substance of their testimony;

(c) Exchange of all proposed exhibits;

(d) Pretrial ruling, where possible, on objections to evidence;

(e) Elimination of unnecessary or redundant proof, including limitation of expert witnesses;

(f) Considering bifurcation of issues to be tried;

(g) Establishing time and other limits for the trial;

(h) Expediting jury selection;

(i) Considering means of enhancing jury comprehension and simplifying and expediting the trial;

(j) Considering the feasibility of presenting direct testimony by written statement;

(k) Considering other means to facilitate and expedite the trial.

2. Special procedures for management of experts. A rule could provide for special procedures in cases where experts may play a significant role. Such a rule could contain the following elements:

(a) Early and binding disclosure of expert witnesses, precluding the appearance of witnesses not previously identified;

(b) Submission of a complete statement of the expert witness' proposed testimony in advance of his or her deposition;

(c) Use of videotaped depositions;

(d) Preclusion of any trial testimony by an expert at variance with the written statement and any deposition testimony; and

(e) Ruling on the admissibility of expert testimony at the final pretrial conference.