CIVIL JUSTICE EXPENSE AND

DELAY REDUCTION PLAN

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Adopted by

The Board of Judges of

The Eastern District of New York

on December 17, 1991

United States District Court
Eastern District of New York

CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

Pursuant to 28 U.S.C. § 471, the Board of Judges of the United States District Court for the Eastern District of New York adopts this Civil Justice Expense and Delay Reduction Plan ("Plan"). In formulating this Plan, the Court has relied extensively on the work of the Eastern District Advisory Group. See Final Report To Honorable Thomas C. Platt, Chief Judge, dated December 9, 1991. That report constitutes the "legislative history" of the Plan and shall serve as a guide in its implementation and interpretation. The Court expresses its deep appreciation to the members of the Advisory Group for their hard work and dedication to the improvement of the civil justice system in the Eastern District of New York.

For cause shown, any judicial officer may in any case modify or suspend the operation of any one or more or all of the provisions of this Plan.

I. Assignment; Reassignment; Setting of Trial Dates

A. Individual Assignment System and Differentiated Case Management

Judges and magistrates judges shall continue to be assigned randomly to cases at the time of filing pursuant to the individual assignment system. The individual assignment system

permits judicial officers to take control of the litigation from the outset and to utilize managerial tools authorized by Rule 16 of the Federal Rules of Civil Procedure. The individual assignment system promotes expedition and discourages delay because the judicial officer assigned to the case is individually responsible for the case and in a position to move the case from the date of filing. The individual assignment system also promotes efficiency by obviating the need continually to re-educate judicial officers assigned to hear various pretrial motions, to assist in settlement and to monitor the progress of the case toward resolution. Litigants also benefit from the individual assignment system because they know from the outset the judicial officers with whom they will be dealing.

The court pursuant to 28 U.S.C. § 473(a)(1) has considered the desirability of creating a formal system of differentiated case management under which different classes of cases would be assigned to different tracks but accepts the recommendation of the Advisory Group that no revision of the present system of differentiated case management, which calls for (1) special treatment or tracking of social security cases and habeas corpus petitions, (2) arbitration of cases involving $100,000 or less, and (3) special treatment of complex cases by the assigned judge according to the needs of the particular case, be implemented at this time. In the court's view, any

modification of its present practices might lead to significant delay and create inefficiencies. Nevertheless, the court will continue to monitor the status of the docket and periodically re-evaluate the desirability of implementation of a formalized tracking system for further differential treatment of categories of cases.

B. Reassignment

If a trial-ready case is not reached by the assigned judge within a reasonable time (but in no event more than six months), the parties may request a conference with the clerk's office at which time they would inform the clerk of the readiness to try a case on specified short notice. The clerk would then seek to ascertain the availability of a judge through the Chief Judge to hear that particular matter on one or two days notice to the parties.

C. Setting of Trial Dates

Pursuant to 28 U.S.C. §473(a)(2)(B), the court has considered the desirability of requiring all cases filed to be tried within 18 months from the date of filing of the complaint. The court concurs with the Advisory Group that adoption of such a fixed period is neither desirable nor consistent with the goal of differentiated case management. In some cases, 18 months is too long a period; in other cases 18 months does not allow the parties sufficient time to prepare for trial. In the view of the

court, the setting of a trial date is best left to the determination of each judicial officer in each individual case.

II. Discovery and Pretrial Practice

A. Automatic Disclosure Prior to Discovery

1. For an eighteen month period, in every civil case filed on or after February 1, 1992, excluding social security, habeas corpus, and pro se cases, as well as civil rights cases in which there is an immunity defense available, the parties must disclose

(a) the identity of all persons with pertinent information respecting claims, defenses and damages;

(b) a general description of all documents in the custody and control of the parties bearing significantly on claims and defenses;

(c) authorization to obtain medical, hospital, no-fault and worker's compensation records;

(d) the documents relied on by the parties in preparing the pleadings or documents that are expected to be used to support allegations;

(e) the contents of any insurance agreement.

2. Unless the court otherwise directs or the parties otherwise stipulate with the court's approval, these disclosures shall be made (i) by a plaintiff within 30 days after service of an answer to its complaint; (ii) by a

defendant within 30 days after serving its answer to the complaint; and, in any event, (iii) by any party that has appeared in the case within 30 days after receiving from another party a written demand for accelerated disclosure accompanied by the demanding party's disclosures. A party is not excused from disclosure because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosures, or, except with respect to the obligations under clause (iii), because another party has not made its disclosures.

3. Upon a showing that a party has failed to make the required disclosures, the court may impose sanctions pursuant to Fed. R. Civ. P. 37(b).

4. Nine months from the effective date of the Plan, the Advisory Group shall commence a study of the automatic disclosure procedures and report whether these procedures should be revoked, modified, expanded or adopted as permanent local rules.

B. Expert Discovery

1. Each party shall disclose to every other party any evidence that the party may present at trial under Rules 702, 703 or 705 of the Federal Rules of Evidence. This disclosure shall include:

(a) a statement of all opinions expressed and the basis and reasons for each opinion;

(b) the information relied upon in forming the opinion.

(c) tables, charts, graphics or other exhibits to be used as a summary of data or support for the experts' opinions.

(d) the qualifications of the expert, including a curriculum vitae detailing the expert's education, employment history, professional affiliations, and all articles authored by the expert;

(e) a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years.

2. Unless the court designates a different time, the disclosure shall be made at least 30 days before the date the case has been directed to be ready for trial, or by the date the court otherwise directs; or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party, within 30 days after the disclosure made by such other party. These disclosures are subject to the duty of supplementation if the party learns that the information disclosed is no longer correct.

C. Limitations on Discovery

1. Interrogatories

In every civil case filed on or after February 1, 1992, a limitation on the number of interrogatories shall be established by agreement of the parties or by court order. In the absence of any agreement or court order, the number of interrogatories, including sub-parts, shall be presumptively limited to fifteen. This limitation shall not apply to actions brought by the United States under 28 U.S.C. § 3101, 18 U.S.C. § 981 and 21 U.S.C. § 881, where interrogatories are served with the complaint.

2. Depositions

In every civil case filed on or after February 1, 1992, a limitation on the number of depositions shall be established by agreement of the parties or by court order. In the absence of any agreement or court order, the number of depositions shall be presumptively limited to ten per side. (Plaintiffs constitute one side, defendants one side, and all other parties one side.)

D. Non-Stenographic Recording of Deposition

Pursuant to Standing Order 7, requests under Fed. R. Civ. P. 30(b)(4) to record depositions by non-stenographic means shall be presumptively granted.

E. Mandatory Pretrial Disclosures

1. In every civil case filed on or after February 1, 1992, at least 30 days prior to trial (unless a different time is specified by the court) the parties must disclose:

(a) The name, address and telephone number of each witness, separately identifying those witnesses the party expects to call and those that may be called if the need arises;

(b) Those portions of testimony that are to be presented by deposition or non-stenographic means (including a transcript);

(c) The identity of each document or exhibit, separately identifying those that the party expects to offer and those that may be offered if the need arises, other than for impeachment or rebuttal.

2. Within 14 days after the disclosures have been made, unless a different time is specified by the court, other parties shall serve and file (a) any objections that designated deposition testimony cannot be used under Rule 32(a) of the Federal Rules and (b)

any objection to the admissibility of the other materials identified. Objections not so made, other than under Rules 402-03 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

F. Motion Practice

1. Judges are requested not to schedule for hearing more motions than could be heard within a reasonable time period on any given day.

2. Motions shall be decided within a reasonable time. Where a motion has been pending for more than six months from the date of final submission, the Clerk's Office shall contact chambers at that time to ascertain the status of the motion and report its findings to the parties. If the motion is still pending three months thereafter, the Clerk's Office shall again ascertain the status of the motion and do so again in three month intervals until the motion has been decided.

3. The court shall upon its own or upon request of a party, convene a premotion conference on dispositive motions, except that if a premotion conference is not held within four weeks of the date it is originally requested, then the motion may be made without a prior conference.

4. The provisions of Standing Order 6 permitting the use of letter submissions in discovery motions shall be expanded to permit the use of letter submissions in other motions that are procedural in character.

5. Pretrial Conferences

(a) Pursuant to Standing Order 3(b), counsel shall confer on a possible Scheduling Order prior to any scheduling conferences.

(b) The initial pretrial conference shall be held face to face with the judicial officer, except where the judicial officer determines that an attorney is so distant from the courthouse as to make an in-person conference impracticable.

(c) Subsequent pretrial conferences shall be held in the discretion of the court.

(d) A final pretrial conference shall be held in all cases.

(e) The agenda of issues to be discussed at a pre-trial conference shall include those currently set forth in Fed. R. Civ. P. 16 as well as the following:

i) identification, definition and clarification of issues of fact and of law genuinely in dispute (see 28 U.S.C. § 483(a)(3)(B));

ii) the making of stipulations of fact and law and otherwise narrowing the scope of the action to eliminate superfluous issues;

iii) the scheduling of cutoff dates for amendment of pleadings;

iv) the scheduling of filing and, if necessary, hearing dates for motions, and where appropriate, providing for management of motion practice;

v) the scheduling of discovery cutoff dates and, where appropriate, providing for management of discovery;

vi) the scheduling of dates for future management and final pretrial conferences, (see 28 U.S.C. § 473(a)(3)(B));

vii) the scheduling of trial date(s) and providing, where appropriate, for bifurcation;

viii) adoption of procedures, where appropriate, for management of expert witnesses;

ix) exploration of the feasibility of settlement or invoking alternate dispute resolution procedures, such as use of

settlement judges, early neutral evaluation, and mediation;

x) determination of the feasibility of reference of the case, or certain matters, to a magistrate judge or master;

xi) the provision that all requests for continuances of deadlines for the completion of discovery or trial dates be signed by counsel and communicated to the client, unless such communication is impracticable (see 28 U.S.C. § 473(b)(3));

xii) consideration and resolution of such other matters as may be conducive to the just, speedy, and inexpensive resolution of the case;

xiii) limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence;

xiv) the appropriateness of summary judgment under Rule 56, which may include an order disposing of claims or issues under Rule 56 if all parties have had reasonable opportunity to discover and present material pertinent to the disposition;

xv) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rules 26 and 29 through 37;

xvi) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue of fact arising in the case;

xvii) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could on the evidence be the basis for a judgment as a matter of law entered pursuant to Rule 50(a) or a judgment on partial findings pursuant to Rule 52(c); and

xviii) an order establishing a reasonable limit on the length of time allowed for the presentation of evidence or on the number of witnesses or documents that may be presented.

G. Complex Litigation

1. Assignment. Judges and magistrate judges shall be assigned to complex cases in accordance with the procedures that apply generally to all cases.

2. Status Conferences. In complex cases, it is generally desirable for the court to exercise greater hands-on control of the litigation than in non-complex cases. Periodic status conferences are useful. At a minimum, status conferences in complex cases should be convened at six month intervals for discussion of motions and discovery. Periodic settlement conferences should also be scheduled. The court may require clients to attend status conferences or settlement conferences where the court finds that the client's presence would be useful.

3. Staged, Tiered or Milestone Discovery. In complex cases, the court should consider implementing staged, tiered or milestone discovery. Under this approach, discovery would be prioritized and channelled to cover certain issues but not others. For example, discovery might be limited in the first instance to matters that might be dispositive, such as jurisdictional defects or particular defenses that would either terminate the litigation or eliminate particular parties. In addition, discovery on liability

issues might be separated from discovery on damages issues; fact discovery might be ordered prior to expert discovery.

4. Lead Counsel. The court may appoint lead counsel on behalf of plaintiffs and defendants where it determines that to do so would eliminate duplicative effort and expedite the resolution of issues.

III. Alternative Dispute Resolution

A. Alternative Dispute Resolution ("ADR") Mechanisms

1. Court Annexed Arbitration

Pursuant to the Local Arbitration Rule as amended February 1, 1991, all claims for money damages involving $100,000 or less shall be sent to arbitration, except for social security cases, tax matters, prisoners' civil rights cases and actions asserting constitutional rights. Any party dissatisfied with the arbitration award may obtain a trial de novo. If the party seeking the trial de novo does not obtain a more favorable result than at arbitration, that party is liable for the arbitrators' fees (unless permission was granted to proceed in forma pauperis).

The arbitration panel shall consist of a single arbitrator unless a party requests three arbitrators.

2. Early Neutral Evaluation

a. The court shall constitute a panel of attorneys to serve as neutral evaluators in civil cases

filed on or after June 30, 1992. The panel shall consist of attorneys who are experts in various types of civil cases.

b. After the panel of neutral evaluators has been constituted, the court may, in its discretion or on consent of the parties, refer matters to the panel for evaluation and recommendation. The evaluator shall identify the primary issues in dispute, explore the possibility of settlement, assist the parties in formulating a discovery plan, and, if appropriate, provide an assessment of the case. The process shall be non-binding.

c. The program shall be experimental and shall be evaluated by the court on a periodic basis.

3. Trials Before Magistrate Judges

The court may upon request of all parties or upon their consent refer matters to a magistrate judge for an early, firm trial date.

4. Settlement Conferences

A settlement conference before a judge or a magistrate judge shall be convened in every case unless it appears to the judicial officers to be unwarranted.

5. Special Masters

Pursuant to Fed. R. Civ. P. 53, a judge may appoint a special master where the judge finds that a special master would play a useful role in resolving the disputes among the parties.

6. Court-Annexed Mediation

The court shall establish a program of court-annexed mediation for civil cases filed on or after June 30, 1992. To that end, the court shall establish a panel of volunteers to serve as mediators. Litigants choosing to avail themselves of court-annexed mediation shall be offered the options of (a) using a mediator from the court's panel; (b) selecting a mediator on their own; or (c) seeking the assistance of a reputable neutral ADR organization in the selection of a mediator. The program of court-annexed mediation shall be experimental and shall be periodically evaluated by the court.

7. Publicizing Alternatives to Trials

The court shall publish and distribute to plaintiffs' counsel, with a direction to send to all counsel, a pamphlet describing the various ADR mechanisms available in the district and their use by the court. The judicial officer hosting the initial

pretrial conference shall, where appropriate, advise the litigants of the availability of possible alternatives to litigation.

B. ADR Administrator

The court shall appoint an administrator effective March 31, 1992 to supervise court-annexed ADR programs. The responsibilities of the ADR administrator shall include educating the bench and bar as to the availability and advantages of ADR, as well as oversight of all ADR programs, including training, maintenance of volunteer panels and other necessary administration.

IV. Sanctions

A. Prior to seeking sanctions pursuant to Fed. R. Civ. P. 11, a party claiming to have been victimized by a Rule 11 violation shall give timely notice to the alleged violator at the time the alleged violation is committed. If this alleged offending conduct does not cease, the party victimized may move for sanctions.

B. A Rule 11 motion must be a separate application to the court and may not consist of a request for sanctions tacked on to another motion.

V. Attorneys' Fees

A. Common Fund Cases

1. Where matters settle early in the life of the action and before significant attorney time has been expended, a percentage recovery, determined by the court in its discretion, shall be awarded. The percentage shall be calibrated to encourage early settlements but at the same time avoid both undue burdens on the fund and windfalls to attorneys.

2. In cases that settle after significant attorney time has been expended, the fee award shall be based on a percentage of recovery; but the attorneys shall be required to submit time records, as is required under the lodestar approach, which shall serve as a guideline for the court in setting the percentage recovery.

B. Statutory Fee Cases

In cases involving fee awards pursuant to statute, plaintiffs' attorneys shall be directed to forward their fee applications, including documentary support, to the defendants' counsel within 30 days of entry of final judgment, no longer subject to appeal, or as directed by the court. Documentary support shall include the number of hours worked and a description of the work performed,

excluding any materials that would breach the attorney-client and work-product privileges. The parties shall then meet, and defense counsel shall identify those portions of the fee application, if any, that are being contested. Those portions of the award that are not disputed shall be paid promptly. Only disputed matters shall be referred to the court.

The fee award in statutory cases shall approximate the fees paid by clients in non-statutory fee matters. Accordingly, the court, in gauging an hourly rate, shall be guided by the rate that plaintiffs' counsel charge their private clients in non-contingent matters. This standard shall serve as presumptive evidence regarding a reasonable hourly rate.

VI. Trial Practices

A. Expert Witnesses

1. In bench trials, the court may direct that an expert's direct testimony be submitted in writing and that only the cross-examination be done before the fact-finder.

2. In bench trials, where appropriate, expert testimony may be taken by deposition.

3. The court may take expert testimony out of the regular order of proof where to do so would avoid delay or facilitate a better understanding of the issues.

B. Jury Selection

Each judge shall determine the extent and manner of participation by attorneys in the jury selection process including the submission of written questions to the court for prospective jurors. Any questions so submitted shall be shown to opposing counsel at least 24 hours before they are furnished to the court.

C. Bench Trials

1. Bench trials shall be encouraged.

2. In every civil case filed on or after February 1, 1992, the parties shall be advised that they may be given a date certain for trial if they consent to trial before a magistrate judge.

3. In every civil case filed on or after February 1, 1992, the magistrate judge assigned to try a case shall be the same magistrate judge initially selected for the case. However, if any party objects to the randomly assigned magistrate judge as trier of fact, the parties may obtain another magistrate judge by random selection. The parties then must accept as trier of fact the magistrate judge designated upon reassignment.

D. Miscellaneous Practices

1. Pretrial statement of stipulated facts and of facts that are disputed. The court may require the parties

in all cases to file a pretrial statement of stipulated facts and of facts that are disputed.

2. Stipulation regarding the admissibility of documents. Any objections to documentary evidence shall be made by in limine motions, if such documentary evidence has been designated at least 10 days prior to trial.

3. Premarking of Exhibits. Exhibits, except exhibits used for the purpose of impeachment or rebuttal, shall be marked prior to trial.

4. Written Direct Examination. Where appropriate, the court may order that direct testimony be submitted in writing.

This Plan was approved and adopted by the Board of Judges of the Eastern District of New York.

Dated: December 17, 1991

Thomas C. Platt
Chief Judge