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October 15, 1992

MEMORANDUM TO GARY C. PETTY

SUBJECT: Recommendation for changes in the Civil Rules

We are sending a copy of your memorandum of September 24, 1992, setting forth recommendations for changes in the Civil Rules to the Chairman and Reporter of the Advisory Committee on Civil Rules for their consideration. Thank you for advising us of these recommendations of the courts.


Peter G. McCabe

cc: Honorable Robert E. Keeton
Honorable Sam C. Pointer, Jr.
Professor Edward H. Cooper

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ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

DUANE REX LEE
CHIEF COURT ADMINISTRATION
DIVISION

September 24, 1992

**Memorandum to Joseph F. Spaniol, Jr., Secretariat, Rules
Committee Support Office**

**Subject: Rules Changes Recommended by the Courts under the Civil
Justice Reform Act**

**From: *Gary C. Petty*
Gary C. Petty, Attorney-Advisor**

**Thru: *Abel J. Mattos*
Abel J. Mattos, Chief, Court Programs Branch**

Some 34 district courts have submitted civil justice expense and delay reduction plans as pilot courts, demonstration courts, or early implementation district courts under the Civil Justice Reform Act. Among other things, the courts recommended changes in the Federal Rules of Civil Procedure. These matters are being referred to you for consideration as staff of the Committee on Rules of Practice and Procedure.

The recommendations of the courts are listed below. Some of them may have already been brought to your attention by the chief judges or clerks of court of the districts. The full recommendations of the courts are attached to this memorandum.

1. Rule 4(j) of the Federal Rules of Civil Procedure requires that the summons and complaint be served upon the defendant within 120 days after the filing of the complaint. In the Eastern District of Pennsylvania, the court recommended that the period from filing to service be shortened because it delays the disposition of civil cases.
2. Under rule 12, Fed.R.Civ.P., an answer to a complaint must generally be served within 20 days. If, however, the opposing party serves a motion to dismiss, the time for serving the answer is tolled until the court rules upon the motion. In the Northern District of Georgia, the court was of the view that the answer should be served regardless of whether a motion to dismiss is pending.

Joseph F. Spaniol, Jr.
Page Two

3. The court in the Northern District of Georgia also recommended an amendment to rule 53, Fed.R.Civ.P., to permit a special master (other than a magistrate judge) to be compensated out of government funds. Under the existing rule, special masters (other than magistrate judges) are compensated by the parties.

Attachments

The judges of this court are in agreement with the analysis and the conclusions of the Advisory Group concerning vacant judgeships, but, as must be clear, the remedy does not lie with the court and can hardly find a place in the court's Plan.

Similarly, the Report of the Advisory Group calls attention to the provision in the national rules⁶ that appears to allow a plaintiff, without reason or penalty, to delay service of process for a full 120 days after the filing of the complaint. Again, the basic remedy does not lie within the competence of the court, but we endorse the analysis and recommendation of the Advisory Group.

A list of recommendations of the Advisory Group not intended for inclusion in the Plan because they were not addressed to the court alone is set forth in Appendix IV.

The Requirements of the Act and the Structure of the Plan

The Civil Justice Reform Act of 1990 sets forth in great detail "principles and guidelines of litigation management and cost and delay reduction."⁷ The statute provides that every district court "shall consider" these principles and guidelines in the development of its plan, but for the vast majority of district courts whether any or all of them is included in their respective plans is entirely discretionary.

This is not true of the respective plans of the Pilot Courts. Accordingly, each of the guidelines and principles is included in the Plan of the court, promulgated herein.⁸ The full text of the relevant section is included in Appendix II, but it is useful to summarize these principles here. They are:

(1) systematic, differential treatment of civil cases that tailor "case-specific management" to specified criteria;

(2) early and ongoing control of the pretrial process by the involvement of a judicial officer;

(3) special treatment for cases identified as "complex," with particular attention to discovery;

(4) encouragement of cost-effective discovery through voluntary exchange of information;

6. See Federal Rule of Civil Procedure 4(j).

7. 28 U.S.C. §473(a), reprinted in Appendix II.

8. Civil Justice Reform Act of 1990 §105(b).

Georgia (N)

judge then incorporates the appropriate, individualized case management directives into the scheduling order for that case.

Local Rule 235-3 requires the Preliminary Statement to be filed no later than 40 days after issue is joined. When the Court established this timetable in 1983, it was believed that this requirement would assure the judge's intervention in the case, if necessary, within three months or less after filing of the complaint. The Court's experience with LR235-3 has, however, shown that joinder of issue in many cases is delayed for months and, sometimes for over a year, because of plaintiff's delay in affecting service of process and due to the defendant or defendants filing motions under FRCivP12 or requesting extensions of time to answer. In addition, the deferral of other proceedings in the case while the Rule 12 motion is briefed, submitted, and ruled on unnecessarily delays the ultimate disposition of the case.

The Court has concluded that such lapses of time are unreasonable and lead to a result inconsistent with Section 103 of the Civil Justice Reform Act (28 USC §476) requiring the Director of the Administrative Office of the United States Courts to disclose for each judicial officer " . . . the number and names of cases that have not been terminated within three years after filing. (emphasis added)" For this reason, the Court adopts, in Part VIII of this Plan, the recommendation of

the Advisory Group that the Federal Rules of Civil Procedures, Rules 8 and 12 be amended to require the defendant to file an answer to the complaint, thereby joining issue in the case, at the time defendant files a Rule 12 motion. The Court also intends to revise its local rules to accelerate its case management timetable as much as possible, consistent with the existing provisions of the Federal Rules of Civil Procedure, without impacting adversely the administration of justice in any particular case.

In addition, as part of this Plan, the Court hereby adopts Recommendation 3 of the Advisory Group (Advisory Report, pp. 46, 49, 52, and 72) made pursuant to 28 USC §273(b)(1) that LR235-3(7) and corresponding Item 7 of the form Preliminary Statement be amended by addition of the following provision: "If the parties anticipate that additional time [beyond that allowed by the assigned discovery track]¹ will be needed to complete discovery, please state those reasons in detail below: [space for response.]" Adoption of this provision not only implements the litigation technique of Section 273(b)(1) that counsel work together in planning discovery, but it also permits the judge to act on the finding of the Advisory Group that excessive and/or unguided discovery is the greatest factor contributing to unnecessary litigation expense in this District (see discussions in Advisory Report, Part II (B)(2)(3), pp. 28-36).

¹This phrase is added to the Advisory Group's Recommendation 3 because of the Court's adoption of discovery tracks in the following Section I(B). The discovery provision is Item 8 in the amended document.

binding on the parties. The rulings and findings of a Special Master would be reviewable by the Court and could be reversed if clearly erroneous. Otherwise, the Findings of Fact and Conclusions of Law of the Special Master would be entered as the final judgment in the case." Advisory Report, pp. 47-8. See also Advisory Report, pp. 49-50; 54-5; 71.

The Court adopts this proposal and recommends that it be broadened: (1) to acknowledge the judge's authority, in compliance with the provisions of FRCivP 53, to initiate appointment of a special master in complex cases; and (2) to develop a list of persons qualified to serve as a special master from which the parties could select a special master to be paid out of government funds appropriated for this pilot program. Special masters chosen by the parties from outside this list would be paid by the parties pursuant to prior agreement between them.

New local rules implementing the special master procedure and the court-annexed arbitration program will be prepared when the Court receives confirmation of the presence of funding and statutory authority to support these two new programs.

VII. Voluntary Litigation Techniques (28 USC §473(b)).

Several specific amendments to the Local Rules of Practice of this Court have been incorporated into this Plan in order to implement litigation techniques