UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

IN RE: PLAN FOR CIVIL JUSTICE DELAY AND EXPENSE REDUCTION

ORDER

Upon consideration of the report of the Civil Justice Expense and Delay Reduction Advisory Report filed pursuant to the provisions of the Civil Justice Reform Act of 1990, the United States District Court for the Southern District of West Virginia hereby adopts and implements this Civil Justice Expense and Delay Reduction Plan pursuant to Title 28, United States Code, Section 471, et seq., it is

ORDERED that said Plan attached hereto shall be implemented and placed in operation throughout the District.

It is further ORDERED that a certified copy of this Order and the attached Plan be made available to the public and filed at each of the statutory points of holding court in the Southern District of West Virginia. In addition, the Clerk of the Court is directed to provide a certified copy of this Order and attached Plan to the Director of the Administrative Office of the United States Courts to the Judicial Council of the Fourth Circuit, the Chief Judge of the United States Court of Appeals for the Fourth Circuit, and to the Chief Judges of each of the other United States District Courts located in the Circuit. In addition, the Clerk of Court is directed to provide a certified copy of this Order and attachment to the Honorable Joseph C. Biden, Chairman, Senate Judiciary Committee, and to the Honorable William W. Schwartzer, Director of the Federal Judicial Center.

ENTERED this 30th day of December, 1991.

ENTERED

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NO._____ PAGE_____

Charles H. Haden II
Chief Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF WEST VIRGINIA

PLAN FOR IMPLEMENTATION OF THE CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

INTRODUCTION

Pursuant to the provisions of Public Law 101-650, approved December 1, 1990, creating the Civil Justice Reform Act of 1990, the United States District Court for the Southern District of West Virginia appointed a Civil Justice Expense and Delay Reduction Advisory Group for the Southern District of West Virginia. The Advisory Group was charged with recommending a plan to facilitate deliberate adjudication of civil cases on the merits, to monitor discovery, to improve litigation management, and to ensure just, speedy, and inexpensive resolution of civil disputes.

The Advisory Group filed its initial Report August 29, 1991. After review with the Court, the Advisory Group filed its final Report in December 1991. Upon consideration of the recommendations of the Advisory Group, the Southern District will adopt and implement the following plan for the District.

I. STANDING COMMITTEE ON LOCAL RULES

To facilitate the implementation of the various components of the Plan, the District's Standing Committee on Local Rules will be reconstituted and directed to review the Report and, by no later than June 1, 1992, draft proposed Local Rules changes needed to implement this Plan.

II. PRINCIPLES AND GUIDELINES

A. Systematic, Differential Treatment of Civil Cases

All cases shall be analyzed by a judicial officer to determine the appropriate schedule for the Time Frame Order. In complex cases or at the request of counsel, a conference will be held to establish time frames.

When setting time frames, each case is to be reviewed and placed into one of three classes:

Class A - Set for trial 6 months from filing.

Class B - Set for trial 9 months from filing.

Class C - Open end period as to trial date. The date of trial shall be scheduled after conference with counsel.

The purpose of a time frame conference, which may be held by telephone, shall be to establish the following:

1) To assist in the determination of the complexity of the case, and if necessary, to designate it as a complex or mass tort litigation-type case.

2) To establish realistic discovery and pretrial time frame deadlines.

3) To establish summary judgment or dismissal motions deadlines.

4) To determine if the parties are willing to proceed through the trial phase with the Magistrate Judge sitting at all levels of the litigation, including final settlement conference and trial.

5) To evaluate the possibility of early settlement and the setting of alternative dispute resolution mechanisms as early as possible.

B. Plan and process of the case, early and on-going involvement of judicial officers, discovery control and early motion deadlines:

1. Time Frame Orders

Once issues are joined or a responsive pleading has been filed by all defendants, the Court shall enter a Time Frame Order in all civil actions not excepted by Local Rule, which shall establish the dates for the completion of pretrial matters. A model Time Frame Order is set forth in the appendix.

The Time Frame Order will set firm dates for the following:

a) Joinder and amendments

b) Rule 12(b) motions

c) Extra-judicial procedures

d) Discovery

e) Summary judgment and other dispositive motions (except for Rule 12 (b) motions)

f) Pretrial order

g) Proposed charges to the jury and/or suggested and/or findings of fact and conclusions of law

h) Pretrial conference

i) Final settlement conference

The judge to whom the case is assigned shall enter a scheduling order designated as a "Time Frame Order" setting the required schedules with the proviso that counsel or unrepresented parties may, within twenty-one days after the entry of the order, move for modifications of the time limitations contained in the order. Absent the receipt of such motion from counsel or unrepresented parties, the time limitations set forth in the order will not be altered by the Court except upon subsequent order based on a showing of good cause.

2. Discovery

Once issues are joined, the Court will establish a

binding discovery schedule under which all discovery will be completed. "Completed" means that all discovery, objections, motions to compel and all other motions and replies relating to discovery in this action must be filed and/or noticed in time for the party objecting or responding to have opportunity under the Rules of Civil Procedure to make responses. Counsel will have twenty-one days from the entry date of the Time Frame Order to move for modifications of the discovery schedule established therein.

3. Motions and Responses

All motions in civil actions shall be concise and shall state precisely the relief requested. Motions shall be filed timely but not prematurely.

The Court shall give priority status to motions to dismiss. To receive priority treatment, a dismissal motion should not be buried within a pleading or within other motions. It must be designated separately and prominently as a motion to dismiss when filed within or among other pleadings. Counsel must brief dismissal motions adequately.

All non-dispositive motions shall be referred to the Magistrate Judge unless otherwise ordered by the District Judge assigned the case. Dispositive motions may be referred

to a Magistrate Judge upon the individual determination of the District Judge.

All motions shall be filed with supporting memoranda except routine, non-dispositive motions, e.g., motions for enlargements or extensions of time under Rule 6, motions to amend clerical errors in pleadings, motions for sanctions filed under Rule 37 and 56, and motions to compel when the opposing party has ignored the interrogatory or request.

In addition to supporting memoranda, all dispositive motions shall be accompanied by depositions (or designated portions thereof), admissions, documents, affidavits or other such exhibits in support thereof.

Memoranda and other matter in opposition to motions shall be submitted to the Clerk, with copies also submitted to the assigned Judge and served on opposing counsel or parties entitled thereto within fourteen days from the date of service of the motion. Any reply memoranda shall be submitted to the Clerk and also submitted to the assigned Judge and served upon opposing counsel or parties entitled within seven days.

Briefs or memoranda supporting any motion shall be limited to no more than twenty pages without prior approval of the District Judge or Magistrate Judge.

All dispositive motions unsupported by memoranda will be denied without prejudice.

The time periods contained in the Time Frame Order will not be modified to permit late filing of dispositive motions, or review of the same, except upon good cause shown.

Hearings or oral arguments on motions may be set by the Court at its discretion. Otherwise, motions shall be determined without hearing or oral argument.

Judges will impose time limits on referral motions, and will monitor those time limits. All time limits so established shall conform to the reporting guidelines established by the Civil Justice Reform Act.

C. Complex Case Identification and Management

The case management practice set out within this Plan allows for the identifying of complex cases and the establishing of time frames needed to adequately manage such cases.

The District's Standing Committee on Local Rules has been asked, however, to review the Local Rules and draft by no later than June 1, 1992, any amendments needed to identify and manage complex cases.

D. Voluntary Discovery Exchange

This Court encourages cost-effective discovery through

voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices.

The District's Standing Committee on Local Rules has been asked to review the Local Rules and draft by no later than June 1, 1992, proposed amendments concerning routine discovery exchange.

E. Good Faith Efforts of Parties to Resolve Discovery Disputes

Prior to filing a motion to compel or other motions in aid of discovery, counsel shall confer and proceed in good faith to resolve each dispute arising out of any discovery request. The motion to compel shall contain a statement that counsel have conferred and failed to resolve all disputes.

F. ALTERNATIVE DISPUTE RESOLUTION PROGRAM

1. Basic Features

The Southern District of West Virginia's Mediation Program shall be a mandatory mediation program involving those cases deemed by the assigned judge as appropriate for mediation. The selection of cases for inclusion will be made by the Court. The neutral mediators are to be drawn from experienced litigators in the Southern District who will donate

their time to the program. The program includes provisions for recusal of neutrals assigned by the Court upon a showing of good cause. Based upon the experience of other districts, the average time for a mediation session will be approximately two hours. All discussions during the mediation sessions will be absolutely and completely confidential and shall not be referred to or discussed with the presiding judge should the case remain unsettled after the mediation effort. This requirement will be strictly enforced.

2. Cases Included

All civil cases within the Southern District are potentially eligible for inclusion in the Mediation Program. The Court, however, shall make the ultimate decision regarding which cases to include and shall order mandatory participation of these cases in the Mediation Program. To be considered for mediation, cases typically must be mature, that is, six months has passed since the case was filed. Discovery in the case shall either be complete or be close to the completion. If counsel or the Court have allowed the matter to languish, it may be appropriate for mediation although meaningful discovery has not occurred.

A general notice will be sent to all attorneys practicing

in the Southern District inviting their participation and asking them to suggest cases for inclusion in the program. So as not to be perceived by opposing counsel to be operating from a weak position in referring a case to mediation, the suggestion by moving counsel for inclusion would be wholly "blind" and the fact that the case was suggested would not be disclosed to the other party or to anyone other than the Judge deciding the question of eligibility for the Mediation Program.

Once a case has been determined appropriate for mediation by the Court, a notice will be sent to the parties and the matter shall proceed to mediation unless good cause can be shown by the litigants why the case should not be included in the program. The experience of mediation and settlement week programs throughout the country is that if both parties suggest a case for mediation, it should be included in the mediation program and if one party suggests inclusion of the case, it should be given strong consideration for participation in the program.

While all civil cases that have matured appropriately potentially will be eligible for inclusion, the experience of other mediation programs and the docket experience of the Southern District suggest that not all cases are likely to

benefit from mediation equally. Most mature civil cases are likely candidates for participation in the program. Types of cases typical for inclusion are:

1. Commercial and Other Contract Cases
2. Personal Injury Matters
3. Civil Rights Employment Cases
4. ERISA Cases
5. Tax Matters
6. Debt Collection Cases
7. Asbestosis Claims
8. FELA Matters
9. Labor Management Employment Cases
10. Miscellaneous Civil Actions

Cases typically excludable from the mediation program are:

1. Administrative Agency Appeals
2. Habeas Corpus and Other Prisoner Petitions
3. Forfeitures of Seized Property
4. Bankruptcy Appeals

On a case-by-case basis, even these matters may be included in the program.

3. <u>Mediators</u>

Mediators will be selected from the experienced litigators at the bar in the Southern District. They will be matched with cases that need to be mediated based upon the mediator's experience in the relevant area of law. Volunteers will be invited to participate in a letter issued by the Chief Judge, with a copy of that invitation to be published in the West Virginia Lawyer. Training will be coordinated with the State Bar, particularly with the Committee on Judicial Improvement and the Alternative Dispute Resolutions Committee. Training of those volunteers selected by the Court is anticipated to take 1-1/2 days on a weekend at a central site. These volunteers will be trained in alternative dispute resolution methods, and particularly techniques related to mediation. Efforts will be made to obtain Mandatory Continuing Legal Education credits for volunteers who undergo the training program and who participate in the mediation program.

The mediator in a particular case will be selected from a panel of three mediators named by a District Judge. The plaintiff's side and the defendant's side will each strike one mediator, with the one remaining automatically being named the mediator for that case.

Since the mediators will be donating their time and expenses to participate in the program, it is expected that best results would obtain if notice of the scheduling of the settlement periods were given at least five months in advance. Initially, it is anticipated that settlement periods will take place approximately every six months, perhaps in early April and late October.

4. Mediation Procedure

After the Court has determined a case to be appropriate for mediation, notice will be given requiring trial counsel and a party with settlement authority to attend. Each notice will be signed by the Judge to whom the case is assigned and be transmitted as a court order. The order will also state that the parties are required to participate in good faith.

The notice of mediation will indicate that counsel for each party is to file a written factual presentation not to exceed five pages in length, with the attachment of any pertinent supporting documents at least ten days prior to the mediation. At the mediation session, counsel for each party will be given five to ten minutes to clarify any facts which need additional development. Up to fifteen minutes will be permitted for counsel for each party in the form of argument.

Mediators may then meet with the parties and their counsel together and separately in an effort to encourage settlement.

5. Post Mediation Follow-up

At the conclusion of each mediation session, all participants will be given questionnaires to solicit their views of the process. Mediators will fill out a form indicating whether the case was settled or whether follow-up mediation efforts are necessary. If the case is not mediated successfully, the mediators shall forward suggestions to the Court for early resolution of the litigation. Any follow-up necessary with regard to the mediation of cases on which progress was made but final settlement not achieved will be undertaken by a designated Magistrate Judge.

6. Implementation

Initial planning for the Southern District program will be undertaken by a committee consisting of the Chief Judge, one Magistrate Judge, the Clerk of the Court and two representatives of his office, and three members of the Advisory Group. It is anticipated that the program will be implemented by April, 1992.

In the initial phases of the project, particular emphasis will be given to the selection of older and "stalled" cases. To

that end, the Clerk's office will identify all cases which are more than six months old and will separate them into the types of cases which presumptively will be included and those which presumptively will be excluded by subject matter as described supra. Additionally, a mailing to all attorneys practicing in the Southern District will invite suggestions for additions to the mediation program. The ultimate decision as to the eligibility of case for inclusion in the project will be made by the Judge to whom the case is assigned.

Any initial notice indicating that the case had been designated for mediation will be sent to the parties to determine whether good cause could be shown why the case should not be included. After the case is determined to be definitely appropriate for mediation, an order signed by the appropriate Judge will be issued. The order will indicate three possible meeting times during a two-week period. Counsel will then be asked to rank those times in order of preference and to indicate which of those times counsel is absolutely not available.

With regard to scheduling mediators, care should be taken not to overburden mediators not residing in the immediate area since they will be providing their services on

a pro bono basis. For efficiency, mediators will be asked to handle no fewer than four cases per settlement period. For out-of-area mediators, these cases will be scheduled over a two-day period rather than throughout the two-week mediation period.

It is estimated that the cost for training mediators, including notices, etc., will be approximately $7,000.00. The Court petitions the Judicial Conference, through the Administrative Office, to fund this cost pursuant to 28 U. S. C. § 482 (c) 2 from funds appropriated to the Judiciary pursuant to Section 106 (a).

III. TECHNIQUES INCLUDED IN THE PLAN

A. Binding Representatives at Pretrial and Final Settlement Conference

Lead trial counsel shall appear at the pretrial conference fully prepared to discuss all aspects of the case and the matters set forth in the pretrial order.

During no later than the 10-day period prior to the conference, the parties and their lead trial counsel shall meet together and conduct negotiations looking toward the settlement of the action, and counsel will be prepared at the conference to certify that they have done so. Lead counsel for the plaintiff first named in the complaint shall take the initiative in scheduling such meeting, and all other counsel shall cooperate to effect such negotiations.

Should lead trial counsel fail to appear at any pretrial conference or should a party (or his authorized representative) and his lead trial counsel fail to appear (or in the case of a party or his authorized representative, fail to be available as required by Local Rule 2.11) at any final settlement conference, should lead trial counsel for the parties otherwise fail to confer in settlement negotiations as provided herein, the Court may impose appropriate sanctions, including, but not limited to, sanctions by way of imposition of attorney's

fees against the attorney and/or his client pursuant to Rule 16(f), F. R. Civ P.

B. Extensions of Deadlines for Completion of Discovery or for Postponement of the Trial

If counsel makes repeated requests of the Court for extensions of discovery or continuances of the trial date, the Court may require that the parties consent to such requests in writing.

C. Neutral Evaluation Programs

The Court has developed an informal neutral evaluation program among the judges to allow for the presentation of the legal and factual basis of a case to a neutral court representative (District Judge or Magistrate Judge) at a non-binding conference conducted early in the litigation to facilitate settlement.

D. Parties with Binding Authority Required at Settlement Conferences

Lead trial counsel shall attend the final settlement conference. All parties or their representatives authorized to settle the case shall attend the final settlement conference in person or be available for consultation by telephone with the Court.

To avoid the assessment of fees and allowances of

jurors against either or both parties plaintiff and defendant and their counsel, the parties are to advise the Court of any settlement not later than 3:00 p.m. of the last day not a Saturday, Sunday or holiday prior to the trial date.

E. Trial Schedule Conflicts

When a District Judge who has more than one case scheduled to commence trial on the same day becomes aware that more than one case will go to trial on that day, the Judge shall attempt to secure consent, in the remaining cases scheduled for that day, to a trial before a Magistrate Judge. If agreement is not reached, the assigned Judge must attempt to secure another District Judge who is willing to try the next scheduled case.

IV. ADDITIONAL STAFF RESOURCES

A. Automation of the Court System

The Advisory Group Report has recommended that the Court take immediate steps to fully automate the Court system and that the Court petition the Administrative Office of the United States Court for funding to employ one additional full-time computer systems person to supervise software maintenance, networking, back-up, and perhaps most importantly, training and updating of all Court personnel.

The Court supports the recommendation and petitions the Judicial Conference through the Administrative Office, to fund this position pursuant to 28 U. S. C. § 482 (c) 2 from funds appropriated to the Judiciary pursuant to Section 106 (a).

B. Additional Law Clerk Support

Pursuant to the additional duties placed upon Magistrate Judges, the Advisory Group has recommended that one additional law clerk to be located in Charleston be appointed and assigned by the Chief Judge to ease the Magistrate Judge workload.

The Court supports this recommendation and petitions the Judicial Conference, through the Administrative Office, to

fund this position pursuant to 28 U. S. C. § 482 (c) 2 from funds appropriated to the Judiciary pursuant to Section 106 (a).

C. Additional Mid-Level Management Staff

The Advisory Groups Report recommends that the Clerk's office mid-level management staff be increased by creating and funding an operations manager position, as contained in the Judicial Salary Plan. This position will insure that all civil and criminal cases in the District are monitored constantly. To assure that all cases stay on a time track, if a case encounters delay, appropriate action can be taken to resolve the cause of the delay. The appointee will serve as a civil case coordinator and will monitor the District's mediation system.

The Court supports this recommendation and petitions the Judicial Conference, through the Administrative Office, to fund this position pursuant to 28 U. S. C. § 482 (c) 2 from funds appropriated to the Judiciary pursuant to Section 106 (a).

V. PERIODIC DISTRICT COURT ASSESSMENT

The Advisory Group appointed on March 1, 1991, in compliance with the Civil Justice Reform Act of 1990, 28 U. S. C. § 472 by the Chief Judge of this District shall meet on a regular basis during 1992, and succeeding years, to review the implementation of the District's Civil Justice Expense and Delay Reduction Plan and to assess the condition of the Court's civil and criminal docket with a view to determine appropriate additional actions that may be taken by the Court to reduce cost and delay in civil litigation and to improve the litigation management practices of the Court.

Beginning in 1993, the Advisory Group shall meet annually at least to review the condition of the Court's civil and criminal docket.

APPROVED this 30th day of December, 1991.

CHARLES H. HADEN II
Chief Judge, U. S. District Court