UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Entered November 1, 1991

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

ORDER

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

DONE October 24, 1991, at Houston, Texas.

FOR THE COURT:

\s\
James DeAnda, Chief Judge
United States District Court

COST AND DELAY REDUCTION PLAN

SOUTHERN DISTRICT OF TEXAS

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

THE PLAN

1. Differential Case Management[1]

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

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

A. Bankruptcy Appeals

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

B. Social Security Appeals

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

C. FDIC, RTC, FSLIC Cases

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

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[1] **28 U.S.C. §473(a)(1) (Supp. 1991) "systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity ..."**

D. Pro se Plaintiff Cases

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

E. Removed Cases

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

F. All Other Cases

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

2. Magistrate Judges[2]

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

3. Initial Pretrial Conferences[4]

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

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Rule 8. Initial Pretrial Conference Scheduling Orders

Within 140 days after a party files a complaint or notice of removal the judge to whom the case is assigned will conduct an initial pretrial conference under Fed. R. Civ. P. 16 and enter **a** scheduling order, except in the following types of cases: (a)

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[2]28 U.S.C. § 473(a)(2) (Supp. 1991) "early and ongoing control of the pretrial process through involvement of a judicial officer ..." and (3) "... careful and deliberate monitoring through a discovery-case management conference or a series of conferences ..."

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

[4]28 U.S.C. § 473(a)(2) (Supp. 1991) "early and ongoing control of the pretrial process through involvement of a judicial officer in -- (A) assessing and planning the progress of a case; (B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint ..."

> prisoner civil rights actions; (b) state and federal habeas corpus actions; (c) student and veteran loan actions; (d) social security appeals; (e) bankruptcy appeals; and (f) complaints to forfeit seized assets.
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> A judge may in his discretion conduct an initial pretrial conference and enter a scheduling order in any of the types of cases excepted.
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> * * *

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

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

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

4. Discovery/Case Management Order[5]

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

5. Complex Cases

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

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

A. Discovery

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

B. Bifurcation

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

6. Voluntary Disclosure[6]

Each Judge will order discovery to proceed under the proposed federal rule on voluntary disclosure[7] in a minimum of twenty cases each year in the Houston Division and a minimum of ten cases each year in the remaining divisions. This practice will be evaluated annually to assess its effectiveness and to consider expansion or discontinuation.

7. Alternative Dispute Resolution[8]

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

* * *

Alternative Dispute Resolution

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

A. Timing of the ADR Decision.

1. Before the initial conference in a

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[6]**28 U.S.C. § 473(a)(4) "encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices."**

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

[8]**48 U.S.C. § 473(a)(6) "authorization to refer appropriate cases to alternate dispute resolution ...."**

case, counsel shall discuss the appropriateness of ADR in the litigation with their clients and with opposing counsel.

2. At the initial pretrial conference the parties shall advise the court of the results of their discussions concerning ADR. At that time and at subsequent conferences, if necessary, the court shall explore with the parties the possibility of using ADR.

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

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

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

E. List of Providers. The court shall have a standing panel on ADR providers. The court will appoint three members and designate one member as chairperson. The panel will review applications from providers and annually prepare a list of those qualified under the criteria contained in this rule. A provider denied listing may request a review of that decision.

1. To be eligible for listing, providers must meet the following minimum qualifications:

a. Membership in the bar of the United States District Court for the Southern District of Texas;

b. Licensed to practice law for at least ten years;

c. Completion of at least forty hours training in dispute resolution techniques in an alternative dispute resolution course approved by the State Bar of Texas Minimum Continuing Legal Education department.

2. A provider must submit a completed application which contains:

   a. The ADR method(s) in which the provider seeks to be listed;

   b. A concise summary of the provider's training, experience, and qualifications for the ADR method(s) in which the provider seeks to be listed;

   c. The subject matter area(s) in which the provider has particular expertise;

   d. The provider's fee schedule;

   e. A commitment to accept some cases for no fee or **a** reduced fee.

3. Annually after listing the provider must participate in at least five hours of ADR training.

4. Each provider shall remain on the list for five years. After a five-year term the provider may apply for relisting.

5. The court may approve any other provider the parties agree upon even though the provider is not listed.

F. Attendance: Authority to Settle. Party representatives with authority to negotiate a settlement and all other persons necessary to negotiate a settlement, including insurance carriers, must attend the ADR session.

G. Fees. The provider and the litigants will determine the fees for the ADR. However, the court reserves the right to review the reasonableness of fees.

H. Binding Nature. The results of ADR are nonbinding unless the parties agree otherwise.

I. Confidentiality; Privileges and Immunities. All communications made during ADR procedures are confidential and protected from disclosure and do not constitute a waiver of any existing privileges and immunities.

J. Disqualification. All providers are subject to disqualification pursuant to 28 U.S.C. 455 (1988).

K. Conclusion of ADR Proceedings. At the conclusion of each ADR proceeding the provider, parties, and the court will take the following action:

1. The ADR provider will send the court clerk a memorandum stating the style and civil action number of the case; the names, addresses, and telephone numbers of counsel; the type of the case; the method of ADR proceeding; whether ADR was successful; and the provider's fees.

2. The court clerk shall submit a questionnaire to the parties and will require counsel and their clients to complete and return the questionnaire for reference by the court, attorneys, and public.

3. The court clerk annually shall tabulate, analyze, and report on the disposition of ADR proceedings. The clerk

shall keep on file the questionnaire from closed ADR proceedings.

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

8. Trial Procedures

A. *Jury Education*

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

B. *Timing orders*

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

C. *Expert Witness Testimony*

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

9. Conservation of Judicial Resources[9]

Southern District of Texas Local Rule 6 A.4.a.b., reads in pertinent part "Opposed motions shall: . . . [c]ontain an averment that (a) The movant has conferred with the respondent and that (b) Counsel cannot agree about the disposition of the motion."

10. Resources[10]

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

A. *Three Staff Attorneys.*

These positions shall perform the tasks enumerated in part (1) of this Plan. Based on the current 350 case standard for staff attorney allocation, the Court contemplates that planned addition of 1000+ case filings demanding close attention,[11] together with an anticipated 1400 removed case filings[12] requiring

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[9]29 U.S.C. § 473(a)(5) "conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion ...."

[10]28 U.S.C. § 473(a)(1) "... differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as ... resources required and available for the preparation and disposition of the case."

[11]During the twelve-month period ending May 31, 1991, there were 156 bankruptcy appeals and 59 social security appeals in the Southern District of Texas. During the twelve-

expedited, cursory review will necessitate three staff attorneys. Accelerated attention will be given to over half of the annual civil filings under this plan by the staff attorney team.

B. *Two Secretaries*

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

C. *Eighteen Courtroom Deputies*

Each judge (18) will have a deputy district clerk serving as a courtroom attendant performing courtroom support functions thereby relieving the case manager from these responsibilities. This clerk will assist the case manager when not performing duties in the courtroom.

D. *Three Case Managers*

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

E. *Two Alternative Dispute Resolution Clerks*

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

F. *Four Electronic Court Recorder Operators*

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

G. *Justification*

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

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

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month period ending June 30, 1991, there were 226 non-prisoner pro se filings, and 609 filings with the FDIC, FSLIC, and RTC as parties.

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

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

annual judicial support of $4,297,218.20.[14] The district is imploring Congress to provide a small portion of this savings to help the district remedy the problems that judicial vacancies have caused.

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

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

Excerpt from Preliminary Draft of Proposed Amendments to the FEDERAL RULES OF CIVIL PROCEDURE, August 1991

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except in actions exempted by local rule or when otherwise ordered, each party shall, without awaiting

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

a discovery request, provide to every other party:

(A) the name and, if known, the address and telephone number of each individual likely to have information that bears significantly on any claim or defense, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

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.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required in paragraph (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 be in the form of a written report prepared and signed by the witness which includes a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information relied upon in forming such opinions; any exhibits to be used as a summary of or support for such opinions; the qualifications of the witness; and 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.

(B) Unless the court designates a different time, the disclosure shall be made at least 90 days before the date the case has been directed to be ready for trial, or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(A), within 30 days after the disclosure made by such other party. These disclosures

are subject to the duty of supplementation under subdivision (e)(1).

(C) By local rule or by order in the case, the court may alter the type or form of disclosures to be made with respect to particular experts or categories of experts, such as treating physicians.

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, each party shall provide to every other party the following information regarding the evidence that the disclosing party may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken by stenographic means, a transcript of the pertinent portions of such deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, other parties shall serve and file (i) any objections that deposition testimony designated under subparagraph (B) cannot be used under Rule 32(a) and (ii) any objections to the admissibility of the materials identified under subparagraph (C) . 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.

(4) Form of Disclosure; Filing. The disclosures required by the preceding paragraphs shall be made in writing and signed by the party or counsel in compliance with subdivision (g) (1) . The disclosures shall be served as provided by Rule 5 and, unless otherwise ordered, promptly filed with the court.

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 3 4 or 4 5 (a) (1) (C) , for inspection and other purposes; physical and mental examinations; and requests for admission. ***

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence,

description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. Limitations in these rules on the number and length of depositions and the number of interrogatories may be altered by local rule for particular types or classifications of cases. The frequency or extent of use of the discovery methods permitted under these rules and any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery to the resolution of the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b) (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37 (a) (4) apply to the award of expenses incurred in relations to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose, after any report required under subdivision (a)(2) has been provided, any person who has been identified as an expert whose opinions may be presented at trial.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result,(i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b) (4) (A) and (b) (4) (B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

(c) Protective orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certificate that the movant in good faith has conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37 (a) (4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery. Except with leave of court or upon agreement of the parties, a party may not seek discovery from any source before making the disclosures under subdivision (a) (1) and may not seek discovery from another party before the date such

disclosures have been made by, or are due from, such other party. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the f act that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request f or discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired as follows:

(1) A party is under a duty seasonably to supplement its disclosures under subdivision (a) if the party learns that the information disclosed is not complete and correct. With respect to expert testimony that the party expects to offer at trial, the duty extends both to information contained in reports under Rule 26(a)(2)(A) and to information provided through a deposition of the expert, and any additions or other changes to such information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is not complete and correct.

(f) [Abrogated.]

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision(a) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry the disclosure is complete and correct as of the time it is made.

(2) Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall,be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

COMMITTEE NOTES

Subdivision (a). Through the addition of paragraphs (i)(4) , this subdivision is revised to impose on parties a duty to disclose, without awaiting discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) to identify at the outset of the case all persons with pertinent knowledge about the case and sources of potential documentary evidence, (2) to disclose in detail all expert opinions that may be offered at trial, and (3) to identify the persons and exhibits that may be offered at trial. Interrogatories should no longer be needed to obtain this information. The enumeration in Rule 26(a) of items required to be disclosed does not prevent a court by local rule or by order in a specific case from requiring that the parties disclose additional information without a discovery request.

The purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information. The concepts of imposing a duty of disclosure were set forth in Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1348 (1978) and in Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703, 721-723 (1989). The rule is based upon the experience of several district courts that have required such disclosures by local rule or standing orders.

Paragraph (1). As the functional equivalent of standing interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the district court to exempt a particular case from the requirement for automatic disclosure or to provide by local rule for the exclusion from this obligation of categories of cases in which discovery will probably be unnecessary, such as review of Social Security decisions.

Subparagraph (A) requires identification of all persons likely to have information that bears significantly on any of the claims and defenses presented by the pleadings in the case, including damages. The limitation to those with "significant" information is not intended to provide an excuse for failure to identify persons whose information would not support the party's contentions, but rather to eliminate the burdensomeness or potential deception arising from a listing of large numbers of persons who in some cases (e.g., some construction contract disputes) may have some knowledge about minor details in the case but would be unlikely to be called as witnesses by any party. As officers of the court, counsel are expected to disclose the identity of those persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding whether their depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a) (3) (C) , an itemized listing of exhibits is not required, the disclosure should describe and categorize the nature and types of documents,

including computerized data, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents should be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. Unlike subdivisions (a) (1) (C) and (D) , this rule does not require production of any documents, and, where only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. In some cases, particularly where few documents are involved, a disclosing party may prefer simply to provide copies of the documents rather than describe them; and the rule is written to afford this option to the disclosing party.

Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. Note that, if a party **seeks** to obtain materials bearing on its claim for damages which are in the possession of another party, it should seek production by request under Rule 34.

Subparagraph (D) replaces subdivision (b) (2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See Rule 411, Federal Rules of Evidence. Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

The disclosures specified in subdivision (a)(1) are to be made within 30 days after the first answer by a defendant. (In cases with multiple defendants, each defendant should make its disclosure within 30 days after answering.) To avoid undue delay when an answer is deferred pending a ruling on a Rule 12 motion, the rule permits any party to accelerate the time for disclosures by making its own disclosure and serving a demand that adverse parties make their disclosures within 30 days thereafter.

A longer or shorter period for the disclosures may, however, be established by the court. For example, a court may direct that the disclosures be made in advance of a scheduling conference under Rule 16(b) even if answers have not been filed due to pendency of Rule 12 motions. With approval of the court, the parties may agree to delay the disclosures (when, for example, early settlement appears probable).

Before making its disclosure, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the f acts of the case. However, the inability of a party to fully complete its investigation of the case is not a sufficient justification for extending the time for initial disclosures--the party should make its initial disclosure based on the information then available and, as its investigation continues, supplement its responses under subdivision (e)(1). **A** party is not excused from its obligation of disclosure merely because it questions the sufficiency of disclosures made by another party.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for this disclosure in a scheduling order under Rule 16 (b) , and frequently it will be appropriate to require that one party make its disclosure before other parties make their disclosures. The rule provides that, in default of such an order, the disclosures are to be made by all parties at least 90 days before the case has been directed to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters.

The rule contemplates a detailed and complete report prepared by the expert, stating the testimony such a witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 702 of the Federal Rules of Evidence provides an additional incentive for full disclosure; namely, that an expert will not ordinarily be permitted to provide testimony on direct examination that was not revealed in advance of trial.

The rule also requires production of the data and other information relied upon by the expert and any exhibits or charts that summarize or support the expert's opinions. Given the obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions are protected from disclosure when such persons are testifying or being deposed. Revised subdivision (b) (3) (A) authorizes the deposition of expert witnesses, and revised subdivision (e) (1) requires disclosure of any changes made in an expert's opinions.

By order in the case, or more generally by a local rule, courts may alter the form of disclosure for certain types of experts. For example, treating physicians might be relieved from any requirement to prepare a written report or to be subjected to a two-phase deposition.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If not otherwise directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, Rule 26(a) (3) does not require disclosure of evidence to be used solely for impeachment purposes; however, such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those whose testimony the party expects to present should be listed separately from those whose testimony will be presented only if needed because of unanticipated developments during trial.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence). The rule requires a separate listing of each exhibit, but permits voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be collectively shown as a single exhibit with their starting and ending dates. As for witnesses, the party is required to designate the exhibits it expects to offer separately from those it will offer only if needed because of unanticipated developments during trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to indicate objections to the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402-03 of the evidence rules) . Such provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide "foundation" testimony for most items of documentary evidence.

The times set in the rule for the final pretrial disclosures are relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A writing is required to assure that the parties and counsel are mindful of the solemnity of the obligations imposed; a signature on such a disclosure is a certif ication that it is complete. Consistent with Rule 5 (d) , the written disclosures shall be filed with the court unless otherwise directed.

An informal meeting of counsel is the preferred method of exchanging the required information. The initial meeting provides an opportunity to clarify their disclosures, discuss the exchange of additional discoverable information without the need for formal discovery requests, identify information needed for an early consideration of settlement, and plan for document production and such depositions as may be needed. By conf erring to make the disclosures required by subdivision (a) (3) counsel can consider steps to avoid unnecessary proof and cumulative evidence.

Paragraph (5). This paragraph is revised to take note of the availability of revised Rule 45 for inspection of documents and premises from non-parties without the need for a deposition. [Asterisks are shown following the first sentence of this paragraph in recognition that a proposed amendment to this rule adding a sentence relating to conduct of certain discovery outside the United States is currently pending before the Supreme Court; the change in the first sentence, as shown in this revision, is proposed without regard to whether or not the provision relating to foreign discovery is ultimately adopted.)

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly increased the potential cost of wide-ranging discovery and thus increased the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number and length of depositions and the number of interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b) (2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number and length of depositions and the presumptive number of interrogatories allowed in particular types or classifications of cases.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a) (1) (D) , and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) provides that expert witnesses who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the current rule to the actual practice followed in most courts, in which depositions of experts have become standard. concerns regarding the expense

of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition and by the presumptive limit under Rule 30 on the length of the depositions. The requirement under Rule 26(a) (2) (A) for disclosure of a complete and detailed statement of the expected testimony of the expert may, moreover, eliminate the need for some such depositions. A party that wants to take the deposition of its own expert for use at trial must, unless excused by the court under Rule 26(a)(2)(C) provide the expert's written report under Rule 26(a)(2)(A) before the deposition.

Paragraph (4) (C) , bearing on compensation of experts, is revised to take account of the changes in paragraph (4)(A).

Paragraph (5) is a new provision. The basic features of this provision are embodied in a proposed amendment to Rule 26 that is currently pending before the Supreme Court. Since some changes in the pending amendment are proposed, and since it is proposed that this paragraph become part of the rule even if the pending amendment to Rule 26 is not adopted, this revision shows the paragraph in its entirety as a new provision.

The Committee Notes prepared at the time the pending amendment was submitted to the Supreme Court state the purpose of the revision; namely, to establish a procedure by which materials withheld from disclosure or discovery on the basis of a claim of privilege or work product protection are identified, with sufficient information provided so that other parties can determine whether to contest that claim. As those Notes indicate, a party can seek relief by a motion for a protective order under subdivision (c) if providing this information would be unduly burdensome.

Subdivision (c). This subdivision is revised to require that before filing a motion for a protective order the movant must confer--either in person or by telephone--with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant has been unable to get opposing parties even to discuss the matter, the efforts taken in attempting to arrange such a conference should be indicated in the certificate.

Subdivision (d). This subdivision is revised to provide that a party may not begin any formal discovery from any source unless it has made its initial disclosure under subdivision (a) (1) , and may not seek formal discovery from another party prior to the time such disclosure has ben made, or should have been made, by the other party. Leave of court is required to begin discovery at an earlier date. This subdivision does not apply to interviews of witnesses and other informal discovery, which may--and indeed ordinarily should--be undertaken prior to preparing pleadings to the extent consistent with ethical principles.

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures directed by revised subdivisions (a) (1) - (3). Like the former rule, the duty, while imposed on a "party," applies whether information is discovered by the client or by the attorney. Supplementations should be made with special promptness as discovery deadlines and trial approaches.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and request for admission, but not ordinarily to deposition testimony. However, changes in the opinions expressed by an expert at a deposition are subject to a duty of disclosure under subdivision (e) (1) . The obligation to supplement discovery responses applies whenever a party learns that its prior response is no longer complete and correct, and is not limited (as under the former rule) to situations in which a failure to supplement would have constituted a "knowing concealment."

Subdivision (f). These provisions are deleted. The special "discovery conference" envisioned by the 1980 amendment has not proved to be an effective device to prevent discovery abuses. Rule 16, taken in conjunction with the current revisions to Rules 26-37, provides adequate authority for the court to

exercise its responsibilities in controlling discovery.

Subdivision (g). Paragraph (1) is added to require signatures on disclosures, a requirement that parallels the provisions of paragraph (2) with respect to discovery requests, responses, and objections.

(Special Note for Publication: As currently drafted, the sanctions provisions of both Rule 11 and Rule 26(g) have potential application with respect to discovery motions, requests, responses, and objections that are filed with the court. Consideration will be given to the question whether this "overlap" should be eliminated, perhaps making the sanctions provisions contained in Rules 26 and 37 the sole source for sanctions with respect to discovery papers. Comments are welcomed at the present time on this question, as such a change might be made without additional publication.]