General Order 95-12

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

ORDER ADOPTING AMENDMENTS TO THE CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

Having been approved by the Court, it is hereby ORDERED that this district's Civil Justice Expense and Delay Reduction Plan is amended as follows and adopted for immediate implementation [note: new language updating the November 1994 amended CJRA Plan appears in redline form; deleted language appears in ~~strikeout~~ form]:

PART ONE

ARTICLE ONE: DIFFERENTIAL CASE MANAGEMENT - TRACKING AND PRESUMPTIVE DISCOVERY LIMITS

Upon the filing of each case, the Court will assign the case to one of six tracks. The parties may submit an agreed notice of assignment of the case to a track lower than the one to which it is initially assigned by the Court. Upon submission of such notice, signed by counsel for all parties, the case will remain on the track agreed to unless modified by the Court at the Management Conference. Each track will carry presumptive discovery limits as set forth below. These limits shall govern the case and may not be ~~changed~~ increased by the parties or their attorneys by agreement or otherwise. If ~~a~~ any additional change of track number is necessary it should be taken up at the Management Conference at which time the judicial officer to whom the case is assigned may, upon good cause shown, expand or limit the discovery.

TRACK ONE: No discovery

TRACK TWO: Disclosure only

TRACK THREE: Disclosure plus 25 interrogatories, 25 requests for admission, depositions of the parties, and depositions on written questions of custodians of business records for third parties.

TRACK FOUR: Disclosure plus 25 interrogatories, 25 requests for admissions, depositions of the parties, depositions on written questions of custodians of business records for third parties, and three other depositions per side (i.e., per

party or per group of parties with a common interest.)

TRACK FIVE: Disclosure plus a discovery plan tailored by the judicial officer to fit the special management needs of the case.

TRACK SIX: Disclosure plus a discovery plan as determined by the judicial officers to fit the special management needs of mass tort and other large groups of similar cases.

ARTICLE TWO: DUTY OF DISCLOSURE

When required by this Plan, the duty of disclosure means the following:

(1) Initial Disclosure:

(a) Each party shall, without awaiting a discovery request, provide to every other party:

(i) The name and, if known, the address and telephone number of each person likely to have information that bears significantly on any claim or defense, identifying the subjects of the information, and a brief, fair summary of the substance of the information known by the person;

(ii) A copy of~~, or a description by category and location,~~ 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;

(iii) 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

(iv) 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.

(v) There is no duty to disclose privileged documents. Privileged documents or information shall be identified and the basis for the claimed privilege shall be disclosed.

(vi) (1) Where a party's physical or mental condition is at issue in the case, that party shall provide the party's medical records or shall furnish a signed authorization to the opposing party's counsel so that records of health care providers which bear significantly on injuries and damages claimed may be obtained. If additional records are desired, the requesting party must show the need for them.

(2) Where lost earnings, lost earning capacity or back pay is at issue in the case, the party making such claims shall furnish signed authorizations to the opposing party's counsel so that wage and earning records of past and present employers, and the Social Security Administration records, may be obtained.

(3) Copies of any records obtained with authorizations provided pursuant to subsections (1) or (2) above shall be promptly furnished to that party's counsel. Records which are obtained shall remain confidential. The attorney obtaining such records shall limit their disclosure to the attorney's client (or in the case of an entity, those employees or officers of the entity necessary to prepare the defense), the attorney's own staff and consulting and testifying experts who may review the records in connection with formulating their opinions in the case.

(b) Timing of Disclosure

Unless the judicial officer directs otherwise, or the parties otherwise stipulate with the judicial officer's approval, these disclosures shall be made

as follows:

(i) by a plaintiff within 30 days after service of a Rule 12(b) motion or an answer to its complaint or removal of the action from state court, whichever occurs first;

(ii) by a defendant within 30 days after serving a Rule 12(b) motion or its answer to the complaint or removal of the action from state court, whichever occurs first; 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.

(c) bears significantly on

The following observations are provided for counsels' guidance in evaluating whether a particular piece of information "bears significantly on" a claim or defense.

(i) It includes information that would not support the disclosing parties' contentions;

(ii) It includes 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;

(iii) It is information that is likely to have an influence on or affect the outcome of a claim or defense;

(iv) It is information that deserves to be considered in the preparation, evaluation or trial of a claim or defense;

(v) It is information that reasonable and competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense;

(vi) All information that bears significantly on a claim or defense is relevant but all relevant information does

not necessarily bear significantly on a claim or defense.

(d) No Excuses

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 because another party has not made its disclosures. Parties asserting the defense of qualified immunity may submit a motion to limit disclosure to those materials necessary to decide the issue of qualified immunity.

(2) Disclosure of Expert Testimony:

(a) In addition to the disclosures required in paragraph (1), each party shall disclose to every other party the identity of any person who may be used at trial to present evidence under Rules 702, 703, and 705, Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness that includes a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information considered 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. When listing the cases in which the witness has testified as an expert, the disclosure shall include the styles of the cases, the courts in which the cases were pending, the cause numbers, and whether the testimony was in trial or deposition. In addition, the report must include a list of all publications authored by the witness within the preceding ten years and the compensation to be paid for the study and testimony in this case. On motion of the party, an expert witness not retained or employed may be excused from filing the required report with approval of the court.

(b) Unless the judicial officer designates a different time, this 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 under paragraph (2) (a), then disclosure shall be made within 30 days after such disclosure is made.

(c) By order in the case, the judicial officer 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 Disclosure:

(a) In addition to disclosures required in the preceding paragraphs,

each party shall provide to every other party information regarding the evidence that the disclosing party may present at trial other than solely for impeachment purposes, as follows:

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

(ii) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony.

(iii) 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.

(b) Timing

Unless otherwise directed by the judicial officer, those disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (1) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (ii) and (2) any objections, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (iii). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures, Meeting, Filing:

The disclosures required by the preceding paragraphs shall be made in writing and signed by the party or counsel in accordance with Rule 26(a)(4) and 26(g) and shall constitute a certification that, to the best of the signer's knowledge, information and belief, such disclosure is complete and correct as of the time it is made. If feasible, counsel shall meet to exchange disclosures required by paragraphs (1) and (3); otherwise such disclosures shall be served as provided by Rule 5. The parties shall file a prompt notice with the court that the required disclosure has taken place.

(5) Duty to Supplement:

After disclosure is made pursuant to this article, each party is under a duty to ~~reasonably~~ immediately supplement or correct its disclosures if the party obtains information on the basis of which it knows that the information disclosed was either incomplete or incorrect when made, or is no longer complete or true.

ARTICLE THREE: MANAGEMENT CONFERENCE

(1) Attorney Responsibility Prior to Management Conference:

Prior to the Management Conference, attorneys for each party shall make the required disclosures, shall have completed the depositions, if any, of the parties, and shall have conferred with the other attorneys in the action concerning stipulations of fact and ~~issues to be tried~~. each of the items contained in Article 3, Section (3) below.

(2) Timing:

Within 120 days after issues have been joined, the judicial officer assigned to cases in Tracks 3, 4, 5 and 6 shall convene a Management Conference.

(3) Scope of Management Conference:

At the Management Conference, the judicial officer shall address each of the following items:

(a) confirm or modify track assignment;

(b) establish deadlines for filing of motions;

(c) determine issues to be tried;

(d) identify witnesses who will testify at trial;

(e) establish deadlines for approval of proposed expert witnesses;

(f) determine the efficacy of referring the case to alternative dispute resolution;

(g) determine feasibility of a settlement conference and the timing of such conference, if any;

(h) establish a firm trial date;

(I) consider establishing a time limit for trial;

(j) discuss litigation cost estimates with the parties and counsel;

(k) invite offers of judgment;

(l) discuss any other matter appropriate for the case.

(4) Attendance:

The Management Conference shall be attended by an attorney of record with full authority to make decisions and agreements that bind the client. Except in extraordinary circumstances, the court expects that attorney to be the one who will actually try the case. ~~The conference should also be attended by the party or a representative of the party who has authority to settle~~. Attendance by clients at the management conference is not required unless otherwise ordered by the Court.

ARTICLE FOUR: MOTION PRACTICE

(1) Motions shall not exceed fifteen pages including authorities.

(2) Motions filed by the parties shall be determined by the judicial officer as soon as practicable, and in any event within 30 days after filing of the response for non-dispositive motions. The Court shall employ its best efforts to dispose of dispositive motions such as summary judgment within sixty days.

ARTICLE FIVE: ATTORNEYS' FEES

The assumption that underlies the substance of the Civil Justice Reform Act is that implementation of a plan that substantially reduces legal activity during discovery will result in cost reduction for litigants who pay for legal services by the hour. Whether such presumed reductions become a reality remains to be seen. The court shall adopt methods to evaluate the effectiveness of the court's plan in this respect. However, no such reduction from these measures will inure to the benefit of litigants who retain counsel on a contingency fee basis. The court, therefore, adopts the following maximum fee schedule for contingency fee cases (whether filed originally in this court or removed from state court):

(1) Contingent fees in non-statutory cases:

A fee of 33-1/3% of the total award or settlement

(2) Expenses:

Expenses incurred by attorneys that are directly related to the costs of litigation of individual cases shall be deducted from the award or settlement before any calculation or distribution is made for attorneys' fees. No deduction is permitted for general office overhead expenses. Moreover, attorneys are prohibited from charging interest on any money advanced for expenses.

(3) The court may modify the fee in exceptional circumstances.

(4) In cases where statutory attorneys' fees are recoverable, such as civil rights cases, the court shall approve a reasonable fee.

ARTICLE SIX: MISCELLANEOUS MATTERS

(1) Discovery Hotline (903) 593-0742:

The Court shall provide a judicial officer on call during business hours to rule on discovery disputes and to enforce provisions of the Plan. Counsel may contact the judicial officer by dialing the Hotline number listed above for any case in the district and get an immediate hearing on the record and ruling on the discovery dispute or request to enforce or modify provisions of the Plan as it relates to a particular case.

(2) Pretrial Orders:

Pretrial orders shall be prepared for each case in Tracks 3, 4 and 5. These pretrial orders will be standardized and used by each judicial officer. The standardized form can be found in Appendix A of this Plan.

(3) Docket calls:

Traditional docket calls are abolished. Each judicial officer shall endeavor to set early and firm trial dates which will eliminate the need for multiple-case docket calls.

(4) Conformity of Local Rules:

Any existing local rule not in conformity to this Plan will be revised to conform.

(5) Inconsistencies with the Federal Rules of Civil Procedure:

To the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling.

(6) Depositions:

Depositions of witnesses or parties shall be taken on weekdays and may not last longer than six hours, unless otherwise authorized by the court. A non-party witness, that is a neutral witness or a witness which all parties must examine, the six hour time limit shall be divided equally among plaintiffs and defendants. Depositions may be taken after 5:00 P. M., on weekends, or holidays with approval of a judicial officer or by agreement of counsel. Attorneys are prohibited from instructing the deponent not to answer a question or how to answer a question, except to assert a recognized privilege. Other objections shall be made at trial.

(7) Alternative Dispute Resolution:

If the judicial officer determines that the case probably will benefit from alternative dispute resolution, the judicial officer shall have discretion to refer the case to:

(a) court-annexed mediation in accordance with the court's mediation plan.

(b) voluntary mini-trial or summary jury trial before a judicial officer; or

(c) other alternative dispute resolution programs designated for use in this district

(8) Motion for Continuances:

Requests for postponement of the trial shall be signed by the attorney of record and the party making the request.

(9) Offer of Judgment:

At the Management Conference or anytime thereafter, a party may make a written offer of judgment. If the offer of judgment is not accepted and the final judgment in the case is of more benefit to the party who made the offer by 10%, then the party who rejected the offer must pay the litigation costs incurred after the offer was rejected. In personal injury and civil rights cases involving contingent attorneys' fees, the award of litigation costs shall not exceed the amount of the final judgment.

The Court may, in its discretion, reduce the award of litigation costs in order to prevent undue hardship to a party.

"Litigation costs" means those costs which are directly related to preparing the case for trial and actual trial expenses, including but not limited to reasonable attorneys' fees, deposition costs and fees for expert witnesses.

The party who makes an offer of judgment shall set forth the deadline by which the offer must be accepted. The deadline must be reasonable. If the offer is not accepted in writing by the deadline, the offer is deemed rejected on that day.

The government's participation in this Section is not mandatory, but is permitted with the consent of the government.

(10) Docket Control Order Modification:

The Docket Control Order produced at the Management Conference may be modified at any time thereafter by the judicial officer to whom the case is assigned.

CONCLUSION

This Amended Plan has been adopted in the full spirit of the goals and objectives expressed in the Civil Justice Reform Act of 1990. The administration of justice will be enhanced and improved by the implementation of this Plan, and those citizens who seek to resolve their disputes in this Court will not be unduly delayed nor barred from the courthouse by undue and unnecessary costs and expenses.

The Amended Plan is hereby ADOPTED.

So ORDERED this 23rd day of June, 1995.

FOR THE COURT:

Richard A. Schell

RICHARD A. SCHELL
Chief Judge