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## Man With the Plan

### Successful Eastern District Practice Requires Understanding History

by MICHAEL C. SMITH

Litigants in the U.S. District Courts in the Eastern District of Texas often remark on the somewhat unusual local rules and procedures many of the judges follow, which include mandatory document disclosures, page limits on briefs, limitations on permissible activity in depositions and a hotline for discovery disputes.

#### TRIALPRACTICE

But many of these procedures — which contributed to the district's current reputation as a popular forum for complex litigation, such as patent infringement cases — date back to the same document: the district's Civil Justice Expense and Delay Reduction Plan, adopted Dec. 20, 1991, pursuant to the Civil Justice Reform Act of 1991 (CJRA), 28 U.S.C. 471, *et seq.*

Enacted by a Congress concerned by the increasing cost of civil litigation, the CJRA required each U.S. district court to implement a CJRA plan to improve litigation management. Even though the Eastern District was not one of the pilot districts initially required to produce a plan under the CJRA, then-Eastern District of Texas Chief Judge Robert M. Parker of Tyler appointed an advisory group in accordance with the statute. Then, after reviewing that group's recommendations, Parker promulgated what became known locally as "the plan" on behalf of the judges of the Eastern District of Texas.

The plan dominated local practice for the next nine years as part of the local rules, and its major provisions continue to this day to guide practice across much of the district, and in particular the district's heavy patent docket in Marshall and Tyler.

Since the main concern of the CJRA was containing the exploding costs of discovery, the plan consisted primarily of extensive changes to discovery procedures. In most cases it limited oral depositions to three per side, imposed strict page limits on briefing, and required each party, without awaiting a discovery request, to provide certain mandatory disclosures within 30 days after the defendant filed an answer or other responsive pleading in the case. These disclosures included a computation of damages and, most importantly, a copy of all documents likely to bear significantly on any claim or defense.

The plan also provided that "bears significantly on" included information that would not support the disclosing party's contentions, as well as all information "that reasonable and competent counsel would consider reasonably necessary to prepare, evaluate, or try a claim or defense."

The plan provided a discovery hotline that put a judicial officer — a magistrate judge or, in some courts, the district judge handling the case — on call during business hours to rule on discovery disputes, which primarily were disputes arising out of depositions.

The plan also provided a remarkable rule prohibiting attorneys from instructing witnesses during depositions not to answer, except to preserve a privilege. It restricted objections to "form" or "leading." Any objection that did not strictly comply with this limit waived the objection.

Two other provisions also were major changes from traditional conduct in litigation. The plan implemented a full-throated offer-of-judgment proposal that allowed either party to make a written offer of judgment prior to trial. If the offeree did not accept the offer and the offerer then obtained a judgment at least 10 percent better, the offeree had to pay the offerer's litigation costs, including attorneys' fees, deposition costs and fees for expert witnesses.

The plan also noted that it would provide substantial savings for parties that use counsel on an hourly basis. It sought to even the playing field by limiting contingency fees in most cases to 33.3 percent of the total settlement, after expenses were deducted.

#### Integrated in Practice

The plan became a prominent feature of Eastern District practice, with its provisions folded into the Local Rules in 1997. But the Dec. 1, 2000, revisions to Federal Rule of Civil Procedure 26 eliminated local districts' ability to opt-out of that rule's mandatory initial disclosures by local rule.

As a result, the Eastern District judges eliminated the plan's mandatory initial disclosure provisions — which, ironically, were far more demanding than the new federal rule's — from the local rules in late 2000, as noted in General Order 00-11, issued by then-Chief Judge Richard Schell of Plano on behalf of the judges of the court.

But a number of the district's judges continued to implement the major provisions of the plan in case-specific orders, typically by broadening the Rule 26(a)(1) initial disclosures from information "that the disclosing party may use to support its claims or defenses" to information "relevant to the claims and defenses of any party," and defining that standard in Local Rule CV-26(d) as the same as that for disclosures under the former plan.

Two of the plan's most controversial provisions were eliminated in 1997, when the 5th U.S. Circuit Court of Appeals struck the offer-of-judgment rule as inconsistent with Federal Rule of Civil Procedure 68, and in 2000, when the Eastern District judges decided to discontinue the contingent-fee cap when amendments to the Federal Rules pre-



#### Highlights of the Plan

The Eastern District of Texas' Civil Justice Expense and Delay Reduction Plan, adopted Dec. 20, 1991, pursuant to the Civil Justice Reform Act of 1991, 28 U.S.C. 471, *et seq.*, made a number of changes to practice. The CJRA plan:

- limited oral depositions to three per side in most cases;
- imposed strict page limits on briefing;
- required extensive, early mandatory disclosures;
- provided a discovery hotline;
- restricted objections during depositions;
- implemented an "offer of judgment" proposal; and
- limited contingency fees.

vented the district from continuing to apply the restrictions on discovery that were the original basis for the reduction.

But much of the remainder of the plan's discovery provisions have survived intact in the form of procedures contained in the orders that individual judges use to manage their dockets. For example, these standard discovery orders still often contain provisions requiring mandatory initial disclosures and limiting discovery to that specifically authorized by the judge. The no-objections deposition rule remains in place, as does the discovery hotline.

These provisions have much to do with the character of civil litigation in the Eastern District of Texas, and all trace their origin to the 1991 CJRA plan. ▶▶▶



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