

Innovations in the Courts:

A Series on Court Administration

**Partial Payment of
Filing Fees in Prisoner
In Forma Pauperis
Cases in
Federal Courts:
A Preliminary Report**

THE FEDERAL JUDICIAL CENTER

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**PARTIAL PAYMENT OF FILING FEES IN
PRISONER IN FORMA PAUPERIS CASES
IN FEDERAL COURTS:
A PRELIMINARY REPORT**

By Thomas E. Willging

U.S. Department of Justice
National Institute of Justice

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FOREWORD

This publication, the first in a Federal Judicial Center series entitled *Innovations in the Courts: A Series on Court Administration*, focuses on an innovation applied in several district courts for handling prisoner in forma pauperis petitions. In the view of these courts, indigency is a reason for adjusting, but not necessarily eliminating, the costs associated with litigation. Exemption from filing fees means the exempted litigant never has to confront the initial inquiry facing other litigants—namely, “is the merit of the claim worth the cost of pursuing it?” Failure to require litigants to address this question is deemed a major reason for a large number of frivolous prisoner petitions. Partial filing fees are designed to correct that failure without imposing undue financial burdens on petitioners of limited means.

The report details the mechanics of the procedure as it is operated in the Northern District of Ohio, Western Division, with references to similar procedures in several other districts. The general order used in Ohio and an outline of the procedure used in the Houston and Galveston Divisions of the Southern District of Texas are included as aids to other courts that might consider adopting these measures.

We are pleased to make the information in this report more widely available. We are aware that judgments concerning the desirability of particular procedures will vary from district to district, and that each court must assess any proposed change in the light of local conditions. The Center hopes that the information in this report will prove helpful to court personnel concerned with the issues examined here.

A. Leo Levin

EXECUTIVE SUMMARY

Several federal district courts have instituted an innovation in administration of prisoner in forma pauperis petitions. The core of the innovation is that prisoners are required to pay a portion of the filing fee based on a projection of the prisoner's ability to pay. The goals of the innovation are to reduce the time spent by court personnel in reviewing in forma pauperis applications and to reduce the caseload by elimination of frivolous cases.

Appellate courts have held that district courts have discretion under 28 U.S.C. § 1915(a) to require a partial filing fee in lieu of a total waiver. Most courts that have considered the issue have concluded that the partial fee should be limited to a small portion of the balance in the prisoner's account. One court has, however, permitted a partial fee to be based on a prisoner's projected earnings for the next month—if the case was tentatively filed pending the administration of the partial filing fee system. Case law is not conclusive on whether tentative filing during a period of delay is mandatory. Nor have the courts ruled definitively on the issue of whether a fee that is more than a small percentage of the prisoner's current account balance can be required.

Administration of the procedure varies among the district courts; partial payment rules range from purely mechanical application of mathematical or sliding-scale formulas to consideration of a wide range of factors. The coverage extends to all prisoner cases in some courts but may be limited in others to actions involving civil rights, habeas corpus actions, or postconviction relief.

We examined the mechanics of the procedure for partial payment of filing fees in the Northern District of Ohio, Western Division, as the starting point of this report. (The mechanics of the system utilized in the Southern District of Texas, Houston and Galveston Divisions, and a self-assessment of that system by the clerk of court and a staff attorney are presented separately in appendix B of this report.) The clerk

1. lodges the complaint (i.e., stamps the date and time of receipt and marks it "lodged"), the application for leave to proceed in forma pauperis, and an affidavit in support

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2. requests a statement of the prisoner's account from the institution
3. computes the partial filing fee based on 10 percent of the total deposits to the prisoner's account during the past six months
4. issues an order requiring partial payment.

The prisoner may file objections. The magistrate reviews the objections and either modifies the order or makes a report and recommendation to the judge that the objections be overruled. If the objections are overruled and payment is not received within thirty days, the application to proceed in forma pauperis is denied and the case may be dismissed without prejudice.

Administration of the procedure has had little or no adverse impact on the clerk's office or the magistrate in terms of time required. The procedure has probably shifted some demands from the magistrate's office to the clerk's office. Prison personnel report little inconvenience but project some problems based on changed record-keeping procedures.

Delays in filing averaged twenty-three days for cases in which no objection was filed to the partial fee. When objections were filed, the average time increased to fifty-three days. Prisoners object to the process. They objected that the amount of the fee impaired their abilities to obtain necessities from the prison commissary and to pay legal expenses connected with their cases. One prisoner also claimed an invasion of his privacy by disclosure of records of his prison account without his consent.

Evaluation of the effectiveness of the procedure in meeting the stated goals produced mixed results. The procedure does seem to reduce the time required of the magistrate for review of applications for leave to proceed in forma pauperis. On the other hand, case filings have not declined significantly and the procedure appears not to discriminate between frivolous and nonfrivolous cases. However, further study will be necessary to determine the effectiveness of the partial fee in meeting the stated goal of deterring the filing of frivolous cases and to determine whether the procedure imposes more of a burden on prisoners than the burden faced by other indigents in deciding whether to file a lawsuit.

In our view, a court considering adoption of a variation of this procedure would find it helpful to:

1. Review alternative forms of rules from other districts.

Executive Summary

2. Decide on the scope of application of the proposed rule (e.g., all prisoner cases, all prisoner civil rights cases, etc.).
3. Contact prison officials to determine the local system for making payments to prisoners and for keeping records of accounts.
4. Establish a method of estimating potential hardships for the prisoners.
5. Decide to use the balance in the prisoner's account, the average monthly income of the prisoner, or some other method as a starting point for computation of the partial filing fee.
6. Draft an order or local rule (presumably, a local rule is more widely disseminated and therefore preferable). The rule should have objective criteria for calculation of the partial fee so that judicial involvement will be unnecessary for most cases. The rule should also establish the partial fee based on a small, but fixed, percentage of the prisoner's current account balance (we suggest one-third or less) or the anticipated credits during the next thirty days. In addition, the rule should give the prisoner an opportunity to plead special circumstances. The clerk should be authorized to dismiss a case for failure to comply with a partial filing fee order.
7. Include information about the local rule or general order in the application form for in forma pauperis petitions and require, by rule or order, that the prisoner or the institution file a copy of the prisoner's account balance with the application.
8. Provide for tentative filing of the case during the period of investigation until expiration of the time for compliance with the order.
9. Distribute the rule to institutions for posting in prisoner law libraries or other conspicuous places.
10. Plan to evaluate the effectiveness of the rule by comparing results in similar groups of cases before and after the rule, with the assistance of the Research Division of the Federal Judicial Center, if necessary.

I. INTRODUCTION

Background and Goals

Spurred by the dramatic increase in federal litigation by prisoners during the 1970s,¹ several federal district courts have implemented innovations in application of the federal in forma pauperis statute, 28 U.S.C. § 1915, to prisoner cases. The core innovation is that a court will impose a portion of the full filing fee based on a projection of the prisoner's ability to pay. That projection is derived from a review of income in the plaintiff's prison account during several months prior to the filing of the case.

One court has described a partial payment rule as

an attempt to deal with the flood of pro se § 1983 prisoner actions that today clog the federal court calendars by weeding out those where it appears the plaintiff himself has some financial resources but has such lack of good faith in his action that he is unwilling to make any contribution, however small, toward meeting its filing costs.²

That court viewed the district court's partial payment rule as "simply forcing the prisoner 'to confront the initial dilemma which faces most of the other potential civil litigants: is the merit of the claim worth the cost of pursuing it?'"³ The assumption is that the prisoner will aid the court in making a preliminary determination of whether the case is among the great majority of prisoner cases that prove to be without merit.⁴

For this report, we examined the procedure for partial payment of filing fees in the Northern District of Ohio, Western Division. In that court, one stated goal of the procedure is "to permit more expeditious handling of applications for leave to proceed in forma

1. Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts 8 (Federal Judicial Center 1980).

2. *Evans v. Croom*, 650 F.2d 521, 523 (4th Cir. 1981), cert. denied, 454 U.S. 1153 (1982).

3. *Id.* at 524.

4. Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts 9-11 (Federal Judicial Center 1980).

pauperis" so that the court and its magistrate can perform their "duties and obligations to other litigants"⁵ Another goal of the court parallels that of *Evans v. Croom*;⁶ namely, to reduce the caseload by forcing the prisoner to make a decision about whether the case is worth paying a reasonable filing fee.⁷ In other words, the goals in the Northern District of Ohio, Western Division, appear to be reduction of time spent in reviewing in forma pauperis applications by use of a mechanical formula to set a partial fee, and reduction of the prisoner civil rights caseload by elimination of cases so frivolous that the prisoner does not believe that the case justifies payment of a reasonable fee.

Legal Background

Federal courts have statutory authority to waive fees and costs for an indigent litigant; 28 U.S.C. § 1915(a) provides that

[a]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

In the landmark case of *Adkins v. Dupont Co.*,⁸ the United States Supreme Court found that the in forma pauperis statute was "intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, 'in any court of the United States' solely because his poverty makes it impossible for him to pay or secure the costs." According to the Supreme Court, courts should not interpret 28 U.S.C. §

5. United States District Court for the Northern District of Ohio, Western Division, General Order No. 2 (Dec. 8, 1981) at 2 [hereinafter cited as General Order No. 2]. (See *infra* appendix A.) General Order No. 2 also imposes a limit on the use of in forma pauperis procedures by nonprisoners. After three applications in one year, the clerk shall not accept further applications from the same individual unless "good cause is shown to and accepted by the Magistrate, to believe that this proposed complaint is meritorious." *Id.* at 3. The scope of the present report does not include consideration of the nonprisoner aspects of General Order No. 2.

6. 650 F.2d 521 (4th Cir. 1981).

7. Interview with United States Magistrate James G. Carr (N.D. Ohio) in Toledo, Ohio (Nov. 15, 1983).

8. 335 U.S. 331, 342 (1948).

1915(a) "to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution."⁹

District courts have been held to have discretion under 28 U.S.C. § 1915(a) to require partial payment of filing fees for indigents.¹⁰ Appellate courts have, however, articulated limitations and guidelines for the use of partial filing fees. The landmark case of *Evans v. Croom*¹¹ illustrates both poles of current legal doctrine.

In *Evans*, the United States Court of Appeals for the Fourth Circuit reviewed a procedure that provided for the tentative filing of a section 1983 action by a state prisoner when the affidavit in support of the in forma pauperis application showed less than the statutory filing fee in the prisoner's account. The court's general order called for imposition of a partial filing fee based on income received during the previous six months, "but never exceeding 15% of the sums received in the plaintiff's trust account for the preceding six months."¹² In the five cases consolidated under *Evans v. Croom*, the filing fees and the percentages of the prior six months' income were \$1 (9 percent), \$8.70 (7 1/2 percent), \$24 (15 percent), \$33 (15 percent), and \$29 (24 percent).¹³

The *Evans* court reviewed various standards of indigency and cited *Adkins v. Dupont Co.*¹⁴ for the proposition that "indigency under § 1915(a) for a prisoner is not synonymous with absolute penilessness."¹⁵ A compulsory partial filing fee should not "unreasonably interfere with his right to purchase basic amenities in the prison context."¹⁶ The court concluded that a "flexible standard of qualification, under which a prisoner makes some partial payment, never more than a small percentage of his prison trust account *balance*" was permissible.¹⁷ The court remarked that this was the "standard generally adopted by the district court in this case" and again characterized the procedure as a "small progressive rate of payment, adjusted to the amount the prisoner *has* in his trust account."¹⁸ The court thus appears not to have addressed the issue of

9. *Id.* at 340.

10. *Bullock v. Suomela*, 710 F.2d 102 (3d Cir. 1983); *Smith v. Martinez*, 706 F.2d 572 (5th Cir. 1983); *Williams v. Estelle*, 681 F.2d 946 (5th Cir. 1982); *Evans v. Croom*, 650 F.2d 521 (4th Cir. 1981); *Zaun v. Dobbin*, 628 F.2d 990 (7th Cir. 1980); *In re Stump*, 449 F.2d 1297 (1st Cir. 1971); *Braden v. Estelle*, 428 F. Supp. 595 (S.D. Tex. 1977).

11. 650 F.2d 521 (4th Cir. 1981).

12. *Id.* at 522.

13. *Id.* at 523, n.1.

14. 335 U.S. 331, 339 (1948).

15. *Evans v. Croom*, 650 F.2d 521, 524 (4th Cir. 1981).

16. *Id.*

17. *Id.* at 525 (emphasis added).

18. *Id.* (emphasis added).

whether the lower court's rule could legally be applied when the amount of the fee exceeds the current balance in the account. Because the fee is based on income received in the past six months, it may, of course, exceed the current balance.

Addressing the procedural issues, the court emphasized two main points. First, the court made a special note of a provision in the rule permitting a plaintiff to show "special circumstances justifying a different payment."¹⁹ Second, the court expressed difficulty with a provision in the rule permitting the district court to inquire whether a prisoner with no cash credit in his account "had disabled himself by a recent drawing on his account."²⁰ The court of appeals cautioned the district court that "the prisoner should be given some reasonable opportunity, after appropriate notice, to explain and refute any finding" that withdrawals were made to avoid the payment of filing costs.²¹ With the above qualifications, the Fourth Circuit approved the procedures of the Eastern District of North Carolina.

Other courts have exhibited similar concerns that partial filing fees not be administered in such a way that the prisoner is stripped of resources after payment of the proposed fee. In *Green v. Estelle*,²² the United States Court of Appeals for the Fifth Circuit reversed, as an abuse of discretion, an order that a prisoner pay a \$12 fee for filing and marshal's service. The fee was 40 percent of the \$30 balance in the prisoner's account. The court ruled that even the fact that deposits of \$40 had been made to the account during the past two months did not justify the fee.

Similarly, in *Bullock v. Suomela*,²³ the United States Court of Appeals for the Third Circuit generally approved a partial filing fee system but held that it was an abuse of discretion to apply a \$4 fee to an inmate with \$4.76 in his prison account. That his average monthly wages were \$17.48 and that he had received income of \$144.22 during the preceding six months were not enough to justify the fee. The court apparently gave weight to the prisoner's assertion that his prison wages were required "to purchase essential cosmetics, legal paper, photocopies and postage stamps."²⁴ The court

19. *Id.*

20. *Id.*

21. *Id.* at 526. This approach was recently adopted by the court in *Collier v. Tatum*, 722 F.2d 653 (11th Cir. 1983).

22. 649 F.2d 298, 301-302 (5th Cir. 1981).

23. 710 F.2d 102 (3d Cir. 1983).

24. *Id.* at 103.

characterized the prison earnings as "modest indeed and problematical."²⁵

Moreover, in two cases that concerned a statutory \$15 filing fee, circuit courts of appeals held that in forma pauperis status should not be denied to prisoners with approximately \$50 in their respective prison accounts.²⁶ At least one court has held that section 1915(a) does not authorize a court to require payment of filing fee in installments.²⁷

On the other hand, in *Smith v. Martinez*,²⁸ the Fifth Circuit held that imposition of a \$3 filing fee to be paid out of the next payment to the prisoner's trust account was not an abuse of discretion. The court emphasized that the case had been filed pending payment and that nearly three months were allowed to make the payment. The fact that the payment "approached 30% of his monthly income" did not invalidate the order under those circumstances.²⁹

Another legal issue in the administration of partial filing fee plans relates to the status of the prisoner's case during the time required for administration of the plan. The practical effect of failure to file the complaint includes delaying the procedures that depend on filing, such as service of process, responses by the defendant, and perhaps even the right to appeal the dismissal.

There is no definitive ruling regarding reasonable delays in administration of a partial payment program. One court has held that lengthy delays (twenty-one months) state a claim for relief against the clerk of a district court.³⁰ *Evans v. Croom* approved a plan in which the petitions were tentatively filed before administration commenced.³¹ In *Smith v. Martinez*, the court found the tentative filing of the prisoner's complaint to be a saving feature of the plan.³² Based on these cases, it seems fair to conclude that tentative filing of petitions is probably required to avoid unreasonable delays in the proceedings.

Review of in forma pauperis cases for frivolousness presents an analogous issue. District courts have authority under 28 U.S.C. § 1915(d) to "dismiss the case . . . if satisfied that the action is frivolous or malicious." *Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts* (the Aldisert report)³³ rec-

25. *Id.*

26. *In re Smith*, 600 F.2d 714 (8th Cir. 1979); *Souder v. McGuire*, 516 F.2d 820 (3d Cir. 1975).

27. *Caldwell v. United States*, 682 F.2d 142 (7th Cir. 1982).

28. 706 F.2d 572 (5th Cir. 1983).

29. *Id.* at 574.

30. *Carter v. Thomas*, 527 F.2d 1332 (5th Cir. 1976).

31. 650 F.2d 521 (4th Cir. 1981).

32. 706 F.2d 572 (5th Cir. 1983).

33. *Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts* (Federal Judicial Center 1980).

ommended that in forma pauperis cases be filed as soon as the court determines that the petitioner satisfies the economic criteria of 28 U.S.C. § 1915(a). Review for frivolousness under 28 U.S.C. § 1915(d) then might result in dismissal of a case that has been filed.

Several courts, citing the Aldisert report, have held that filing an action prior to a review for frivolousness under 28 U.S.C. § 1915(d) is the preferable procedure.³⁴ The circuits, however, are split on whether tentative filing of a complaint from an indigent is mandatory or merely preferable.³⁵

Summary

In summary, case law permits the use of a partial filing fee that is a reasonable percentage of the balance in a prisoner's trust account if the prisoner is permitted to show special circumstances, and if the fee will not serve to render the prisoner penniless and unable to purchase basic amenities of prison life, including the costs associated with filing a case (paper, postage, copying, etc.). If a higher fee might be warranted because a prisoner has withdrawn from his account to qualify as indigent, the court must make a special finding to that effect and give the prisoner an opportunity to explain the spending activity.

Whether a fee that is greater than the current balance in a prisoner's account or a small percentage of the prisoner's income for the next month can be required has not been decided definitively. Case law does tend to establish that a partial fee should not exceed half of the balance in the prisoner's account or a moderate percentage of the prisoner's income for the next month.

Case law is inconclusive on the issue of whether the preferred procedure of tentative filing during a period of delay is mandatory.

Overview of the Procedure

Formulas

In the district courts that impose a partial filing fee for prisoner in forma pauperis petitions, both the formula by which the fee is

34. See, e.g., *Dugan v. Lumpkin*, 640 F.2d 189 (9th Cir. 1979); *Collins v. Cundy*, 603 F.2d 825 (10th Cir. 1979).

35. See, e.g., *Watson v. Ault*, 525 F.2d 886, 891 (5th Cir. 1976) (court should docket case if economic eligibility appears on face of in forma pauperis affidavit); *Dugan v. Lumpkin*, 640 F.2d 189 (9th Cir. 1979) (preferable, but not mandatory, procedure is to file case before review of merits); *Wartman v. Milwaukee County Court*, 510 F.2d 130 (7th Cir. 1975). See also discussion of *Bounds v. Smith*, 430 U.S. 817, 826 (1970), *infra* note 58.

calculated and the scope of the application vary. The Eastern District of Virginia³⁶ and the Eastern District of North Carolina require payment of up to 15 percent of the income for the prior six months. In the Eastern District of North Carolina, computation is based on the prior six months' income and "such other factors as plaintiff may draw to the court's attention."³⁷ The District of South Carolina, Columbia Division, also requires payment of up to 15 percent of the prisoner's income.³⁸

The Northern District of Ohio, Western Division, requires the prisoner to pay 10 percent of the payments into the prisoner's account during the previous six months. This figure is applied mechanically but is subject to reconsideration based on objection from the prisoner.

The Southern District of Texas uses a "sliding scale" to determine the appropriate fee in all in forma pauperis cases, whether filed by a prisoner or a nonprisoner. The scale ranges from \$0 to \$60 and is applied to the petitioner's present assets. The full \$60 fee is required if the petitioner has assets in excess of \$225.³⁹ In addition, a fee may be assessed based on past deposits to a prisoner's account. The "rule of thumb" formula is that the prisoner will be required to pay the larger of 25 percent of the present balance or 25 percent of the average monthly deposit to the account for the past three months. The Middle District of Florida also uses a sliding scale; the full \$60 fee is assessed if the prisoner has \$120 in the account.⁴⁰

Unlike other district courts using a partial fee, the Southern District of Alabama has no written rule or guideline concerning the amount of partial payments. Personnel of that court "simply try to determine a fair payment by an inmate, in the light of the amount of money he has."⁴¹ This procedure represents a choice to spend

36. Memorandum from W. Farley Powers, Jr., clerk of court (E.D. Va.) to Alan J. Chaset, Federal Judicial Center (July 28, 1983).

37. Order Setting the Procedure for Handling of Section 1983 Cases by State Prisoners (E.D.N.C.) (Apr. 30, 1980).

38. Order of Dec. 3, 1981 (D.S.C., Columbia Division).

39. General Order No. 77-1 (S.D. Tex., Houston and Galveston Divisions) (Apr. 18, 1977). The order refers to the past financial history and current economic status of the prisoner and to "many factors" that the court may consider in exercising its discretion. No other specific factors are mentioned in the order.

40. Letter of United States Magistrate Harvey E. Schlesinger (M.D. Fla.) to Thomas E. Willging, Federal Judicial Center (Mar. 2, 1984).

41. Letter from United States Magistrate David Ashley Bagwell (S.D. Ala.) to Alan J. Chaset, Federal Judicial Center (July 19, 1983); letter from Magistrate Bagwell to Thomas E. Willging, Federal Judicial Center (Mar. 26, 1984). Magistrate Bagwell points out that the court is cognizant of the ruling in *Green v. Estelle*, 649 F.2d 298, 301-302 (5th Cir. 1981) to the effect that a fee of 40 percent of current assets is too high.

time on the review of the merits. Similarly, the Northern District of Illinois monitors trust account balances and assesses partial fees in appropriate cases. That court also reviews the merits prior to filing.

Scope of Application

By general order, the filing fee used by the Northern District of Ohio, Western Division, applies to actions brought under the Civil Rights Acts by persons who are in federal, state, or local custody. The fee does not apply to habeas corpus actions and apparently does not apply to federal civil actions such as mandamus or claims under the Federal Tort Claims Act. Nor does it apply to cases in which a temporary restraining order (TRO) is sought.

The Eastern District of Virginia applies its rule to all habeas corpus actions (including sections 2241, 2254, and 2255) and all civil rights actions and constitutional claims against federal agents.⁴² The Eastern District of North Carolina uses separate orders and procedures for habeas corpus actions and section 1983 actions.⁴³ The Southern District of Texas, Houston and Galveston Divisions, and the Middle District of Florida apply their sliding scale to all applications to proceed in forma pauperis regardless of the nature of the case or the source of the application.⁴⁴ In the Southern District of Alabama, the court applies its unwritten procedures for partial payment to both section 1983 and habeas corpus actions,⁴⁵ while in the District of South Carolina, Columbia Division, the court uses an order applicable only to cases brought by state prisoners under section 1983.⁴⁶

42. Memorandum from W. Farley Powers, Jr., clerk of court (E.D. Va.) to Alan J. Chaset, Federal Judicial Center (July 28, 1983).

43. Only the section 1983 procedure was involved in *Evans v. Croom*, 650 F.2d 521 (4th Cir. 1981). The habeas corpus procedure requires full payment of the \$5 filing fee if the prisoner has more than \$25 in the trust account. If the prisoner does not have \$25 in the account at the time of filing, the clerk will obtain a six-month statement from the prisoner's institution. If 15 percent of that amount exceeds \$5, the prisoner is ordered to pay the fee unless "he demonstrates with particularity within 20 days, that he lacks access to sufficient funds to pay the \$5 filing fee." Order of Sept. 29, 1981 (E.D.N.C.).

44. General Order 77-1 (S.D. Tex., Houston and Galveston Divisions) (Apr. 13, 1977), modified by General Order 79-5 (Oct. 18, 1979); Rule 4.07 (M.D. Fla.) (Jan. 15, 1980).

45. Letter and accompanying forms from United States Magistrate David Ashley Bagwell (S.D. Ala.) to Alan J. Chaset, Federal Judicial Center (July 19, 1983).

46. Order of Dec. 3, 1981 (D.S.C., Columbia Division).

Time of Filing

The Northern District of Ohio, Western Division, the Eastern District of Virginia, and the Southern District of Georgia file the prisoner's complaint only after full compliance with an order for partial payment. On the other hand, the Middle District of Florida, the Western District of Virginia, and the Eastern District of North Carolina provide for filing of the complaint prior to investigation of financial eligibility or section 1915(d) review. As discussed above, the latter procedure conforms to the recommendation on this point in the Aldisert report and avoids any risk of violation of standards articulated in case law.

Time for Payment

The Northern District of Ohio, Western Division, and the Southern District of Texas, Houston and Galveston Divisions, request payment within thirty days. The Western District of Virginia allows for payment on the installment plan by withholding from the trust account each month. Based on 15 percent of the deposits into the account for the past six months, the fee may be withheld in installments over the next six months.⁴⁷ In the Eastern District of Virginia, the prisoner has sixty days in which to make payment.

Repayment

One court, the Middle District of Florida, has announced by rule that all in forma pauperis applicants shall be deemed to have consented to pay all nonprepaid costs and fees from any recovery.

47. In *Caldwell v. United States*, 682 F.2d 142 (7th Cir. 1982), the court ruled that conditioning leave to proceed in forma pauperis on payment of filing fee in monthly installments was improper because 28 U.S.C. § 1915(a) does not authorize installment payments.

II. THE MECHANICS OF THE PROCEDURE IN THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

In this report, we describe the partial filing fee procedure as implemented by the Northern District of Ohio, Western Division, under a general order dated December 8, 1981 (see appendix A). We reviewed the court's files and interviewed clerks, the magistrate, prison personnel, and prisoners in the district. This court has a relatively low rate of filing of prisoner petitions.

In appendix B, we set forth, in the same format, a report from the clerk's office of the Southern District of Texas, Houston Division, detailing the procedures in this court and providing a self-assessment of their effectiveness. This court has a relatively high rate of filing of prisoner petitions and had developed its program in the mid 1970s.

The order used by the Northern District of Ohio, Western Division, notes the "marked increase in the number of in forma pauperis applications" by prisoners and nonprisoners and the resulting demands on judicial time and effort at the expense of other litigants. Relying on the procedure adopted in the Eastern District of North Carolina, approved in part in *Evans v. Croom*,⁴⁸ the court found that procedure to be a balanced approach that would not "raise impenetrable barriers to judicial review and relief for civil rights violations."

The rule used in the Northern District of Ohio, Western Division, is that "a prisoner who seeks leave to proceed in forma pauperis with respect to a complaint under the Civil Rights Acts shall be required to make a partial prepayment of filing fees in an amount not to exceed 10 percent of his or her income during the six-month period preceding submission of the application."⁴⁹

Lodging of the Complaint

Upon receipt of legal papers from a prisoner, the intake clerk checks the papers to verify that the proper number of copies of the

48. 650 F.2d 521 (4th Cir. 1981).

49. General Order No. 2, *supra* note 5.

Chapter II

complaint⁵⁰ are included for service on each defendant, that the papers are signed, that summons(es) and cover sheets are complete, and that an in forma pauperis application and affidavit have been properly completed. If all of the papers are in order, the clerk lodges the complaint (i.e., the clerk stamps the date and time of receipt and marks it "lodged") and assigns it a miscellaneous number (a temporary number used for identification of cases received but not officially filed). The clerk then records in a notebook the plaintiff's name, the type of case, the date lodged, the date submitted, the judge or magistrate to whom submitted, the date returned or filed, and the result (i.e., whether the judge or magistrate granted the application, denied it, or issued an order for partial payment). The clerk also makes out an index card to be placed in a temporary index file. The application for leave to proceed in forma pauperis and the supporting affidavit are submitted on special forms designed for prisoners. The affidavit concludes with a space for a certificate from an official at the institution stating the current sum credited to the prisoner's account.

If plaintiff requests a TRO, the affidavit for in forma pauperis is taken to the magistrate for immediate action. The file is then taken to the assigned judge for action on the TRO.

Request for a Statement of Account

The intake clerk sends a written request to the institution for a copy of the inmate's institutional account, asking for information about income and withdrawals during the preceding six-month period, specifying a return date of twelve to fourteen days from the date of mailing. The clerk then makes a note on a calendar to contact the institution if no response is received within fourteen days.

Response from the Institution

According to the clerk, the institutions have always responded on time. In the four cases we reviewed, the typical response from the institution was a ledger sheet coded to show the date, source, and amount of all income and withdrawals in the account and was delivered within ten days.

Computation of the Fee

After reviewing the ledger sheet from the institution, the intake clerk computes the fee according to the formula established under

50. A copy of this form and all other forms referred to in this report are available from the Federal Judicial Center or from the clerk's office in the Northern District of Ohio, Western Division.

General Order No. 2. Application of the formula is strictly mechanical: 10 percent of the deposits to the account within the past six months, rounded down to the next \$5, is the filing fee.

Order for Partial Payment

Within twenty-four hours of receipt of the account information from the institution, the intake clerk fills in the calculated amount on a form order. The form order refers to General Order No. 2, includes a statement of the total of the last six months' deposits, and requests payment within thirty days. The alternatives to payment are specified as nonpayment and denial of the in forma pauperis application, or explanation of the circumstances regarding past withdrawals, future income, and any substantial hardship that compliance with the order would cause.

Two inmates with experience in civil rights litigation, including one who was research clerk at the Marion Correctional Institution facility, indicated that receipt of an order to pay a partial fee was their first knowledge of the existence of General Order No. 2. Apparently the order has not been posted at the institution or otherwise brought to the attention of inmates as a matter of course.

Objections from Plaintiff

If the plaintiff files written objections, they are sent to the magistrate for action. Generally, the magistrate makes an adjustment in the amount of the fee if the plaintiff offers more than the general allegation of indigency in the poverty affidavit.⁵¹ In the cases reviewed, objections were filed within seven to eleven days; the magistrate's response added eight to fifteen days to the process.

Nonpayment

If no payment is received within thirty days, the clerk forwards the case to the magistrate with a notification-of-status form. The magistrate then issues an order denying the application for in forma pauperis status or an alternative order denying the application and dismissing the case without prejudice.

51. We reviewed six files in which objections were noted. The fee was reduced and paid in three cases and waived entirely in two. In the other case, an inmate of Lima State Hospital (for the criminally insane) merely reiterated the terms of the form motion for in forma pauperis status. The magistrate filed a report and recommendation that the judge deny the motion and the judge concurred. The fee was not paid and the case was dismissed. *Warren v. Martinez*, Misc. No. 83-13 (N.D. Ohio, May 12, 1983).

Payment and Filing

Payment is made either in the form of a check from the institution or from a friend or relative of the inmate. A receipt is issued to the plaintiff and the case is filed, given a regular civil number, and assigned to a judge through a draw of cards.

III. IMPACT OF THE PROCESS ON PARTICIPANTS' RESOURCES

Clerk's Office

The intake clerk and the deputy in charge for the division concur that the work in administering the system is not extensive. The intake clerk estimated that the average time spent on the new procedures amounts to about twenty to forty-five minutes per case, although the first few cases required as much as sixty minutes per case before creation and revision of the forms.

Judges, Magistrate, and Staff

A review of the files and discussion with clerks and the magistrate show minimal judicial involvement in the operation of the partial filing fee procedure. As the above description shows, most of the steps are taken by the clerk's office. The only role of the magistrate is to respond to objections, and the only judicial role occurs when the magistrate decides to overrule an objection.

Prior to General Order No. 2, the magistrate reviewed each application for leave to proceed in forma pauperis and granted it if the applicant appeared to be indigent. This procedure required "considerable time and effort" and impeded the court "in the performance of its duties and obligations to other litigants."⁵² This aspect of the prior procedure has been eliminated by General Order No. 2.

The magistrate reports that he is unaware of any additional time spent on the "special circumstances" review that would not have been spent on reviewing in forma pauperis applications. A review of the records suggests that few objections are filed and that the time spent by the magistrate is minimal. On the other hand, the magistrate for the Eastern District of North Carolina reports that he spends more time on the often lengthy objections than he did on the summary review of in forma pauperis affidavits.

52. General Order No. 2, *supra* note 5, at 1.

In the Northern District of Ohio, Western Division, the magistrate was the principal mover in establishing the system, spending about five hours to formulate the system and draft General Order No. 2. The magistrate

1. reviewed *Evans v. Croom*
2. obtained a copy of the Eastern District of North Carolina rule
3. requested that the clerk's office gather data on the number and types of in forma pauperis filings
4. contacted the superintendent of Marion Correctional Institution (MCI) (the primary source of prisoner cases) and the Ohio assistant attorney general assigned to MCI
5. discussed the potential rule with the judges
6. drafted General Order No. 2, using the Eastern District of North Carolina model and adding a "special circumstances" review and a procedure for nonprisoner overuse of in forma pauperis petitions
7. obtained judicial approval
8. drafted forms.

Prison Personnel

The superintendent of MCI, the only prison studied for this report, says that the use of the procedure to date has demanded little additional staff time. Until recently, MCI kept the statement of account on a ledger card that a clerk was able to photocopy and mail to the court within a few minutes. Under a new computerized system, however, it takes an MCI clerk at least thirty minutes to find and copy the accounts for the past six months. The MCI clerk reports that only the current month and the previous month are stored on the computer and easily accessible. For the prior four months, she has to thumb through voluminous monthly printouts to find the individual account for each month.

Prisoners

Length of Process

In two cases in which no objections were filed to the order and in which payment was made, the process took twenty-two and twenty-four days from the time of lodging of the complaint to final payment of the fee. In three cases in which objections were filed, the entire process took forty-five, fifty-three, and sixty days. During this time, no action was taken on the cases; process was not served until after payment.

Costs

At MCI, all prisoners work unless they are in disciplinary confinement. Prison wages range from \$14 to \$26 per month, with an average of \$18 per month. If a prisoner is being disciplined (up to forty-five days is possible), his prison income is reduced to between \$3 and \$5 per month. MCI permits inmates to spend up to \$40 per week in the commissary, in which they can buy cosmetics and personal articles, writing materials, canned foods, tobacco products, candy, supplemental clothing (shirts, sweaters, shoes), and other items. In addition to commissary purchases, an inmate must pay for photocopies of court papers, all postage costs, and the cost of any reading material not available in the library.

Both of the inmates interviewed had paid partial fees and had objected to the process. During the interview, each articulated general objections to General Order No. 2 on the grounds that it obstructs access to federal court.

Prisoner A earned \$19 per month as a barber. He reported expenditures of between \$5 and \$8 per month on writing paper, soap, deodorant, toothpaste, hair oil, and envelopes. He also reported a need to purchase food, such as cookies without any pork products (\$1 a package), bread, and peanut butter, for times when the prison food is incompatible with his Muslim diet. He also must pay \$.13 a page to copy legal materials. After he objected, his fee was reduced to \$5 and paid by his grandmother from her Social Security disability check.

Prisoner B is a clerk in the MCI law library, for which he is paid the semiskilled rate of \$20 per month. He is an experienced "jailhouse lawyer" with sixteen of his own cases currently pending in the courts.⁵³ In addition to money spent for typical commissary

⁵³ See, e.g., *Johnson v. Hubbard*, 698 F.2d 286 (6th Cir. 1983), cert. denied, 104 S. Ct. 282 (1983).

Chapter III

items, he uses funds to purchase law books and to pay for witness fees and mileage for hearings, items not covered by in forma pauperis status.⁵⁴

Prisoner B's partial fee was \$40. He objected and the magistrate reduced the fee to \$25, which he paid. Ironically, the case involves a challenge to an MCI policy against solicitation of funds for litigation expenses from outside the prison.

Privacy

Prisoner B also objected to the rule on the grounds that it was a humiliating invasion of his privacy to expose his personal financial records to the public without his prior consent. He identified as well the importance of having some money in prison as protection against exploitation by inmates who will pay for sexual favors.

Along this line, the Southern District of Texas, Houston and Galveston Divisions, obtains a release from the inmate for information from the trust account at the institution. In the Western District of Virginia, the court obtains consent from the inmate to have the institution withhold the payment from the account.

⁵⁴. *Id.*

IV. EFFECTIVENESS OF THE PROCESS

Criteria for Evaluation

The threshold issue is how to define the criteria for evaluation of this innovation. Our background research turned up several alternative criteria. The simplest and least justifiable, standing alone, is whether the process reduced the expenditure of resources by judges, magistrates, and clerks. A second measure of effectiveness is whether the innovative procedures screened out frivolous cases and retained meritorious ones. Finally, a potential measure of effectiveness is whether the procedure forces a litigant to confront and evaluate the merits of a claim but does not necessitate dropping the claim because of poverty. The latter criteria focuses on placing the indigent prisoner in a position similar to that of other potential litigants.

The court in *Evans v. Croom* saw the purpose as one of "weeding out" those cases not filed in good faith.⁵⁵ Following the *Evans v. Croom* model, the magistrate and judges of the Northern District of Ohio, Western Division, sought a "balanced" approach that would permit equal access by prisoners to the federal courts.⁵⁶

Based on these statements of purpose and the traditional concern of the federal courts to maintain access for indigents, the criteria for evaluation of the innovation must include a qualitative evaluation of whether cases deterred by partial filing fees are meritorious or not and whether prisoners are treated fairly in the process. Application of these criteria presents a challenge that this study can only begin to address.

Our criteria for evaluation fall into three categories:

1. Does the procedure exclude frivolous cases and preserve non-frivolous cases?
2. Does the procedure provide prisoners with both opportunities and disincentives to initiate litigation that are equivalent to

⁵⁵. *Evans v. Croom*, 650 F.2d 521, 523 (4th Cir. 1981).

⁵⁶. General Order No. 2, *supra* note 5, at 2.

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the opportunities and disincentives applicable to nonindigent nonprisoners?

3. Does the procedure conserve court resources by (a) saving time spent reviewing in forma pauperis petitions and deciding cases in which in forma pauperis status is denied because of failure to pay a partial fee; (b) conserving clerical and judicial resources through deterrence of frivolous filing; and (c) obtaining revenue for operations of the court through partial payment of fees?

The current study can provide only a cursory overview of the success of the innovation under these criteria. We will, however, identify issues for further empirical study.

Savings in Judicial and Court Resources

Table 1 shows that the rate of filing of prisoner civil rights cases has not declined significantly during the operation of the rule. Using the thirty filings in 1980 (pre-General Order No. 2) as a baseline, the 1982-83 figures of thirty-three and twenty-six appear to be within the usual range. We cannot identify a trend prior to the issuance of General Order No. 2 because data for years preceding 1980 are not available. Thus, we cannot determine whether the forty filings for 1981 were as aberrational as they appear from the available data.

TABLE 1
Filings of Prisoner Civil Rights Cases, 1980-1983
(Northern District of Ohio, Western Division)

Year	Annual Rate of Filing
1980	30
1981	40
1982	33
1983	26*

*This figure is based on 22 filings during the first 10 months of 1983.

If there is an as-yet-undetected trend toward decreased filings of prisoner civil rights cases, other factors might account for such a decrease. The magistrate for the Northern District of Ohio, Western Division, observed a general decline in pro se actions due to the "low likelihood of success." Prisoner B, the MCI jailhouse lawyer, stated that inmates are turning more to state courts with negli-

gence claims due to the lower threshold of proof required under state law and more favorable in forma pauperis procedures, witness fees, and similar matters. Given his position as "jailhouse lawyer," his prophecy may be self-fulfilling.

The superintendent of MCI has not noticed any decline in cases filed against him. This observation may, however, result from the fact that he has no need to differentiate between federal and state court litigation. Careful analysis of data from multiple sources and time periods will certainly be necessary, and perhaps sufficient, to test the reasons for the decrease in filings.

There are at least two clear effects of General Order No. 2. First, some cases are screened out. In 1982, two out of thirty-three prisoner civil rights cases (6 percent) were denied in forma pauperis status for failure to comply with a partial payment order. In 1983 (through October), six of twenty-two cases (27 percent) were denied in forma pauperis status on those grounds. Second, some revenue is generated. In 1982, ten prisoners paid 10 percent fees; in the first ten months of 1983, six paid 10 percent fees. In four cases studied, the fees were \$5, \$10, \$10, and \$15, an average of \$10 per case. At this average, \$160 would have been collected during 1982 and 1983.

Somewhat more difficult to assess is whether judicial resources have been conserved. We can safely say that dismissal of eight cases for failure to pay the partial fee conserved resources that would have been involved in deciding those cases on their merits. In addition, it appears that only a small percentage of the plaintiffs objected to the clerk's order, thus bringing few cases to the magistrate's attention. Dealing with these few objections certainly takes less time than reviewing the entire pool of in forma pauperis petitions.

Assuming that the magistrate spends less time on objections than previously spent on reviewing in forma pauperis applications, the effect of the rule is to shift the work to the clerk's office and, probably, to eliminate some work by substituting a mechanical formula for review of individual applications. Any additional burden of the clerk's office appears to be minimal.

Review for Frivolousness

A review of the cases is necessary to determine whether those denied in forma pauperis status were frivolous or malicious filings within the meaning of 28 U.S.C. § 1915(d).⁵⁷ The Supreme Court

57. 28 U.S.C. § 1915(d) provides that

[t]he court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

has recently stated that a "court may pass on the complaint's sufficiency before allowing filing in forma pauperis and may dismiss the case if it is deemed frivolous."⁵⁸

A liberal standard of frivolousness, simply stated, is "whether plaintiff can make a rational argument on the law or facts in support of his claim."⁵⁹ A pro se complaint "however inartfully pleaded" must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'⁶⁰

To conduct a preliminary study of the frivolousness issue, the author reviewed four of the eight cases in which the court ordered dismissal for failure to pay a partial fee. The cases were selected on the basis of availability of files in the clerk's office. For comparison, four cases in which a partial fee was paid were also selected, again on the basis of availability of files.

Of the four cases that were filed after a fee was paid, three probably would survive a threshold test of frivolousness, although one had a dubious jurisdictional basis and one was only marginally nonfrivolous. Of the cases paid for by plaintiffs, none were clearly frivolous; however, one had a dubious jurisdictional basis. The differences do not appear to be significant or conclusive. Indeed, if one were to make a realistic prediction of success, taking into account the difficulties of proof and legal argument by pro se plaintiffs, no more than one or two of the eight cases would have any significant likelihood of a probable final judgment.

Due to the liberal test of frivolousness under 28 U.S.C. § 1915(d), measurement of whether or not the partial filing fee system weeds out unmeritorious cases will have to be tested by some other means. Courts can evaluate their own experiences by comparing results of cases in which a partial fee was paid to cases prior to the rule in which no fee was paid. "Success" could be defined at differ-

58. *Bounds v. Smith*, 430 U.S. 817, 826 (1970) (dictum). In *Bounds v. Smith*, the Supreme Court did not discuss the issue of whether frivolous review may preclude the filing of an action. Clearly, the offhand description of the process is not definitive. See *supra* text accompanying notes 29-34.

59. See also *Anders v. California*, 386 U.S. 738, 744 (1967) ("without arguable merit"); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("beyond doubt" no arguable legal or factual basis for relief); *Bennett v. Passic*, 545 F.2d 1260 (10th Cir. 1976). See also *Collins v. Cundy*, 603 F.2d 825 (10th Cir. 1979); *Boyce v. Alizaduh*, 595 F.2d 948, 951 (4th Cir. 1979).

60. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). See also *Haines v. Kerner*, 404 U.S. 519 (1972); *Boyce v. Alizaduh*, 595 F.2d 948, 951 (4th Cir. 1979).

ent levels of procedure, such as survival of a motion to dismiss or motion for summary judgment, obtaining a hearing on the merits, winning a favorable judgment, winning an appeal, etc. The hypothesis is that a higher percentage of cases will "succeed" under the partial filing fee procedure than under the old system.

Care should be taken to limit the influence of other variables, such as sharp reduction in filings due to adverse rulings, a change in substantive law, or a change in the decision maker. In other words, the cases studied before the onset of the rule should be as nearly identical as possible to cases after the rule became effective. The Research Division of the Federal Judicial Center will assist in designing and conducting such an evaluation.

Even this evaluation, however, does not reach the ultimate issue of fairness; namely, whether the prisoner is treated in a substantially equivalent fashion to the civil litigant who can afford to pay the full filing fee. A sophisticated quasi-experimental design may be necessary to evaluate that objective.

V. OBSERVATIONS

Observations Relating to General Order No. 2

Personnel in the Northern District of Ohio, Western Division, and at Marion Correctional Institution have indicated an interest in, and receptivity toward, suggestions for improvement of General Order No. 2. Based on the above review of the case law and the procedures currently used to implement the rule, we proffer the following ideas for their consideration:

1. Use the balance in the prisoner's account or the prisoner's average monthly income as the starting point for computation of the partial filing fee. The primary reason for this suggestion is that 10 percent of a six-months' figure results in an order that is 60 percent of the average monthly income for the period. Ordering such a relatively large portion of the expected monthly income within thirty days of the order may impose a substantial hardship on the plaintiffs and may also contravene case law, as discussed above.
2. Include information about General Order No. 2 on the application forms for in forma pauperis petitions and on the affidavit in support of the petitions; recommend that the plaintiff forward a copy of the statement of account to the court or arrange to have the institution forward it. The reason for this suggestion is to minimize delays in administration of the program and to better inform the prisoners of the expectation that a filing fee will be required. Currently, the affidavit form requires a certification regarding the balance in the prisoner's institutional account. Simply adding a copy of the statement of account at that time will subtract about two weeks from the process and make the inmate aware of the possibility of an order to pay a partial fee.
3. Consider limiting review of the prisoner's account to the two preceding months (excluding December). The reason for this suggestion is administrative convenience. At MCI, the records for the full six months are no longer easily accessible. A

statement for two months would disclose the prisoner's earnings. We suggest elimination of December because inclusion of holiday gifts would skew the average. The two-month period also has a closer relationship to current income. A trade-off is that a six-month period produces a more reliable average. The institutions should decide whether the administrative convenience justifies a potential sacrifice of accuracy.

4. **Tentatively file the case during the period of investigation until expiration of the time for compliance with the order.** This suggestion is designed to bring the procedure into conformity with the procedures approved in *Evans v. Croom*⁶¹ and *Bullock v. Suomela*.⁶² If there is no delay in processing the cases, due to adoption of suggestion 2, above, this change will be unnecessary.

General Observations for Other Districts

We suggest that any court contemplating adoption of partial payment of filing fees consider the above observations. We also suggest that a court adopting such a rule consider the following steps:

1. Review alternative forms of rules from other districts.
2. Decide on the scope of application of the proposed rule (e.g., all prisoner cases, all prisoner civil rights cases, etc.).
3. Contact prison officials to determine the local system for making payments to prisoners and for keeping records of accounts.
4. Establish a method for identifying and avoiding potential hardships for the prisoners.
5. Draft an order or local rule (presumably, a local rule is more widely disseminated and therefore preferable). The rule should have objective criteria for calculation of the partial fee so that judicial involvement will be unnecessary for most cases. The rule should also establish the partial fee based on a small, but fixed, percentage of the prisoner's current account balance (we suggest one-third or less) or the anticipated credits during the next thirty days. In addition, the rule should give the prisoner an opportunity to plead special cir-

61. 650 F.2d 521 (4th Cir. 1981).

62. 710 F.2d 102 (3d Cir. 1983).

cumstances. The clerk should be authorized to dismiss a case for failure to comply with a partial filing fee order.

6. Provide for tentative filing of the case if the rule does not provide for immediate computation based on information submitted with the application for in forma pauperis status or if other delays are anticipated.
7. Revise the in forma pauperis application form and affidavit so that they instruct the prisoner to obtain a copy of the current prisoner account statement and file it or have it filed with the court.
8. Distribute the rule to institutions for posting in prisoner law libraries or other conspicuous places.
9. Plan to evaluate the effectiveness of the rule by comparing results in similar groups of cases before and after the rule, with the assistance of the Research Division of the Federal Judicial Center, if necessary.

APPENDIX A
General Order No. 2,
United States District Court for the
Northern District of Ohio, Western Division

**In the United States District Court
for the Northern District of Ohio
Western Division**

**In Re Applications
For Leave to Proceed
In Forma Pauperis**

**Western Division
General Order No. 2**

Upon examination and consideration of this court's records relating to the filing of civil complaints, and the records relating to the filing of applications for leave to proceed in forma pauperis, it is the conclusion of this court that, in the interests of justice for all litigants in this court, certain measures should be implemented for the processing of such applications. These measures will be adopted upon filing of this Order, and this Memorandum will explain the court's reasons for adopting the procedures specified herein.

This court, along with other federal district courts, has in recent years experienced a marked increase in the number of in forma pauperis applications. Review of these applications, which have been referred in the interest of judicial economy to the United States Magistrate; requires considerable time and effort. Frequently the asserted claims for relief and the underlying factual basis therefor are not stated with any degree of clarity, thereby compounding the problems confronting the court as it attempts to determine whether there is possible merit to the complaint. As the volume has increased, the result has been to impede the court and its Magistrate in the performance of its duties and obligations to other litigants. It is apparent, and this court finds, that some remedial measures must be adopted to permit more expeditious handling of applications for leave to proceed in forma pauperis.

In developing these remedial measures, the court perceives that there are two distinct classes of forma pauperis applicants: the first comprised of persons confined in either federal, state, or local custody, and the second, consisting of other applicants for forma pauperis treatment. In a number of cases persons within the second category file multiple complaints within a short period of time. With reference to these persons, the court is persuaded that it is highly unlikely that any individual would be subjected to numerous deprivations of his or her civil rights within a given twelve month period, and it therefore appears appropriate to impose limi-

tations upon the number of applications for leave to proceed in forma pauperis which any single individual (who is not confined to custody) may file within a twelve month period.

With reference to the first category of applicants, namely, persons confined in federal, state, or local custody, this court can understand that a single applicant may be confronted on a more frequent basis with apparent or actual violations of his or her civil rights. Therefore, a limitation on the number of applications which may be filed within a particular time period would not be appropriate. On the other hand, experience in other districts makes clear that prisoner applicants for leave to file in forma pauperis frequently have resources available to them sufficient to enable them to file a portion of the required fee. This court is persuaded that the procedure adopted by the Eastern District of North Carolina, and recently upheld by the Fourth Circuit in *Evans v. Croom*, 650 F.2d 521 (4th Cir. 1981), is an appropriate and balanced response to the problem presented by prisoner applications for leave to proceed in civil rights actions.

Under this procedure, which this court adopts by this Order, a prisoner who seeks leave to proceed in forma pauperis with reference to a complaint under the Civil Rights Acts shall be required to make a partial prepayment of filing fees in an amount not to exceed 10% of his or her income during the six month period preceding submission of the application (not to exceed the filing fee required of other civil plaintiffs).

In reaching and describing its conclusions concerning the implementation of suitable and appropriate methods of processing in forma pauperis applications, this court notes that the effect of this order is not to raise impenetrable barriers to judicial review and relief for civil rights violations affecting those unable to prepay filing costs. In all instances the applicants cannot be completely foreclosed from proceeding in forma pauperis without at least an opportunity for consideration and determination by the Magistrate. This is not, therefore, a mechanistic process; rather scope is provided for the exercise of judicial discretion. Moreover, this court would point out and emphasize a consideration often overlooked or disregarded by civil rights plaintiffs: namely, that the state courts have concurrent jurisdiction in civil rights cases. Those courts, therefore, provide an alternate forum for prospective plaintiffs who desire to proceed in forma pauperis.

Wherefore, it is hereby

ORDERED:

1. With reference to applications for leave to proceed in forma pauperis filed by persons who are not confined to federal, state or

local custody, upon filing of such application, the Clerk shall determine whether prior applications have been filed by the applicant during the preceding twelve month period:

- a. If three or more applications have been filed during such period by the applicant, the Clerk shall not accept the application, and shall notify the applicant that said application shall not be accepted unless good cause is shown to, and accepted by the Magistrate, to believe that the proposed complaint is meritorious;
- b. If fewer than three applications have been filed by the applicant during such period, the Clerk shall lodge such application, assigning thereto a Miscellaneous Docket Number, and he shall forward the application for further review and determination by the Magistrate prior to filing the complaint and service of summons.

2. With reference to applications for leave to proceed in forma pauperis relating to an action brought under the Civil Rights Acts, and filed by persons who are in federal, state or local custody, the Clerk shall lodge all such applications and assign thereto a Miscellaneous Docket Number:

- a. Thereupon, the Clerk shall communicate forthwith with the appropriate official at the institution at which the applicant is confined, and request that official to provide a copy of the applicant's prison fund account(s) for the six month period preceding submission of the application;
- b. Upon receipt of the statement of the trust fund account, the Clerk shall forthwith inform the applicant that he or she will be allowed to proceed with the complaint upon prepayment of an amount specified by the Clerk; said amount shall not exceed 10% of the income received by the applicant (as disclosed by the statement of the trust fund account) within the six month period preceding the submission of the application; the Clerk shall also inform the applicant that he or she may, if desired, explain any circumstances which may have required withdrawal of funds in the past or defeat the expectation of receipt of funds in the future;
- c. If the filing fee, as determined by the Clerk, is not paid within thirty days of the date of mailing of the notice which was sent in accordance within the preceding paragraph, the application for leave to proceed in forma pauperis shall be

Appendix A

forwarded to the Magistrate, along with any further submissions by the applicant, for final review and determination;

d. If the filing fee, as determined by the Clerk, is paid within thirty days of the date of the notice, the complaint shall be accepted for filing and service of process upon the defendant(s) shall issue without further order of court, and plaintiff's application to proceed in forma pauperis shall be allowed as to any additional portion of the filing fee and plaintiff shall be treated as proceeding in forma pauperis for all further purposes.

3. At any time during the pendency of the litigation, the defendant(s) may move for reconsideration of the plaintiff's eligibility for proceeding in forma pauperis.

4. The procedures required by this Order shall be instituted immediately upon the filing of this Order, and shall apply to all applications for leave to proceed in forma pauperis thereafter submitted to this court.

SO ORDERED.

Nicholas J. Walinski
United States District Judge

Toledo, Ohio

APPENDIX B
The Program Utilized in the United States
District Court for the Southern District of
Texas, Houston and Galveston Divisions

by Jesse E. Clark, Clerk of Court, and
Molly Cavazos, Staff Attorney

The Mechanics of the Procedure in the Southern District of Texas, Houston and Galveston Divisions

Lodging of the Complaint

In the Southern District of Texas, Houston and Galveston Divisions, inmates seeking to file section 1983 actions write to the court for instructions and forms. The court responds by sending the inmate a section 1983 instructional packet. (This packet and other supporting documents are available from the Federal Judicial Center's Research Division or from the clerk's office in the Southern District of Texas, Houston Division.) Upon the inmate's submission of the civil rights complaint for filing, all materials are stamped "received" and dated accordingly by a deputy clerk. All the materials are then forwarded to the staff attorneys' secretary for technical screening to insure:

1. that the inmate has properly completed the requisite number of copies of the Complaint for Violation of Civil Rights
2. that each copy of the form is properly notarized or verified pursuant to 28 U.S.C. § 1746
3. that the inmate has properly completed the mandatory Affidavit in Support of Request to Proceed In Forma Pauperis
4. that the inmate, if incarcerated at the Texas Department of Corrections (TDC), has submitted the Release Form required by the institution prior to its release of an inmate's trust account information.

The Southern District of Texas, Houston and Galveston Divisions, does not make a distinction between an in forma pauperis application and an in forma pauperis affidavit. Instead, that court requires only an Affidavit in Support of Request to Proceed In Forma Pauperis, which it considers the inmate's in forma pauperis (IFP) "application."

If all papers are in order, the staff attorneys or their secretary promptly prepare a "Case Filing Data Sheet." This data sheet, together with the inmate's complaint, and sufficient copies thereof; the affidavit in support of request to proceed IFP; and the Release

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Form (if a TDC inmate) are then sent to the intake section of the clerk's office for official filing; i.e., a judge, magistrate, and case number are assigned, the docket sheet is prepared, and the case file is organized.

At this time, the following materials are sent to the inmate-plaintiff:

1. notification that the complaint has been filed
2. instructions regarding consent to have the case tried by a United States Magistrate
3. a letter advising plaintiff as to the services provided by the Texas Center for Correctional Services, if the plaintiff is a TDC inmate filing pro se against TDC personnel
4. an insufficient information letter, if plaintiff has failed to provide sufficient information as to the name(s) and address(es) of the defendant(s) named in the complaint
5. an exhibits letter, if plaintiff has failed to submit sufficient copies of the exhibits for filing.

When the case file is received back in the staff attorneys' office, the staff attorneys' secretary records in a log the case style, docket number, judge and magistrate assigned to the case, a brief description of the case, and whether the \$60 filing fee was paid. Finally, an index card is prepared for first-time filers identifying their name, prison identification number, and case number. An inmate who has previously filed a case in the Houston or Galveston divisions of the court, however, is considered a "multiple-filer" and a new case number is added to those on the index card prepared upon the inmate's first filing in the court. Any prisoner complaint meeting the court's technical requirements is filed before consideration of the inmate-plaintiff's IFP eligibility.

Request for a Statement of Account

For trust account information from inmates incarcerated at TDC, the staff attorneys' secretary sends a written request to the institution for a printout of the inmate's trust account activity for the preceding three months. Prisoners at federal, county, and out-of-state penal institutions are ordered by the court to complete an Authorization for Release of Inmate Trust Account Information and have the cashier or director of accounting fill out a certificate with information concerning the inmate's financial history over the previous six months. Furthermore, plaintiff is advised that

"[f]ailure to comply as directed may result in the dismissal of [the] action pursuant to 28 U.S.C. § 1915(d), based on the untruthfulness of the allegation of poverty."

Response from the Institution

TDC responds directly to the staff attorneys' office, usually within ten to fourteen days. The response includes submitting a printout of the inmate's trust account transactions over the previous three months and completing the Certificates of Attestation and Authentication that were previously provided to TDC by the court. For prisoners at institutions other than TDC, the court has had little, if any, problem with inmates' compliance with the order for completing the required Certificates of Attestation and Authentication. They are prompt in responding to the court's request for inmate trust account data.

Computation of the Fee

After reviewing the trust account information provided by the institutions, the staff attorneys compute the fee pursuant to the sliding-scale guidelines set forth in General Orders 77-1 and 79-5. (These general orders apply to all applications to proceed in forma pauperis regardless of the nature of the case or the source of the application.) The court has utilized the following "rule-of-thumb" formulas in calculating what portion of the \$60 filing fee and \$3 per defendant service, if any, the inmate-plaintiff should be required to pay:

1. **TDC Inmates.** If the inmate-plaintiff's present balance is greater than the average monthly deposit over the previous three months, then the payment required within thirty days shall be approximately one-fourth (or 25 percent) of the present balance (the "Partial Payment—Regular" situation).
If, however, the inmate-plaintiff's average monthly balance over the previous three months is greater than the present balance, then the payment required upon plaintiff's next deposit to the trust account shall be approximately one-fourth (or 25 percent) of the average deposit over the previous three months (the "Partial Payment—Monitored" situation).
2. **Non-TDC Inmates.** The same formulas for computation of the required partial payment fee are utilized, except that the fee is determined on the basis of trust account information over the previous six months.

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3. Examples.

TDC (Regular):

TDC inmate's present balance = \$80.

Deposits over previous 3 months = \$180.

Therefore, the average monthly deposit (over the previous 3 months) = \$180 divided by 3 months = \$60. Since \$80 is greater than \$60, the court would require payment of \$20 (1/4 of \$80) within 30 days.

TDC (Monitored):

TDC inmate's present balance = \$10.

Deposits over previous 3 months = \$180.

Therefore, the average monthly deposit (over the previous 3 months) = \$180 divided by 3 months = \$60. Since \$60 is greater than \$10, the court would require payment of \$15 (1/4 of \$60) upon receipt of plaintiff's deposit to his trust account.

Non-TDC (Regular):

Inmate's present balance = \$80.

Deposits over previous 6 months = \$180.

Therefore, average monthly deposit (over the previous 6 months) = \$180 divided by 6 months = \$30. Since \$80 is greater than \$30, the court would require payment of \$20 (1/4 of \$80) within 30 days.

Non-TDC (Monitored):

Inmate's present balance = \$10.

Deposits over previous 6 months = \$180.

Therefore, average monthly deposit (over the previous 6 months) = \$180 divided by 6 months = \$30. Since \$30 is greater than \$10, the court would require payment of \$7.50 (1/4 of \$30) upon receipt of plaintiff's next deposit to his trust account.

4. **Special Note.** Unlike *Evans v. Croom*, 650 F.2d 521 (4th Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982), the Southern District of Texas, Houston and Galveston Divisions, in the "Partial Payment—Monitored" situation, will require, in most instances, no more than one-fourth (or 25 percent) of the average monthly deposit, as opposed to the *Evans* imposition of a partial filing fee never exceeding 15 percent of the total sums received for the preceding six months. Thus, the *Evans* requirement may result in an order that can be as high as 90 percent of the average monthly income whereas the Southern District of Texas, Houston and Galveston Divisions, will keep its requirement at or around 25 percent of the average

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monthly income. Furthermore, the Southern District of Texas, Houston and Galveston Divisions, utilizes the 25 percent requirement to cover partial payment of both filing and service fees. Limitation to only the filing fee would lead to a separate calculation to determine the appropriate partial payment of the service fee.

Order for Partial Payment

If it is determined after review of an inmate's financial history that in forma pauperis status should be granted, an order is entered accordingly. If it is determined, however, that the inmate-plaintiff can make full or partial payment of the filing and service fees, the fee is calculated and the appropriate order is entered in the case.

The form order in each situation makes reference to three of the inmate's highest balances over a specified period of time as well as the total deposits made to the inmate's trust account over that period of time. In each of the "regular" situations, payment is requested within thirty days and the order specifically states that "[f]ailure to comply as directed may result in the dismissal of this action." Furthermore, summons will not be issued in these situations until payment has been received by the clerk. In the "monitored" situations, however, payment is requested upon plaintiff's next trust account deposit. Plaintiff is advised that the trust account will be monitored by the court to enforce compliance with its order and that "failure to comply as directed upon receipt of funds may result in the dismissal of this action." In these situations, summons is issued immediately and the defendants are promptly served accordingly.

Objections from Plaintiff

Although the partial payment orders utilized by the court make reference to only one alternative to payment—to wit, dismissal—an inmate-plaintiff will occasionally, within thirty days, file objections to the partial payment order. If the court finds that the claim of special circumstances warrants modification of the prior partial payment order, it will enter a new order.

Nonpayment

In the "Partial Payment—Regular" situations, if no payment is received within thirty days, plaintiff's case is dismissed by the court (not the clerk) pursuant to the authority vested in the court under 28 U.S.C. § 1915(d). In the "Partial Payment—Monitored"

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situation, however, plaintiff's trust account is monitored to enforce compliance with its prior order: An updated computer printout is requested for TDC inmates; prisoners at other institutions are required to submit a certificate indicating their most recent financial data. In either event, if deposits have been made to the inmate-plaintiff's trust account and no effort has been made to comply with the prior order on payment, plaintiff is faced with dismissal pursuant to 28 U.S.C. § 1915(d).

Payment

Payment is made in the form of a check or money order from the institution or from a friend or relative of the inmate. Upon receipt of payment in a "Partial Payment—Regular" situation, a receipt for the partial payment of the filing fee is sent to the plaintiff, summons is issued, and the requisite partial payment of the service fee is forwarded to the United States Marshal. In the "Partial Payment—Monitored" situation, however, since summons was issued at the time of filing of the partial payment order, plaintiff is simply sent a receipt for the partial payment of the filing fee and the requisite service fee is forwarded to the United States Marshal for processing.

Impact of the Process on Participants' Resources

Clerk's Office, Judges, Magistrates, and Staff

Administration of the partial payment program is not new to the court; the program had its inception in the mid-1970s. Since the handling of all preliminary matters (i.e., prior to pretrial) in prisoner section 1983 cases has always been the responsibility of the staff attorneys' office, there is minimal judicial involvement in the operation of the partial payment procedure. The staff attorneys' secretary is responsible for requesting inmate trust account information. Upon receipt, the staff attorneys review each IFP application and draft the appropriate order for signature by the magistrate. If objections are filed, the staff attorneys are again responsible for drafting the appropriate order for signature by the magistrate or judge. The average time spent on the partial payment procedures by the staff attorneys and their secretary is between ten and thirty minutes per case.

Prison Personnel

The supervisor of E. & R. Accounting for the Texas Department of Corrections, who was asked to estimate the average time spent per inmate on obtaining the inmate trust account data sought by the court, said that the use of the court's partial payment procedure demands a total of about ten to fifteen minutes per case from their accounting and/or data processing departments. Since TDC operates a computerized system, inmate trust account information is easily accessible.

Prisoners

Length of Process. In the Southern District of Texas, Houston and Galveston Divisions, the amount of time that elapses between the submission and immediate filing of all complaints that have met the court's technical requirements and the issuance of summons upon the defendants depends on when plaintiff's trust account information is received by the court; what action is taken with regard to plaintiff's IFP affidavit upon receipt of the information; and what other action is taken by the court with regard to plaintiff's complaint. For example, if the court finds plaintiff's pleadings evasive, vague and/or incoherent, the court may seek additional facts from the plaintiff prior to any further consideration of the IFP application. Assuming that the court has received plaintiff's trust account data and that plaintiff responds within the time allowed to any order entered by the court prior to service of process, summons will be issued immediately upon entry of the partial payment order in the "Partial Payment—Monitored" situation as well as in the situation where the inmate-plaintiff is allowed to proceed in forma pauperis. In the "Partial Payment—Regular" situation, however, summons will not be issued until plaintiff's partial payment is received by the clerk.

Costs. In Texas, wages are not paid to prisoners; any money received in an inmate's trust account comes from an outside source or from craft sales and the like.

Privacy. At the insistence of TDC, all inmates are required to submit to the court a Release Form prior to TDC's release to the court of inmate trust account data. Similarly, non-TDC prisoners are required by the court to complete an Authorization for Release of Inmate Trust Account Information prior to release of account information by the deputy cashier or director of accounting of the institution at which they are incarcerated. Hence, the court has no problem with an allegation that the inmate's right to privacy has

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been invaded by disclosure of records of the prisoner's account to the court without consent.

Effectiveness of the Process

The following approximations regarding section 1983 prisoner filings in the Southern District of Texas, Houston and Galveston Divisions, during 1983 have been compiled to evaluate the effectiveness of the partial payment program in the court.

Number of § 1983 cases filed:	500	
Number of § 1983 cases filed but dismissed prior to entry of a service or partial payment order:	235	(47%)
Number of § 1983 cases where plaintiff paid full fees:	15	(3%)
Number of § 1983 cases where plaintiff allowed to proceed in forma pauperis 100%:	100	(20%)
Number of § 1983 cases where partial payment order was entered:	150	(30%)*

*Of those 150 cases, 30 (or 20%) were dismissed for failure to make partial payment in accordance with the court's order.

These figures show that, although this court is utilizing various measures to weed out frivolous and maliciously motivated cases prior to service, of those cases that reach the level of entry of partial order, 20 percent are dismissed for failure to comply therewith. This figure would probably be greater if, of the 500 cases filed, 47 percent were not dismissed prior to entry of a service of process or partial payment order. Bases for dismissal of those 47 percent included, but was not limited to, the following:

1. 28 U.S.C. § 1915(d)—frivolous, maliciously motivated, and duplicative cases
2. Rule 12(h)(3), Fed. R. Civ. P.—lack of subject matter jurisdiction
3. Want of Prosecution—i.e., for failure to comply with an order of the court requiring a more definite statement prior to service of complaint upon the defendant(s), and for failure to keep the court advised of a current address, especially upon release from the institution
4. Rule 41(a)(1), Fed. R. Civ. P.—voluntary dismissal
5. Transfer—i.e., to another federal district court or division where venue was proper.

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Accordingly, since 47 percent of the section 1983 inmate cases filed in 1983 were dismissed prior to ordering partial payment, the full effect of the partial payment program in the Southern District of Texas, Houston and Galveston Divisions, is not evident. However, we find that dismissal of 20 percent of the cases where a partial payment order is in fact entered is significant enough to substantiate the procedure's value as a final tool to weed out cases not filed in good faith. Hence, the court plans to continue its usage of the partial payment procedure.

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