Annual Assessment of the Civil and Criminal Dockets and of the Civil Justice Expense and Delay Reduction Plan for the District Court for the Northern District of California

November 5, 1993

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I. INTRODUCTION

This report is prepared in compliance with the Civil Justice Reform Act of 1990, 28 USC §475, which requires each court that has adopted a Civil Justice Expense and Delay Reduction Plan to "assess annually the condition of the court's civil and criminal dockets with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation practices of the court." Judge Robert M. Parker's memorandum of February 5, 1993, concerning annual assessments and plan revisions under the Civil Justice Reform Act, notified all district courts that the Judicial Conference's Committee on Court Administration and Case Management recommends that the annual assessment take place one year after the court's Civil Justice Expense and Delay Reduction Plan becomes operational. The Northern District of California adopted its Civil Justice Expense and Delay Reduction Plan pursuant to the Civil Justice Reform Act (CJRA) in December 1991. Many of the changes in court procedure outlined in the plan became operational on July 1, 1992. Therefore, the court is submitting this assessment of the court's civil and criminal docket for the year July 1, 1992 to June 30, 1993.

The court is grateful to its Advisory Group for its assistance in developing the court's Plan and in preparing this assessment. In particular, the court acknowledges the contribution of Jerrold M. Ladar, Chair of the Statistics and Technology Task Force, in providing the Docket Analysis.

The Northern District of California was designated as a Demonstration District under section 104 of the CJRA. This court was directed to "experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution. . . ." As part of the implementation of the court's Civil Justice Expense and Delay Reduction Plan, the court is experimenting with several programs that potentially could affect the court's docket. On July 1, 1992, the court adopted the Case Management Pilot Program which is a major experiment with innovative approaches to case management, disclosure/discovery, and motion practice. Several improvements were made to the court's Early Neutral Evaluation (ENE) project. In addition, the court adopted the ADR Pilot Program on July 1, 1993.

This first annual assessment includes an analysis of the court's civil and criminal docket from statistics collected by the Administrative Office of the U.S. Courts, a preliminary study of the effects of the court's Case Management Pilot Program, a summary of a study of the court's Early Neutral Evaluation program conducted during the past year, and a description of the court's Alternative Dispute Resolution Pilot Program that became effective July 1, 1993.

II. DOCKET ANALYSIS

CIVIL CASES

SOURCE OF STATISTICS

The following statistics are excerpted from data supplied by the Administrative Office of the U.S. Courts (AO). All figures are based on a twelve month period ending June 30.

SUMMARY

The Past Reporting Period, ending June 30, 1993:

The district is authorized 14 judgeships. One position was vacant and one curtailed due to appellate proceedings. Thus the 1993 complement was 12 active and 6 participating senior judges. Total trials completed was 240. Civil case filings decreased 1.3% from 1992, to a total of 5,924 cases commenced, while criminal cases increased 23% to 682 cases commenced.

The latest judicial workload profile for the district discloses no undue delay in dispositions. The median time from filing to disposition of a civil case is 7 months. Civil, from issue to trial, is 17 months. Only 7% of civil cases are over three years old. (63rd in the U.S.). Criminal felony cases showed a median time of 9.2 months from filing to disposition.

Statistically, there is no evidence that the present criminal caseload poses a serious problem for civil docket management.

[Nationally, a number of districts report emergency conditions where criminal cases literally prevent the timely trial of civil matters. (e.g. E.D.N.Y. See: U.S. v. Mosquera, 816 F.Supp. 168 (E.D.N.Y. 1993), opinion by Judge Weinstein.)]

The Current Picture:

As of September 1993, it appears that the median time from filing to trial in civil cases in this district is between 20 and 22 months.

Two judicial vacancies now exist, which we are hopeful will soon be filled. One active judgeship is curtailed pending the outcome of appellate proceedings. Thus, there are 11 active judges and six

participating senior judges now able to take case matters. The district has seven full time magistrate-judges.

State prisoner pro per cases comprise almost a quarter of the district's civil docket. A CJRA Task Force has undertaken a detailed study of the prisoner pro per procedures and is assisting the court in reviewing the processing of these cases. The CJRA will make recommendations regarding prisoner petitions to the court in the next few months.

The Future:

The court's vulnerability to future docket congestion lies, in part, in uncharted areas where predictions are perilous.

State Prisoner Petitions:

Construction of additional state prison facilities in the district could swell the prisoner petition volume, however no major construction is presently in progress.

Increased Federal Prosecutions:

Executive branch decisions affecting the prosecution of criminal offenses by the U.S. Attorney's Criminal Division, Organized Crime Strike Force and Drug Task Force (approximately 57 Assistant U.S. Attorneys altogether) could rapidly change the docket picture.[1]/

The district has not been favored with a Presidentially appointed U.S. Attorney for over three years, however it appears that the nomination recently forwarded by the President to the Senate will be acted upon in the very near future. The nominee is the currently appointed U.S. Attorney, Michael Yamaguchi, who was appointed by the Attorney General on July 4, 1993.

1.The last docket crisis occasioned by criminal filings occurred 25 years ago in 1968-1969, when over 750 criminal selective service cases were on the docket of an 8 active judge court, along with the normal complement of criminal and civil cases. There were usually 15 cases for trial on the master calendar each Monday to be spread among the 7 judges.

Death Penalty Habeas:

California presently has approximately 370 persons on death row, and approximately 100 habeas death penalty cases pending in our four districts. As affirmances of the judgments of death occur in the state court, this district's proportionate share of habeas cases will rise.

Dual Jurisdiction:

State decisions in civil cases where litigants enjoy a choice of dual jurisdiction can result in a shifting to or from the federal docket. For example, on September 9, 1993, the California Supreme Court ruled that investors must prove they relied on alleged misrepresentations in securities fraud cases, rejecting the "fraud-on-the-market" doctrine used in federal court in § 10b-5 cases. Mirkin v. Wasserman, S020465, __ Cal.4th __, _____ WL _____ (Sep. 9, 1993) 93 CDOS 6799. Mirkin, presenting a state court plaintiff with a higher burden to maintain his case, could cause potential plaintiffs to look increasingly to a federal forum, thus impacting our docket. The difficulty in assessing potential impact is illustrated by the fact that in Mirkin, a class action lawsuit under § 10b-5, based on the same events, was filed in federal court in the same district as the state suit. One also must add to the mix the facts that there is a more favorable state statute of limitations than federal and the requirement of a unanimous jury in federal court versus 9 out of 12 in state court.

Asset Forfeiture Litigation:

Increased activity in civil asset forfeiture cases arising from criminal activity (less than 50 such cases were filed in this reporting period) may ensue in the wake of a California legislation imbroglio in mid-September. California's narcotic asset forfeiture statutes, modeled on the federal, expire December 31, 1993. New legislation foundered at the last minute, with no new statutes being enacted as the Legislature recessed. This returns California, on December 31, to either prior narcotic asset forfeiture laws (which require a criminal conviction before forfeiture can be undertaken) or to no forfeiture law whatsoever. State narcotic law enforcement requests for federal forfeiture filings could dramatically increase, although the U.S. Attorney's Forfeiture Unit is staffed at four attorneys (including its chief) with one attorney eligible to retire. Civil forfeiture cases can present time consuming and complex constitutional and statutory questions.

See, e.g. U.S. v. Austin, 509 U.S. ____, 125 L.Ed.2d 488 (1993); U.S. v. 105,800 Shares of Common Stock of Firstrock Bancorp, Inc., 825 F.Supp. 191 (N.D. Ill. 1993).

TRIALS

Totals [2]/ (Criminal and Civil, Jury and Non-Jury)

1990	1991	1992	1993:
202	178	200 (+12.3%)	240 (+20%)

In 1993, 22 districts (out of 94) completed more trials than the N.D. of California. The highest was Texas, Southern with 918, followed by the Central District of California (639) and S.D.N.Y. (631). In 1992, 32 districts (out of 94) completed more trials than the Northern District.

According to the AO's judicial workload profile, this district's allocation was 17 trials per judge for the 12-month period, placing it 89th among districts nationwide.

2.The AO notes that magistrate trials are excluded. However, TRO's Preliminary Injunctions, hearings on contested motions and other proceedings when evidence is introduced, are included. Under this system, "trials" may be interpreted in a varying manner and reported differently from district to district or, for that matter, from judge to judge. See n. 3, infra, re 1991 "Court Trials".

1993's breakdown:

	135 civil:	56 jury and 79 non-jury
	105 criminal:	63 jury and 42 non-jury
1992:	108 civil:	52 jury and 56 non-jury
	92 criminal:	59 jury and 33 non-jury
1991:	99 civil:	42 jury and 27 non-jury
	79 criminal:	52 jury and 27 non-jury[3]/

Length of Trials 1993

The length of trials statistics have remained relatively constant over the period 1990-1993. For the period ending June 30, 1993, increased trials were significant in the one day and 4-9 day ranges. There was an increase of 16 civil trials (36%) over 1992 in the 4-9 day range, and 8 (42%) in the 1 day category. Criminal trials also showed a significant increase in the 4-9 day range, 13 (43%) and 8 (34%) in the 1 day classification.

DAYS	1	2	3	4-9	10-19	20+
Civil (135 cases)	27	16	13	60	14	5
Criminal (105 cases)	31	12	11	43	8	--

3.In 1991, 27 non-jury "trials" actually represented only 7 trials in the traditional usage of the word. The remaining 20 consisted of contested evidentiary matters (e.g., a motion to suppress). Succeeding years followed this pattern.

Length of Trials 1992

DAYS	1	2	3	4-9	10-19	20+
Civil (108 cases)	19	20	8	44	10	7
Criminal (92 cases)	23	14	17	30	7	1

CIVIL CASES

In 1992 Civil filings increased 9.2% nationally and 29.8% in this district.

In 1993, national civil filings increased by only 0.7% and decreased by 1.8% in the district. District terminations in 1993 increased 9.5% and the pending caseload decreased by 2.2%. This contrasts with a national decrease in terminations of -5.8% and a pending case increase of 1.3%.

N.D. CA

	1990	1991	1992	1993
Commenced	4,801	4,643 (-3.3)	6,030 (+29.8)	5,924 (-1.8)
Terminated	4,837	4,360 (-9.9)	5,514 (+26.5)	6,040 (+9.5)
Pending	4,945	4,883 (+6.2)	5,350 (+10.7)	5,208 (-2.2)

In 1993, the Northern District ranked eighth among 94 districts in cases commenced. In 1992 it was fifth. Within the circuit in 1993, the Central District had 9,859 (the nation's highest).

Civil categories of cases commenced in the district which reflected significant number were:

	1991	1992	1993
1. Contract	1,092	2,008	1,390
2. Civil Rights (excludes Prisoner)	522	607	751
3. Labor	478	627	692
4. Tort (includes Tort Claims Act, FELA & Maritime)	414	506	603
5. Copyright	210	226	267
6. Social Security	76	114	99
7. Tax	97	107	96
8. Forfeiture & Penalty	56	62	50
9. Real Property	44	79	32
10. Anti-Trust	25	21	25

PRISONER PRO PER CASES

For 1993 our district ranked 10th highest in the country in the number of civil rights state prisoner cases and 4th highest in habeas corpus state prisoner petitions.

For 1993, a total of 1,079 pro-per state and federal institution "Prisoner Petitions" ("Habeas corpus, civil rights, mandamus and others") were filed. This comprised almost 20% of the civil filings in the district.

Prisoner pro-per cases in 1993 involving state penal institutions and alleging civil rights violations numbered 746; an additional 333 were "habeas, mandamus" and "other" for a total of 1,079 cases involving non-federal facilities. (State prisoner pro-per cases are initially screened and handled by the court's pro-se staff and are later referred to judge's chambers when becoming an "in court" matter.)

CRIMINAL CASES

Criminal case filings decreased nationally in 1993 by 3.87% and increased 23% in the district.

Including petty offenses, transfers from other districts and cases reopened from appeal, the last four years are as follows:

	1990	1991	1992	1993
Commenced	729 (+.6)	702 (-.2)	552 (-21.5)	682 (+23)
Terminated	572 (-37.6)	661 (+14.0)	578 (-12.6)	574
Pending	801 (+25.2)	857 (+5.0)	833 (-3.0)	917 (+10)

Excluding petty offenses, transfers from other districts or cases reopened from appeal, cases were divided as follows:

	1991	1992	1993
Felony	392	381	423
Misdemeanor	277	161	239
Total	669	542	662

The number of defendants involved were:

	1990	1991	1992	1993
Felony	658	619	567	690
Misdemeanor	277	289	241	255
Total	936	908	811	945

The 1993 42 felony case increase with an average of 1.4 defendants per case does not pose any systemic problem for the court's docket.

A random survey of new criminal case filings did not reveal any fundamental change in types of cases charged, except in one category. The major increases in prosecution occurred in embezzlement (122%), Robbery (23%),and Drugs (18%). A random sampling of the embezzlement cases indicates most are disposed of as misdemeanors and few set for trial.

Weapons cases did not increase significantly (16%), despite the Department of Justice's "Operation Triggerlock" announcement in 1991. Prosecution of traffic cases (driving under the influence, etc.), decreased by 30%, as did larceny prosecutions.

	1990	1991	1992	1993	% Change
Robbery	53	57	51	63	(+23)
Larceny	34	47	58	40	(-31)
Embezzlement	119	90	45	100	(+122)
Fraud	156	127	108	117	(+8)
Weapons	14	14	37	43	(+16)
Drugs	109	97	97	115	(+18)
Traffic	86	96	97	67	(-30)
Escape	22	12	17	16	(-.05)
Immigration	39	29	9	12	(+3)
Forgery	19	9	13	20	(+5)

III. SUMMARY OF PRELIMINARY STUDY OF THE CASE MANAGEMENT PILOT PROGRAM

The complete preliminary study of the Case Management Pilot Program is attached as Appendix A to this Annual Assessment.

Key Preliminary Findings about the Case Management Pilot Program

- Substantial compliance
- Net positive effect in middle range of cases
- Net effect not clearly positive in some other kinds of cases
- Widespread endorsement of meet and confer requirement
- Substantial disaffection with presumptive stay on discovery
- Early preliminary statistical analysis inconclusive

A. PRECAUTIONARY STATEMENT

This report is based largely on in-depth interviews of 25 lawyers who appeared in cases subject to the Case Management Pilot Program rules, a preliminary statistical analysis of docket entries, review of Case Management Statements filed in Pilot Program cases, and, to a lesser extent, observation of Case Management Conferences and informal conversations with lawyers and court personnel.

When considering the data reported here, it is essential to bear in mind **the early stage at which the program is being observed.** Although the court and others are eager to measure the effects of the Pilot Program, it is difficult to accurately measure results of the program within one year of implementation.

Cases in the Pilot Program sample in this study were filed in only the first five months after the effective date of General Order 34. Thus, all the cases in the sample were relatively young, ranging in age from one day to no more than 11 months. Moreover, some lag time beyond this early period can be expected before the "true" program effects can be observed, because, (1) the most costly and delay-prone cases commonly last longer than 11 months, (2) judges and their staffs must adjust their work practices and (3) attorneys must accustom themselves to new procedural requirements. Since this first evaluation draws its experimental sample entirely from what might be considered a "settling" period for the Pilot Program, the results should be considered as tentative indications of trends, rather

than as concrete conclusions about the program's true effects. Studying the program in future years will yield more useful and reliable information about its impacts.

B. RESULTS OF ATTORNEY INTERVIEWS

A preliminary survey conducted by telephone of 12 plaintiffs' and 13 defendants' attorneys with experience under the Case Management Pilot Program suggests that the Pilot Program has had a net positive effect on some cases subject to it. **The Pilot Program appears to be most beneficial for the middle range of cases filed in this court.** These moderate or "mainstream" cases are cases that remain on the court's docket long enough for the requirements of the Pilot Program to be meaningful, that need some discovery before they can be resolved, that require resolution of substantial factual matters, and that are not truly complex cases.

Over half of the attorneys involved in such mainstream cases thought that the Pilot Program was an improvement over earlier practices in this court. Several other attorneys who were involved in these same mainstream kinds of cases thought the net effect of the Pilot Program was mixed. These attorneys thought that the Pilot Program was an improvement over earlier practices in the court except for the presumptive requirement that discovery be stayed pending the Case Management Conference. Some of the positive effects mentioned by attorneys were: the Pilot Program controls initial discovery, gets rid of run-of-the-mill discovery disputes, streamlines issues, encourages parties to focus discovery on issues that are central to the case, makes parties think and plan ahead, and forces parties to look at the whole case and investigate early.

There was no identifiable difference between plaintiffs' attorneys opinions and defendants' attorneys opinions. Indeed, there was a remarkable symmetry between the opinions of the attorneys involved in the same case.

The survey also suggests that there are groups of cases on the court's docket for which it is not clear that the Pilot Program has had a net positive effect. They include cases that can be resolved very early in the pretrial period because (1) they self-resolve without much, if any, judicial intervention, (2) their resolution depends on an issue of law that can be decided relatively soon after filing without much discovery or (3) they will be removed from the docket through rulings on jurisdiction or venue. The effect of the Pilot Program also is not clear in cases whose principal objective is emergency equitable intervention and truly complex cases.

The observation that the Pilot Program has been useful to some types of cases but may not have a net positive effect in

others must be coupled with another set of comments made by the attorneys interviewed. Contrary to what the court expected, we have some reason to believe that an appreciable number of attorneys are reluctant to request that the Pilot Program be modified to better fit the needs of an individual case. Some such attorneys do not want to be perceived as trying to escape compliance with the Pilot Program. In addition, some cases for which the Pilot Program is not appropriate are so small that the cost that would be incurred to request the modification cannot be justified. One of the goals of the court in the next years of the Pilot Program should be to determine ways to identify, as early as possible (perhaps even by criteria applied when the complaint is filed), those mainstream cases that the Pilot Program is most likely to benefit.

Attorneys also were surveyed about the effects of specific provisions of the Pilot Program. **Attorneys mentioned the meet and confer requirement, the disclosure requirement, and the Case Management Conference, in order of frequency, as the most valuable aspects of the Pilot Program.**

An overwhelming majority of the attorneys interviewed who had completed the Case Management Statement thought that enough was accomplished by the meet and confer process and preparation of the Case Management Statement to justify the resources the parties committed to them. Attorneys gained a better understanding of their opponents' views of the case, discussed alternative dispute resolution, developed a motion practice plan, and planned discovery. Attorneys also mentioned that they were able to discuss a road map for the case or agree to limit discovery temporarily to the threshold issue in the case.

Of the 25 attorneys interviewed, more (9) thought that the disclosure requirements had a net positive effect in their cases than (5) thought the disclosure requirement had a net negative effect. Some attorneys thought that they obtained useful information earlier through disclosure than they would have through traditional discovery. Several attorneys responded that disclosure did obviate the need for some discovery. One attorney specifically mentioned that the disclosure requirement obviated the need to send the standard set of interrogatories that are reflexively served after receiving the complaint. Another attorney commented that disclosure smoothed out discovery and avoided the routine disputes in early discovery.

Nearly all attorneys involved in Case Management Conferences held under the Pilot Program thought that enough was accomplished to justify the resources committed to the conference. Parties found that the most useful aspects of the conference were getting feedback from the judge, either concerning a potential discovery dispute or the substantive

issues in the case, and having the judge try to settle the case at the conference or refer it to an alternative dispute resolution procedure such as Early Neutral Evaluation or a settlement conference. In general, attorneys found conferences in which central issues were discussed more worthwhile than conferences that consisted only of setting dates. Attorneys thought that if the purpose of the conference was simply to set dates, that could be accomplished with less cost either by telephone or in writing.

The presumptive requirement of the Pilot Program that discovery be stayed pending the Case Management Conference was not as popular among the attorneys interviewed. **In response to questions about whether the Pilot Program had any negative effect or whether any provisions of Pilot Program were actively counterproductive, nine attorneys interviewed mentioned the stay on discovery before the Case Management Conference.** No other provision of the Pilot Program was mentioned as actively counterproductive. A substantial number of attorneys thought that the stay on discovery delayed their ability to get the information that they really wanted. They noted that the case is not going to settle before they have an opportunity to see the documents that hurt their opponent's case.

The disaffection with the stay on discovery suggests two possible responses. The court could abandon the presumptive stay on discovery or the court could expand the reach of the disclosure obligation to embrace not only exculpatory but also inculpatory documents. The court and its Advisory Group will be investigating ways that the Pilot Program can be improved so that the disclosure and meet and confer provisions of the Pilot Program can remain useful in streamlining discovery while minimizing the negative impact of a stay on discovery in certain cases.

C. COMPLIANCE WITH THE PILOT PROGRAM

Compliance with the Pilot Program has been good. A review of over 200 Case Management Statements showed that more than 75% of these filings described disclosures from <u>both</u> the plaintiff and the defendant in the case. In a sample of 400 cases, of the 268 cases that were on the docket for at least 140 days, Case Management Statements were filed in 198 cases (74%). Although all requirements of the Case Management Statement were not always fulfilled, nearly all parties supplied useful substantive information in the Case Management Statement. Case Management Conferences were held in 164 of the 261 cases (63%) that were on the court's docket for at least 150 days.

D. DOCKET STATISTICS

The court, with the assistance of an outside consultant, performed a statistical analysis of objective data collected from the court's docket. The database contained 837 control cases filed from July 1, 1991 through November 30, 1991 and 933 Pilot Program cases filed from July 1, 1992 through November 30, 1992. As expected, the results of the analysis reflect the early stage at which the Pilot Program's effects were observed. The oldest cases in the Pilot Program sample had been on the docket for only 11 months, and some were on the docket for as little as one day.

In this early study, no significant difference could be measured in the time to termination between Pilot Program and control cases. However, first motions are occurring earlier and the time from the date the complaint is filed to the first answer is shorter. Event frequency measures, such as number of motions and number of docket events, which are intended to monitor improvements over longer periods, showed no significant change. Of course, this means that while no significant improvement was detected, neither was there any significant deterioration in these docket measures, disproving any notion that the Pilot Program is actually increasing cost and delay in ways that frustrate its intent.

Despite the lack of statistical significance between most Pilot Program and control case measures, the objective statistics, together with the encouraging rate of compliance with the Pilot Program's requirements, do make one thing clear: the sky has not fallen. While the Pilot Program may be counterproductive in a few cases, this study shows no general deterioration of the adversary process, no deleterious effect on the attorney/client relationship, and no widespread rebellion against the rules of this court. While it is too early to pronounce the Pilot Program a resounding success, it also is clear that the Pilot Program has not had any of the disastrous consequences feared by some.

It is important that the Pilot Program be assessed in light of its purpose. It is an experiment. The preliminary study conducted by our court shows that the program is having some beneficial effects on the cases subject to it. However, it also appears that the program has had some unintended effects on a subset of cases subject to it. At this stage of its development, any assessment of the program should focus on determining how the program can be improved to have more positive effects and better fit the cases subject to it rather than on declaring the program a success or failure.

IV. ALTERNATIVE DISPUTE RESOLUTION

Since submitting our CJRA Plan in late 1991, the court has received from its Advisory Group an extensive report evaluating our Early Neutral Evaluation (ENE) program and has implemented several new ADR procedures and programs. This section summarizes the ENE report and describes the court's ADR programs and procedures.

A. EARLY NEUTRAL EVALUATION

ENE has been a regular part of our court's ADR program since 1988. In ENE, an experienced attorney with expertise in the subject matter of the case hosts an ENE session that is attended by counsel and their clients and which begins with each side presenting the evidence and arguments supporting its case. Thereafter the evaluator assists in clarifying and focusing issues and provides a non-binding case assessment. If the parties wish, the evaluator also assists with settlement negotiations. If settlement discussions do not occur or do not resolve the case, the evaluator works with the parties to develop an efficient and effective discovery and motion plan and to position the case for early resolution by trial, dispositive motion or settlement. ENE is a non-binding, confidential process.

Cases have generally been assigned to ENE at the time of filing based on various case criteria. Judges have occasionally referred other cases to ENE either *sua sponte* or on motion or stipulation of the parties. Cases assigned to ENE fall under the categories of contract, product liability, securities, insurance, employment, personal injury, fraud, antitrust, copyright, patent and trademark. The program is governed by the court's General Order 26 (a copy of which is attached as Exhibit 1).

1. Evaluation

The court received a lengthy report on the study of its ENE program conducted by consultants Dean Jay Folberg and Professor Joshua Rosenberg of the University of San Francisco School of Law and Robert Barrett of Robert Barrett and Associates for the Task Force on Alternative Dispute Resolution of the court's Advisory Group. The study involved hundreds of cases filed between April 1988 and March 1992 that were eligible for ENE. The 1992 report of the court's CJRA Advisory Group summarizes some of the consultants' findings as follows:

> The USF Report confirms the moderately high satisfaction level of participants with the ENE process. Sixty-seven percent of

attorneys and 64% of the parties were strongly or somewhat satisfied with ENE, and about the same percent felt that resources devoted to ENE were worth it. ENE ranked first as the most helpful ADR device, followed closely by Rule 16 case management conferences and settlement conferences. Thirty-five percent of the parties said that their case settled in ENE or as a consequence of it.

Eighty-four percent of attorneys would choose ENE again for at least some types of litigation. Contract type cases received the highest ranking and patent cases the lowest, with insurance, tort, employment, copyright and trademark cases falling in between.

The biggest benefit of ENE to participants was in gaining a better understanding of the other side's view of the case. Attorneys and parties also benefited from ENE by gaining more knowledge of legal and factual issues, likely outcomes, and potential fees and other costs. The percentage of favorable responses ranged from 31% to 67%.

Forty percent of attorneys and 42% of parties felt that ENE reduced their overall costs. A comparable number felt that ENE increased costs. However, savings exceeded costs by ten times. The savings estimated by attorneys and parties averaged $47,000 and $44,000 respectively, while the average costs equaled only $3,300 and $5,900. (Ranges were wide.)

Coming to grips with time saved by ENE was difficult, even after extensive analyses of dockets, questionnaires and interviews. Using different measures, our consultants reported that about 40% of participants think that ENE cut case time, about half think that ENE improved early settlement prospects and half think that ENE reduced time to final disposition.

The USF Report also contains these additional findings:

(1) Attorneys hold varying expectations of what their ENE session might accomplish, despite the court's written material on the subject. For example, 32% of attorneys do not look for ENE to be helpful in organizing and streamlining discovery and motion practice. Eighteen percent do not think that ENE would be helpful in improving prospects for settlement.

This finding is significant in that some evidence was found that an attorney's expectations affected preparation time for the ENE session, and in turn the success of the session itself.

(2) There is a lack of knowledge about ENE among litigating attorneys who have not been part of the ENE process. For example, 32% of this group are unaware of the program's existence.

(3) Participants confirmed the importance of parties with decisionmaking power attending ENE sessions. Nine percent of parties do not appear, and 12% of corporate participants were not armed with settlement authority.

(4) Our consultants recognize that ENE is an individual process, with evaluators having substantial discretion as to how they conduct each ENE session. Most evaluators agree on the basic goals, namely that the process should help participants identify and understand issues, enhance communication and achieve settlement.

Evaluators often disagree on the priorities given these different goals, on the importance of planning discovery and trial motions, and whether parties should be asked to enter into stipulations of fact or law.

Partly because priorities among evaluators vary, and because evaluators vary, our consultants found a wide variation in the way ENE sessions are conducted. However, they could not draw hard conclusions as to what works in an ENE session and what does not work, what promotes settlement and what does not, with one key exception, the personnel involved.

(5) Evidence clearly shows that the substance and style of individual evaluators does make a significant difference in how cases proceed, and in how successful ENE is as viewed by participants. Thirty-five percent of the satisfaction level with ENE is attributable to the identity of the evaluator.

Interviews also highlighted the importance of some judicial involvement. The only other variable clearly linked to successful ENE is the degree to which a Judge endorses the process, and encourages litigants to pay attention to it.

2. ENE Program Administration

Prior to July 1, 1993, approximately 25 to 30 cases per month were being assigned to the ENE program. In 1991, 303 cases were assigned to ENE and 91 ENE sessions were held. In 1992, 343 cases were assigned to ENE and 173 ENE sessions were held. Beginning July 1 of this year, a significant portion of the cases that would have been assigned to ENE at the time of filing are now being placed into the ADR Multi-Option Pilot program, described below, in which the parties can elect to participate in ENE or another ADR option. We do not know how many of these cases will be selecting ENE.

In an effort to improve the quality of the ENE process, the court conducted two full-day ENE training programs for over 125 experienced and new evaluators during the summer of 1993. Magistrate Judge Brazil and the ADR Directors clarified the process and instructed on techniques, ethics, and the administrative process. One of the consultants who conducted the ENE study reported on their findings. Experienced evaluators shared ideas on successful and unsuccessful techniques and discussed the handling of problems and issues likely to arise. Almost all of those who attended reported that the training was a great success and believed it would enhance their future ENE sessions. We will conduct a third one-day training session early in 1994.

The evaluators who attended the training were given a binder handbook with the rules, guidelines, forms and other information about ENE. These handbooks are intended to be used by evaluators as a reference, and we periodically update them by sending out revised rules and other pertinent information.

As part of our effort to improve the matching of cases to appropriate evaluators, we have asked our veteran and new

evaluators for more detailed information on their areas and subareas of expertise. We have been using this information in matching evaluators to cases.

We also have changed the process of assigning evaluators to cases. Previously, the court sent a prospective evaluator a docket sheet and pertinent pleadings and waited for the evaluator to notify us by mail if he or she was either unavailable or had a conflict. In some cases many weeks would pass before a final evaluator could be confirmed. Now, one of the ADR Directors or their Administrative Assistant calls the evaluators to discuss their availability and likelihood of conflicts. As a result, we are able to identify potential conflicts at an earlier stage and thereby confirm evaluators more quickly.

The court has also improved other internal ENE procedures, has updated and improved many of the forms relating to the program and has revised General Order 26 which governs the ENE program. We will be designing an improved database to help us monitor and evaluate the ENE program.

B. ADR MULTI-OPTION PILOT

On July 1, 1993, the court adopted an ADR Multi-Option Pilot program (governed by General Order 36, a copy of which is attached as Exhibit 2) to offer litigants in certain civil cases a range of alternative dispute resolution processes. In this pilot, litigants in certain cases assigned to any of the five participating judges are presumptively required to participate in one of the following ADR processes offered by the court:

- Arbitration (non-binding or binding)
- Early Neutral Evaluation (ENE)
- Mediation
- Early Settlement Conference with a Magistrate Judge

With the court's approval, a private ADR procedure may be substituted for a court program.

Litigants are encouraged to stipulate early to an ADR process. Unless they have stipulated to an ADR process, counsel are required to participate in a joint telephone conference with the court's ADR Director or Deputy Director (approximately 100 days after the case is filed) to consider the suitability of the ADR options to their case.

When litigants have not stipulated to an ADR process before the Case Management Conference (approximately 120 days after filing), the judge will discuss the ADR options with counsel at that conference. If the parties cannot agree on a

process before the end of the Case Management Conference, the judge will select one of the court's non-binding ADR processes unless persuaded that no ADR process is likely to deliver benefits to the case sufficient to justify the resources consumed by its use.

The time and date of the ADR phone conference are set at the time the case is filed. Beginning in mid-October, the court has scheduled approximately 17-20 phone conferences per week. These conferences will be cancelled in cases in which parties already have stipulated to an ADR process or the case has already been dismissed. When the litigants do not stipulate to an ADR process before the Case Management Conference, the ADR Directors can, at the judge's request, recommend to the judge the ADR process they think most likely to benefit the case.

It is too early to assess the impact of this program. The FJC will be evaluating the program as part of its evaluation of our demonstration. We will be coordinating with the FJC to conduct our own evaluation as well. We hope to learn from this pilot about the potential and relative advantages of the ADR processes in different types of cases, including their impact on cost and delay.

C. MEDIATION PROGRAM

Mediation is a new ADR option introduced in our court on July 1, 1993, as part of the ADR Multi-Option Pilot described above. The mediation program is governed by General Order 37 (a copy of which is attached as Exhibit 3).

1. Description

Mediation is a non-binding, confidential process in which a neutral attorney-mediator helps counsel and their clients explore settlement alternatives. The mediator has been specially trained by the court, is experienced in communication and negotiation techniques, and is knowledgeable about federal litigation. The mediator works with the parties and their counsel to improve communication across party lines, helps each party clarify its understanding of its and its opponent's interests, probes the strengths and weaknesses of each party's legal positions, identifies areas of agreement and generates options for a mutually agreeable resolution to the dispute. The mediator generally does not give an overall evaluation of the case.

Cases are referred to mediation either through the judges in the ADR Pilot or occasionally through other judges. The subject matter categories include: contract, product liability, securities, insurance, employment, personal injury, property damage, antitrust, copyright, patent and trademark.

We anticipate that cases will begin to be assigned to mediation under the ADR Pilot in October when the first ADR Phone Conferences and Case Management Conferences are held in ADR Pilot cases. In the meantime it is encouraging that some judges have already assigned cases not in the ADR Pilot to mediation.

2. Mediation Program Administration

The court has conducted three two-day mediation training programs for neutrals who will serve in the mediation program and for ENE evaluators, some of whom will serve as mediators and others of whom will use the mediation training to enhance their ENE skills.

The mediators who attended the training were given a binder handbook with the rules, guidelines, forms and other information about the ADR Multi-Option Pilot and mediation program. These handbooks are intended to be used by mediators as a reference, and we periodically update them by sending out revised rules and other pertinent information.

The court is in the process of developing administrative procedures, forms and a database for monitoring and evaluating the mediation program. The FJC will be evaluating the mediation program as part of its assessment of our demonstration.

D. ADR CERTIFICATION RULE

Based in part on the recommendation of the court's CJRA Advisory Group, the court initiated an ADR Certification requirement for cases filed on or after July 1, 1993. Pursuant to the court's General Order 35 (a copy of which is attached as Exhibit 4), counsel and their clients must certify that they have

- read the brochure entitled *Dispute Resolution Procedures in the Northern District of California;*
- discussed the available court and private dispute resolution options;
- and considered whether their case might benefit from any of them.

The brochure, which has been distributed by the court since 1989, is given to the plaintiff or removing defendant upon the filing of a complaint or notice of removal, who in turn must serve it on the other parties. The certification requirement was implemented to help ensure that attorneys and their clients are informed of available ADR options.

It is too early to examine the impact of this new rule. For litigants who choose to participate in an ADR program, we will attempt to discern the factors that led to their choice, including information provided by the court, such as the brochure.

E. ARBITRATION

In 1978, this court became one of the first three federal district courts to offer non-binding arbitration. The arbitration program reaches contract, personal injury and property damage cases in which the only relief sought is monetary and in which the amount in controversy is less than $150,000. The case criteria and procedures for this program are described in the court's Local Rule 500, a copy of which is attached as Exhibit 5.

The number of cases designated at filing for the arbitration track has averaged between 500 and 550 per year. The number of arbitration hearings held annually is approximately 65. Following the arbitration hearing, any party may request without penalty a trial de novo in front of a district judge. Approximately 1.5% of cases assigned to the arbitration track ever have that trial de novo.

This program was evaluated by the Federal Judicial Center in a comprehensive report issued in 1990. The FJC found that over 80% of the lawyers whose cases were ordered into the arbitration track gave a positive overall endorsement of the program. More than 90% of these lawyers indicated that the arbitration procedures were fair, and about two-thirds felt that assigning the case to the arbitration program had resulted in an earlier and less expensive disposition of their case. The FJC also found that 85% of the litigants whose cases proceeded to an arbitration hearing felt that the entire arbitration program and the hearing itself were fair.

Since July 1 of this year, a significant number of the cases that would have been assigned to arbitration at filing are now part of the ADR Multi-Option Pilot program, described above. We do not yet know how many of the ADR Pilot cases will ultimately be assigned to arbitration.

GENERAL ORDER NO. 26

EARLY NEUTRAL EVALUATION

* * * * *

Notice Regarding Cases in the Case Management Pilot Program

In all cases which are assigned to the Case Management Pilot Program and to Early Neutral Evaluation, requests for extension of time to serve the summons and complaint shall be addressed to the judge to whom the case is assigned rather than to the ENE Magistrate Judge. This notice supersedes section 3.f.(4) of Amended General Order No. 26.

* * * * *

1. PURPOSE

The Court recognizes that full, formal litigation of claims can impose large economic burdens on parties and can delay resolution of disputes for considerable periods. The procedure established by this General Order provides litigants with means to resolve their disputes faster and at less cost.

2. CATEGORIES OF CASES ELIGIBLE FOR INCLUSION IN THE EARLY NEUTRAL EVALUATION PROGRAM

a. Only civil matters are eligible for inclusion in the Early Neutral Evaluation (ENE) program. Among civil matters, class actions, cases in which the principal relief sought is injunctive, or in which one or more of the parties is proceeding in **pro per**, shall not be automatically ordered into the program. Cases in which a declaratory judgment is sought may be automatically ordered into the program except when the only parties to the action are insurance carriers, sureties, or bonding companies. Suits of the following nature, as designated on the Civil Cover Sheet, may be automatically ordered into the program: CONTRACT: Insurance (110), Miller Act (130), Negotiable Instrument (140), Stockholders Suits (160), Other Contract (190), and Contract Product Liability (195); TORTS: Motor Vehicle (350), Motor Vehicle Product Liability (355), Other Personal Injury (360), Personal Injury -Product Liability (365), and Other Fraud (370); CIVIL RIGHTS: Employment (442); PROPERTY RIGHTS: Copyrights (820), Patent (830), and Trademark (840); OTHER STATUTES: Antitrust (410), Racketeer Influenced and Corrupt Organizations (470), and Securities/Commodities/Exchange (850). To the extent that qualified evaluators are available, individual judges may designate cases in other subject matter categories for inclusion in the program.

b. Absent a written stipulation executed by all parties (through counsel), cases that meet the criteria for inclusion in the Court's arbitration program under Local Rule 500 shall not be designated for Early Neutral Evaluation.

3. ADMINISTRATIVE PROCEDURE

a. Subject to the availability of qualified evaluators and of administrative resources in the Court, every even numbered case that meets the criteria set forth in paragraph 2., above, and that has been assigned to a judge who is participating in the program, shall be designated for Early Neutral Evaluation. Any judge of this Court, on motion from a party or acting *sua sponte*, may designate additional individual cases for inclusion in the program.

b. The Court has assigned responsibility for all procedural matters related to the Early Neutral Evaluation program to the ENE Magistrate Judge (see attached Order). Appeals from his decisions will be heard by the judge to whom the case is assigned only if they are filed within ten calendar days of service of the order containing the Magistrate Judge's ruling.

c. A party who believes that some extraordinary circumstance makes it unfair to have its case go through the evaluation process may petition the ENE Magistrate Judge for relief, but must do so within ten calendar days of receiving notice that the case has been designated for the program. Such petitions shall be presented in letter form, shall set forth in detail the considerations supporting the petition, shall indicate realistically the amount in controversy in the case, and shall be accompanied by a proposed order.

d. At the time a case is designated for ENE the Clerk shall provide plaintiff's counsel with a notice of such designation, a copy of this General Order and such other materials as required by the Court or the ENE Magistrate Judge. The plaintiff shall provide all defendants with copies of the Notice, General Order, and materials explaining the ENE program at the time the defendants are served or within ten calendar days of the date plaintiff's counsel receives this material from the Court. Any party who, after the filing of the original complaint, causes a new party to be joined in the action (*e.g.*, by way of impleader) shall promptly serve on that new party a copy of the Notice described in this paragraph, this General Order, and the material that explains the ENE program.

e. Each party who has a duty under this Order to serve documents on another party shall file proof of service promptly after effecting same.

f. Cases designated for ENE are subject to the following requirements:

(1) The evaluation session described hereafter shall be held within 150 days of the filing of the complaint unless otherwise ordered by the ENE Magistrate Judge on a showing of good cause.

(2) Service of the summons and complaint on all defendants shall be effected within forty (40) days of the filing of the complaint. Failure to effect service within this period will result in the issuance of an order to show cause why the complaint should not be dismissed for lack of prosecution.

(3) Subparagraph (a) of Local Rule 220-10, which permits parties to stipulate to one 60-day extension of time to comply with deadlines fixed by the Federal Rules of Civil Procedure, shall not apply to pleadings or responses to pleadings that are filed in cases designated for ENE. In cases designated for ENE, pleadings and responses to pleadings shall be filed by the deadlines set in the Federal Rules of Civil Procedure unless, prior to those deadlines, a party has secured permission from the ENE Magistrate Judge to file by another date. These rules for "pleadings" do not apply to requests for or responses to "discovery."

(4) To seek relief from any of the deadlines referred to in the preceding subparagraphs, a party must submit a letter directly to the ENE Magistrate Judge, with a copy to the evaluator (if appointed), detailing the considerations that support the request and indicating whether any other party objects to it. Such letter requests must be accompanied by a proposed order setting forth the date by which the party shall meet the obligation in question or the ENE session shall be held.

g. When the Clerk ascertains the identity of the lawyers who will be representing the named parties in the action, he or she will designate an evaluator with expertise in the subject matter of the lawsuit. After being satisfied that the evaluator has no conflict of interest and will be available during the appropriate period, the Clerk will disclose the identity of the evaluator to the assigned judge and to counsel.

h. No evaluator may serve in any matter in violation of the standards set forth in Section 455 of Title 28 of the United States Code. If an evaluator is concerned that a circumstance covered by subparagraph (a) of that section might exist, *e.g.*, if the evaluator's law firm has represented one or more of the parties, or if one of the lawyers who would appear before the evaluator at the ENE session is involved in a case on which an attorney in the evaluator's firm is working, the evaluator shall promptly disclose that circumstance to all counsel in writing. A party who believes that the assigned evaluator has a conflict of interest shall bring this concern to the attention of the ENE Magistrate Judge, in writing, within ten calendar days of learning the source of the potential conflict or shall be deemed to have waived objection.

i. Within the time frames fixed by the Court, the evaluator shall fix the specific date and place of the evaluation session. The evaluation session shall be held in a suitable neutral setting, *e.g.*, at the office of the evaluator or in the courthouse. Unless otherwise ordered by the ENE Magistrate Judge or the judge to whom the case is assigned, the evaluation session shall be held within 150 days of the filing of the complaint and within forty-five (45) days of the date on which the Clerk's office notifies plaintiff's counsel of the identity of the evaluator. Requests for extensions of these deadlines shall be presented in the first instance to the ENE Magistrate Judge and shall be granted only after a showing of extraordinary circumstances. Such requests shall be delivered to the Magistrate Judge's chambers, and a copy provided to the evaluator, no later than ten calendar days after the requesting party has received notice of the date set by the evaluator for the session and shall be in writing in the form specified in paragraph 3.f.(4), above, accompanied by a proposed order.

j. The Clerk and the evaluators shall schedule ENE events and administer the program in a manner that does not interfere in any way with the management of the action by the assigned judge. Any follow-up to an ENE session that is ordered by an evaluator may not impose duties or fix schedules that are inconsistent with orders entered by the assigned judge. No party may seek to avoid or postpone any obligation imposed by the assigned judge on any ground related to the ENE program.

4. WRITTEN EVALUATION STATEMENTS

a. No later than ten calendar days prior to the evaluation session each party shall submit directly to the evaluator, and shall serve on all other parties, a written evaluation statement. Such statements shall not exceed fifteen (15) pages (not counting exhibits and attachments) and shall conform to Local Rule 120.1. While such statements may include any information that would be useful, they must:

(1) identify the person(s), in addition to counsel, who will attend the session as representative of the party with decision making authority,

(2) describe briefly the substance of the suit,

(3) address whether there are legal or factual issues whose early resolution might appreciably reduce the scope of the dispute or contribute significantly to settlement negotiations, and

(4) identify the discovery that promises to contribute most to equipping the parties for meaningful settlement negotiations.

b. Parties may identify in these statements persons connected to a party opponent (including a representative of a party opponent's insurance carrier) whose presence at the evaluation session would improve substantially the prospects for making the session productive; the fact that a person has been so identified, however, shall not, by itself, result in an order compelling that person to attend the ENE session.

c. Parties shall attach to their written evaluation statements copies of documents out of which the suit arose, *e.g.*, contracts, or whose availability would materially advance the purposes of the evaluation session, *e.g.*, medical reports or documents by which special damages might be determined.

d. The written evaluation statements shall not be filed with the Court and the assigned judge shall not have access to them.

e. Special Provisions for Patent, Copyright, and Trademark Cases.

(1) **Patent Cases:** In a case where a party is basing claims on a patent, that party shall attach to its written statement an element-by-element analysis of the relationship between the applicable claims in the patent and the allegedly infringing product. In addition, each party who asserts a claim based on a patent shall describe in its written statement its

theory or theories of damages and shall set forth as much information that supports each theory as is then available. Any party who asserts a defense against the patent based on "prior art" shall attach an exhibit that identifies each known example of alleged prior art and that describes the relationship between each such example of prior art and the claims of the patent. In addition, if such party denies infringement, it shall describe the basis for such denial.

(2) **Copyright Cases**: A party who bases a claim on copyright shall include as exhibits the copyright registration and exemplars of both the copyrighted work and the allegedly infringing work(s), and shall make a systematic comparison showing points of similarity. Such party also shall present whatever direct or indirect evidence it has of copying, and shall indicate whether it intends to elect statutory or actual damages. Each party in a copyright case who is accused of infringing shall set forth in its written statement the dollar volume of sales of and profits from the allegedly infringing works that it and any entities for which it is legally responsible have made.

(3) **Trademark Cases**: A party who bases a claim on trademark or trade dress infringement, or on other unfair competition, shall include as an exhibit its registration, if any, exemplars of both its use of its mark and use of the allegedly infringing mark, both including a description or representation of the goods or services on or in connection with which the marks are used, and any evidence it has of actual confusion. If "secondary meaning" is in issue, such a party also shall describe the nature and extent of the advertising it has done with its mark and the volume of goods it has sold under its mark. Both parties shall describe in their evaluation statements how the consuming public is exposed to their respective marks and goods or services, including, if available, photographic or other demonstrative evidence. Each party in a trademark or unfair competition case who is accused of infringement shall set forth the dollar volume of sales of and profits from goods or services bearing the allegedly infringing mark.

5. ATTENDANCE AT THE EVALUATION SESSION

a. The parties themselves shall attend the evaluation session unless excused as provided in this section. This requirement reflects the Court's view that one of the principal purposes of the evaluation session is to afford litigants an opportunity to articulate their position and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the relative strengths of the two sides' cases. A party other than a natural person (*e.g.*, a corporation or association) satisfies this attendance requirement if it is represented at the session by a person (other than outside counsel) with authority to enter stipulations (of fact, law, or procedure) and to bind the party to terms of a settlement. A party that is a unit of government need not have present at the session the persons who would be required to approve a settlement before it could become final (*e.g.*, the members of a city counsel or the chief executive of a major agency), but must send to the session a representative, in addition to counsel, who is knowledgeable about the facts of the case and the governmental unit's position. In cases involving insurance carriers, representatives of the insurance companies, with authority, shall attend the evaluation session.

b. Each party shall be accompanied at the evaluation session by the lawyer expected to be primarily responsible for handling the trial of the matter.

c. A party or lawyer will be excused from attending the evaluation session only after a showing that attendance would impose an extraordinary or otherwise unjustifiable hardship. A party or lawyer seeking to be excused must petition the ENE Magistrate Judge, in writing, and provide a copy to the evaluator, no fewer than fifteen (15) calendar days before the date set for the session. Any such petition should be in the form of a letter, shall set forth all considerations that support the request, shall state realistically the amount in controversy in the case, and shall be accompanied by a proposed order. A party or lawyer who is excused from appearing in person at the session shall be available to participate by telephone.

6. PROCEDURE AT THE EVALUATION SESSION

a. The evaluators shall have considerable discretion in structuring the evaluation sessions. The sessions shall proceed informally. Rules of evidence shall not apply. There shall be no formal examination or cross examination of witnesses.

b. In each case the evaluator shall:

(1) permit each party (through counsel or otherwise) to make an oral presentation of its position;

(2) help the parties identify areas of agreement and, where feasible, enter stipulations;

(3) assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain as carefully as possible the reasoning by the evaluator that supports these assessments;

(4) if the parties are interested, help them, through private caucusing or otherwise, explore the possibility of settling the case;

(5) estimate, where feasible, the likelihood of liability and the dollar range of damages;

(6) help the parties devise a plan for sharing the important information and/or conducting the key discovery that will equip them as expeditiously as possible to enter meaningful settlement discussions or to posture the case for disposition by other means; and

(7) determine whether some form of follow-up to the session would contribute to the case development process or to settlement.

7. FOLLOW-UP

At the close of the evaluation session, the evaluator and the parties shall discuss whether it would be beneficial to schedule some kind of follow-up to the session.

The evaluator may order limited forms of follow-up, for example (1) responses to settlement offers or demands, (2) a focused telephone conference, (3) exchanges of letters between counsel addressing specified legal or factual issues, or (4) written or telephonic reports to the evaluator, *e.g.*, describing how discovery or other events occurring after the ENE session have affected a party's analysis of the case or position with respect to settlement. If appropriate, the evaluator may order that written follow-up reports be signed not only by counsel, but also by their clients.

With the parties' consent, the evaluator may schedule a follow-up evaluation or settlement session.

8. CONFIDENTIALITY

This Court and all counsel and parties shall treat as confidential all written and oral communications made in connection with or during any Early Neutral Evaluation session. The Court hereby extends to all such communications all the protections afforded by Federal Rule of Evidence 408 and by Federal Rule of Civil Procedure 68. In addition, no communication made in connection with or during any Early Neutral Evaluation session may be disclosed to anyone not involved in the litigation. Nor may any such communication be used for any purpose (including impeachment) in any pending or future proceeding in this Court. The privileged and confidential status afforded to communications made in connection with any Early Neutral Evaluation session is extended to include not only matters emanating from parties and counsel but also evaluators' comments and assessments, as well as their recommendations about case development, discovery and motions. There shall be no communication about such matters between evaluators and judges of this Court. Nothing in this paragraph shall be construed to prevent parties, counsel, or evaluators from responding, in absolute confidentiality, to inquiries by any person duly authorized by this Court to analyze the utility of the ENE program. Nor shall anything in this paragraph be construed to prohibit parties from entering and filing procedural or factual stipulations based on suggestions or agreements made in connection with an ENE session.

9. LIMITS ON POWERS OF EVALUATORS

a. Within limits imposed by this Order or by individual judicial officers of this Court, evaluators shall have authority to fix the time and place for and to structure evaluation sessions and follow-up events. Evaluators shall have no powers other than those described here and in paragraphs 6 and 7 of this Order. Evaluators shall have no authority to compel parties to conduct or respond to discovery or to file motions. Nor shall evaluators have authority to determine what the issues in any case are, or to impose limits on parties' pretrial activities.

b. Evaluators shall promptly report to the ENE Magistrate Judge violations of this Order, including failures to submit timely Written Evaluation Statements or failures to comply with the attendance requirements set forth in this Order.

10. COMPENSATION OF EVALUATORS

ENE evaluators shall volunteer their preparation time and the first four hours of their time in ENE sessions. After four hours of ENE sessions, the evaluator may either (1) continue to volunteer his or her time or (2) give the parties the option of concluding the procedure or paying the neutral for additional time at an hourly rate of $150. The ENE procedure will continue only if all parties and the evaluator agree.

11. ENFORCEMENT

The ENE Magistrate Judge shall conduct evidentiary hearings, make findings of fact, and recommend conclusions of law with respect to alleged violations of this Order. The Magistrate Judge's reports shall be made to the judge assigned to the case in which the violation(s) allegedly occurred. Objections to the Magistrate Judge's report shall be made in writing within ten days after service of notice that the report has been filed.

12. QUESTIONS ABOUT ENE

Please direct any questions about ENE to the ADR Unit at 415/556-3167.

ADOPTED: May 21, 1985
AMENDED: July 22, 1986
AMENDED: August 12, 1988
AMENDED: January 1, 1990
AMENDED: July 1, 1993

FOR THE COURT

CHIEF JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ORDER APPOINTING MAGISTRATE
TO SUPERVISE ADMINISTRATION OF
EARLY NEUTRAL EVALUATION PROGRAM

The Court hereby appoints Magistrate Wayne D. Brazil to supervise administration of the Early Neutral Evaluation program and authorizes him to exercise the powers set forth in the General Order that establishes that program.

May 21, 1985
Dated

Chief United States District Judge

GENERAL ORDER NO. 36

ADR MULTI-OPTION PILOT PROGRAM

I. PURPOSE

The court adopts an ADR Multi-Option Pilot program (the "ADR Pilot") to offer litigants in certain civil cases a range of court-connected alternative dispute resolution (ADR) processes. These processes are designed to provide quicker, less expensive and potentially more satisfying alternatives to continuing litigation without impairing the quality of justice or the right to trial.

The Northern District of California is one of three federal courts specifically mandated by Congress, under the Civil Justice Reform Act of 1990, to "experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution." 28 U.S.C. §471 Note. The ADR Pilot represents one such experiment through which the court hopes to assess the potential of various ADR processes in different kinds of cases.

II. SUMMARY

In this pilot, litigants in certain cases designated upon the filing of the complaint or notice of removal are presumptively required to participate in one non-binding ADR process offered by the court (Arbitration, Early Neutral Evaluation, Mediation, or Early Settlement Conference with a Magistrate Judge) or may substitute a similar process offered by a private provider. Unless they have stipulated to an ADR process, counsel shall participate in a joint telephone conference with the Director or Deputy Director of the court's Alternative Dispute Resolution (ADR) program to consider the suitability of the ADR options to their case. When litigants have not stipulated to an ADR process before the Case Management Conference (see General Order No. 34), the judge will discuss the ADR options with counsel at that conference. If the parties cannot agree on a process before the end of the Case Management Conference, the judge will select one of the ADR processes offered by the court unless persuaded that no ADR process is likely to deliver benefits to the case sufficient to justify the resources consumed by its use.

III. SCOPE

All civil actions filed in this court on or after July 1, 1993 that are assigned to the following judges and subject to the Case Management Pilot (General Order No. 34), shall be automatically assigned to the ADR Pilot and governed by this General Order (excluded cases are listed in Appendix A):

Chief Judge Thelton E. Henderson
Judge Marilyn Hall Patel
Judge Fern M. Smith
Judge Vaughn R. Walker
Judge Barbara A. Caulfield

IV. RELATIONSHIP TO OTHER COURT RULES

ADR Pilot cases shall remain subject to this court's Local Rules and General Orders (including General Order No. 34 governing the Case Management Pilot), as well as to individual judges' Standing Orders, but the provisions of this General Order shall supersede any conflicting provisions of any such Rules or Orders.

V. SERVICE OF PERTINENT DOCUMENTS

Upon the filing of a complaint or notice of removal, the Clerk shall give the filing party an Order re Court Procedures indicating whether the case has been assigned to the ADR Pilot and specifying, among other dates, a date and time for an ADR Telephone Conference; a copy of this General Order; a Notice re ADR Multi-Option Pilot; the brochure entitled *Dispute Resolution Procedures in the Northern District of California*; and such other materials as required by the Court. The filing party shall serve these documents on all other parties with the complaint or notice of removal and other papers required to be served.

Any party who, after the filing of the original complaint and before the initial Case Management Conference, causes a new party to be joined in the action, shall promptly serve on that new party a copy of the items described in the preceding paragraph.

A party required under this Order to serve documents on another party shall file proof of service promptly after effecting service.

VI. ADR OPTIONS

All litigants whose cases are assigned to the ADR Pilot are presumptively required to select one of the following court ADR programs in which to participate:

- ***Arbitration (non-binding or binding)***
- ***Early Neutral Evaluation (ENE)***
- ***Mediation***
- ***Early Settlement Conference with a Magistrate Judge (subject to availability)***

These programs are described in the brochure *Dispute Resolution Procedures in the Northern District of California*. Arbitration is governed by Local Rule 500, ENE by General Order No. 26 and Mediation by General Order No. 37. The brochure, Rule and General Orders are available in the court clerk's office.

A private ADR procedure (such as arbitration, ENE or mediation) conducted within the time frames set forth in Section VII.D. may be substituted for a court program if the parties so stipulate and the assigned judge approves.

VII. PROCEDURE FOR SELECTING AND PARTICIPATING IN ADR PROCESS

A. Stipulation

As soon as feasible after filing or removal, counsel shall confer to attempt to agree on an ADR process. If counsel agree on an ADR process, they shall file, as soon as feasible, a Stipulation and Order Selecting ADR Process in the form attached as Appendix B to this General Order. The parties also shall specify which information, if any, will be disclosed or discovered before the ADR process begins.

If the parties file a stipulation selecting an ADR procedure before the date set for the ADR Telephone Conference (see ¶ B, below), the Telephone Conference shall not take place. Parties who stipulate to a procedure after the Telephone Conference may do so in their Case Management Statement.

B. ADR Telephone Conference

On the Order re Court Procedures distributed by the clerk upon the filing of the complaint or notice of removal, the clerk shall specify a time and date, 95 to 105 days after filing, for a joint ADR Telephone Conference. During the phone conference, the ADR Director or Deputy Director will discuss with counsel the suitability of the ADR options for their particular case.

The court will notify the parties of the procedures for the ADR Telephone Conference. The attorney expected to be primarily responsible for handling the trial of the matter shall participate in the ADR conference. Clients and their insurance carriers are strongly encouraged to participate as well. Counsel may request an in-person ADR conference at the court in lieu of the telephone conference by calling the ADR Unit at 415/556-3167.

C. Case Management Conference

If the parties do not stipulate to an ADR option before the Case Management Conference, the judge shall discuss with the parties the selection of an option at that Conference. The ADR Director or Deputy Director may consult with the judge before the Case Management Conference and may recommend a specific ADR option for that case.

If the parties agree to a particular ADR option at the Case Management Conference and the judge approves, the judge will issue an order referring the case to that program. If the parties do not agree on an ADR program, and the judge deems it appropriate, he or she will select one of the court ADR programs (either Non-binding Arbitration, ENE, Mediation or an Early Settlement Conference with a Magistrate Judge) and issue an order referring the case to that program.

If the parties persuade the judge that no ADR process is likely to deliver benefits to the case sufficient to justify the resources consumed by its use, the judge will exempt their case from the Pilot.

D. Timing of ADR Process

Unless otherwise ordered, Arbitrations shall be conducted within 135 days after the Case Management Conference and Early Neutral Evaluation or mediation sessions shall be conducted within 90 days after the date for which the first Case Management Conference was initially set.

E. Certification of Completion

The arbitrator(s) shall file an award upon completion of a court-connected arbitration. Upon completion of a court-connected ENE session, mediation session, or a Magistrate Judge Settlement Conference, the neutral or Magistrate Judge shall file a Certification in the form provided by the court certifying that the process was completed. When a private ADR program is substituted for a court process, the parties shall file the Certification.

F. Selection of Neutrals in Court ADR Programs

Parties shall select arbitrators in accordance with LR 500. The ADR Directors will assign ENE evaluators and mediators to cases from the court's rosters of trained neutrals for each of these two programs. While parties may indicate a preference for a particular Magistrate Judge for an Early Settlement Conference, the court will select the Magistrate Judge based on availability.

G. **Payment of Neutrals**

1. **Arbitrators**

Arbitrators are paid by the court through funds authorized pursuant to 28 U.S.C. §657. Arbitrators who serve alone are paid $250 per day of hearing or portion thereof and members of three-arbitrator panels are paid $150 per day or portion thereof.

2. **ENE Evaluators and Mediators**

ENE evaluators and mediators shall volunteer their preparation time and the first four hours of their time in ADR sessions. After four hours, the neutral may either (1) continue to volunteer his or her time or (2) give the parties the option of concluding the procedure or paying the neutral for additional time at an hourly rate of $150. The procedure will continue only if all parties and the neutral agree.

All terms and conditions of payment must be clearly communicated to the parties. The parties may agree to pay the fee in other than equal portions. The parties shall pay the neutral directly. At the conclusion of the ADR process, the neutral shall promptly report to the court the amount of any payment received.

VIII. QUESTIONS ABOUT PILOT

Parties may direct questions about ADR options, the ADR Telephone Conference or the operation of the ADR Pilot to the court's ADR Unit at 415/ 556-3167. Any request for continuance of the ADR Telephone Conference must be made in the first instance to the ADR Director and not to the assigned judge.

IX. REQUESTS FOR RELIEF

To seek relief from any obligation imposed by this Order or an ADR order, including an extension of the deadline for conducting the ADR session, a party shall submit a letter to the ADR Director, for transmittal to the assigned judge, detailing the considerations that support the request and indicating whether the other party or parties join or object to it. Such letter requests shall be accompanied by a proposed order setting forth the date by which the party shall meet the obligation in question. Such requests will be granted only after a showing of extraordinary circumstances.

X. EVALUATION

Congress has mandated that the court's ADR programs be evaluated. Neutrals, attorneys and clients shall promptly respond to any inquiries or questionnaires from persons authorized by the court to evaluate the programs. Questionnaire responses will be used for research and monitoring purposes only and the sources of specific information will not be disclosed to the assigned judge or in any report.

ADOPTED: July 1, 1993

FOR THE COURT

CHIEF JUDGE

APPENDIX A

CATEGORIES OF CASES EXCLUDED FROM PILOT

The following types of cases, based on information set forth on the Civil Cover Sheet, are excluded from this General Order: class actions, multidistrict litigation, transferred cases, cases filed by pro se plaintiffs, cases remanded from appellate court, reinstated and reopened cases, and cases in the following nature of suit categories: Prisoner Petitions (510 - 550) Forfeiture/Penalty (610 - 690), Bankruptcy (422 - 423), Social Security (861 - 865), Contracts (only nos. 150 (Recovery of Overpayment and Enforcement of Judgment), 151 (Medicare Act), 152 (Recovery of Defaulted Student Loans), and 153 (Recovery of Overpayment of Veteran's Benefits)), Civil Rights (only no. 441 (Voting)), and other Statutes (only nos. 400 (State Reapportionment), 460 (Deportation), 810 (Selective Service), 875 (Customer Challenge 12 USC 3410), 892 (Economic Stabilization Act), 894 (Energy Allocation Act), 895 (Freedom of Information Act) and 900 (Appeal of Fee Determination Under Equal Access to Justice)).

MEDPI\GO36

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Plaintiff,	CASE NO. CV
v.	STIPULATION AND ORDER SELECTING ADR PROCESS
Defendant.	

I. ADR PROCESS

The parties hereby stipulate to participate in the ADR process checked below (*select one court-connected or private process*).

Court-connected ADR processes:

- ☐ Arbitration
  - ☐ Non-binding
  - ☐ Binding
- ☐ Early Neutral Evaluation (ENE)
- ☐ Early Settlement Conference with a Magistrate Judge
- ☐ Mediation

Private ADR process:

- ☐ Type of Process: _____

Name, address and phone number of private provider:

_____

_____

_____

II. **TIMING FOR ADR PROCESS**

☐ **Cases in ENE or Mediation (or similar private process):**

The parties shall conduct the ADR session by _____ *(no later than 90 days after the date set for the first Case Management Conference unless otherwise ordered under General Order 36, § VII.D.)*

☐ **Cases in Arbitration (court-connected or private):**

The parties shall conduct the Arbitration by _____ *(no later than 135 days after the date set for the first Case Management Conference unless otherwise ordered – the clerk will send the parties a list of arbitrators for ranking within 10 days after the Case Management Conference.)*

III. **OTHER STIPULATIONS** (*e.g.* regarding additional disclosures and/or discovery before the ADR session, issues to be addressed in ADR session, etc.)

Dated:

_____
Plaintiff

Dated:

_____
Defendant

IT IS SO ORDERED.

Dated:

_____
United States District Judge

GENERAL ORDER NO. 37

MEDIATION

I. PURPOSE

The court adopts a mediation program to broaden the range of alternative dispute resolution (ADR) processes that the court makes available to litigants. The mediation process is designed to provide a quicker, less expensive and potentially more satisfying alternative to continuing litigation without impairing the quality of justice or the right to trial.

The Northern District of California is one of three federal courts specifically mandated by Congress, under the Civil Justice Reform Act of 1990, to "experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution." 28 U.S.C. §471 Note. The mediation program is one part of the court's response to this mandate.

II. DESCRIPTION OF MEDIATION

Mediation is a non-binding, confidential process in which a neutral attorney-mediator helps counsel and their clients explore settlement alternatives. The mediator has been specially trained by the court, is experienced in communication and negotiation techniques, and is knowledgeable about federal litigation. The mediator works with the parties and their counsel to improve communication across party lines, helps parties clarify their understanding of their own and their opponent's interests, probes the strengths and weaknesses of each party's legal positions, identifies areas of agreement and generates options for a mutually agreeable resolution to the dispute. The mediator generally does not give an overall evaluation of the case.

III. ELIGIBLE CASES

Cases assigned to the ADR Multi-Option Pilot (under General Order No. 36) are eligible for the mediation program. The court will make mediation available to litigants in other civil cases filed on or after July 1, 1993 who stipulate to participate in the program if appropriate resources are available.

IV. MEDIATORS

A. Assignment

After entry of an ADR order (pursuant to General Order No. 36) or other court order in which mediation is selected, the ADR Directors shall appoint a mediator from the court's roster of qualified mediators and shall notify the parties of the appointment.

B. Qualifications

Mediators on the court's roster shall have strong mediation process skills and familiarity with civil litigation in federal court. Each mediator must have been admitted to the practice of law for at least seven years and be a member of the bar of this court or of the faculty of an accredited law school. The court may modify these requirements in individual cases for good cause.

C. Conflicts of Interest

No mediator may serve in violation of the standards set forth in 28 U.S.C. §455. If a circumstance covered by subparagraph (a) of that section might exist such that the mediator's impartiality might reasonably be questioned, the mediator shall promptly disclose that circumstance to all counsel in writing. A party who believes that the assigned mediator has a conflict of interest shall bring this concern to the attention of the ADR Director, in writing, within 10 calendar days of learning the source of the potential conflict or shall be deemed to have waived objection. Further guidance regarding the rules governing conflicts appears in the memorandum entitled *Conflicts of Interest* provided to mediators and available from the court's ADR unit.

V. SCHEDULING THE MEDIATION

Promptly after being appointed to a case, the mediator shall fix the specific date and place of the mediation session within the time frame set by the ADR order.

VI. WRITTEN MEDIATION STATEMENTS / CONTACT WITH MEDIATOR

No later than 10 calendar days before the first mediation session, each party shall submit directly to the mediator, and shall serve on all other parties, a written Mediation Statement. The statements shall **not be filed** with the court and the assigned judge shall not have access to them. The statements shall not exceed 10 pages (not counting exhibits and attachments) and shall:

- identify the person(s) with decision-making authority, who, in addition to counsel, will attend the mediation as representative(s) of the party,
- describe briefly the substance of the suit, addressing the party's views on the key liability issues and damages,
- identify persons connected to a party opponent (including an insurer's representative) whose presence might substantially improve the prospects for settlement, or the utility of the mediation,

- contain the status of any settlement negotiations and any other information that might be useful to the mediator, and

- include copies of documents likely to make the mediation more useful or productive or materially advance settlement prospects.

The mediator may request that the parties submit an additional confidential written statement or may discuss the case in confidence with an attorney during a telephone conversation. The mediator shall not disclose any party's confidential communication without permission.

VII. ATTENDANCE AT SESSION

A. Clients

The **parties themselves** shall attend the mediation unless excused as provided in paragraph C, below. A party other than a natural person (*e.g.*, a corporation or an association) satisfies this attendance requirement if represented by a person (other than outside counsel) with full authority to settle and knowledgeable about the facts of the case.

In cases involving insurance carriers, representatives of the insurance companies, with full authority to settle, shall attend the mediation. A party that is a governmental unit shall send a representative, in addition to counsel, knowledgeable about the facts of the case and the governmental unit's position.

B. Attorneys

Each party shall be accompanied at the mediation by the attorney expected to be primarily responsible for handling the trial of the matter.

C. Requests to be Excused

A party or lawyer will be excused from personally attending the mediation only after a showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A party or attorney seeking to be excused shall submit a letter to the ADR Director, for transmittal to the assigned judge, and provide a copy to the mediator, no fewer than 15 calendar days before the date set for the session. The letter shall set forth all considerations that support the request, state realistically the amount in controversy in the case, and indicate whether the other party or parties join or object to the request. The letter shall be accompanied by a proposed order. A party or attorney excused from appearing in person at the session shall be available to participate by telephone.

VIII. PROCEDURE AT THE MEDIATION

The mediations shall be informal. Within guidelines fixed by the court, mediators shall have discretion to structure the mediation so as to maximize prospects for settling all or part of the case. The mediator may hold separate, private caucuses with any party or counsel but may not, without the consent of that party or counsel, disclose the contents of that discussion to any other party or counsel.

IX. FOLLOW UP

At the close of the mediation session, the mediator and the parties shall jointly determine whether it would be appropriate to schedule follow up. Such follow up could include, but need not be limited to, written or telephonic reports that the parties might make to one another or to the mediator, exchange of specified kinds of information, and/or another mediation session.

Within 10 days of the close of each mediation session and on the form provided by the court, the mediator shall report to the ADR Director whether the mediation resulted in full or partial settlement and whether any follow up was set.

X. CONFIDENTIALITY

This court, the mediator, all counsel and parties shall treat as confidential all written and oral communications made in connection with or during any mediation session. The court hereby extends to all such communications all the protections afforded by Federal Rule of Evidence 408 and by Federal Rule of Civil Procedure 68.

No written or oral communication made by any party, attorney, mediator or other participant in connection with or during any mediation may be disclosed to anyone not involved in the litigation. Nor may such communication be used for any purpose (including impeachment) in any pending or future proceeding in this court. Such communication may be disclosed, however, if all participants in the mediation, including the mediator, so agree.

None of the substance of any mediation may be communicated by anyone to the assigned judge.

Nothing in this section shall be construed to prevent parties, counsel or mediators from responding, in absolute confidentiality, to inquiries or surveys by persons authorized by this court to evaluate the mediation program. Nor shall anything in this section be construed to prohibit parties from entering into written agreements resolving some or all of the case or entering and filing procedural or factual stipulations based on suggestions or agreements made in connection with a mediation session.

XI. COMPENSATION OF MEDIATORS

Mediators shall volunteer their preparation time and the first four hours of their time in the mediation. After four hours of mediation, the mediator may either (1) continue to volunteer his or her time or (2) give the parties the option of concluding the procedure or paying the mediator for additional time at an hourly rate of $150. The procedure will continue only if all parties and the mediator agree. (See General Order 36, § VII.F.2)

All terms and conditions of payment must be clearly communicated to the parties. The parties may agree to pay the fee in other than equal portions. The parties shall pay the mediator directly. The mediator shall promptly report to the court the amount of any payment received.

XII. ENFORCEMENT

Mediators shall promptly report any violation of this order to the ADR Director for transmittal to the assigned judge, including failure to submit timely written Mediation Statements or failure to comply with the attendance requirements of this Order.

XIII. EVALUATION

Congress has mandated that the court's ADR programs be evaluated. Neutrals, attorneys and clients shall promptly respond to any inquiries or questionnaires from persons authorized by the court to evaluate the programs. Questionnaire responses will be used for research and monitoring purposes only and the sources of specific information will not be disclosed to the assigned judge or in any report.

ADOPTED: July 1, 1993

FOR THE COURT

CHIEF JUDGE

MEDPI\GO37

☆U.S. GOVERNMENT PRINTING OFFICE: 1993 - 786-471/99144

GENERAL ORDER NO. 35

CERTIFICATION OF DISCUSSION OF ADR OPTIONS

I. PURPOSE

It is the policy of this court to help litigants resolve their civil disputes in a just, timely and cost-effective manner. To that end, the court makes available to the parties in civil litigation several dispute resolution services described in the brochure entitled *Dispute Resolution Procedures in the Northern District of California*. The court encourages attorneys and clients to call its ADR Program Director or Deputy Director at (415) 556-3167 to discuss the various options and their suitability for particular types of cases.

II. SERVICE

When serving a Complaint or Notice of Removal, the filing party shall serve on all other parties a copy of this General Order and the brochure entitled *Dispute Resolution Procedures in the Northern District of California*.

III. CERTIFICATION

Within 110 days after the filing of a Complaint or Notice of Removal, or within 30 days after being served, whichever is later, in all civil cases except those exempted below, each party shall file and serve on all other parties, a *Certification of Discussion of ADR Options*, in the form attached to this General Order as Appendix A, signed by ***both*** client and counsel, certifying that they have:

(1) read the brochure entitled *Dispute Resolution Procedures in the Northern District of California*;

(2) discussed the available court and private dispute resolution options; and

(3) considered whether their case might benefit from any of them.

IV. SCOPE

This order applies to all civil cases filed in this court on or after July 1, 1993 ***except***: class actions, multidistrict litigation, transferred cases, cases filed by pro se plaintiffs, cases remanded from appellate court, reinstated and reopened cases, and cases in the following nature of suit categories indicated on the civil cover sheet: Prisoner Petitions (510 - 550) Forfeiture/Penalty (610 - 690), Bankruptcy (422 - 423), Social Security (861 - 865), Contracts (only nos. 150 (Recovery of Overpayment and Enforcement of Judgment), 151 (Medicare Act), 152 (Recovery of Defaulted Student Loans), and 153 (Recovery of Overpayment of Veteran's Benefits)), Civil Rights (only no. 441 (Voting)), and other Statutes (only nos. 400

(State Reapportionment), 460 (Deportation), 810 (Selective Service), 875 (Customer Challenge 12 USC 3410), 892 (Economic Stabilization Act), 894 (Energy Allocation Act), 895 (Freedom of Information Act) and 900 (Appeal of Fee Determination Under Equal Access to Justice)).

ADOPTED: July 1, 1993

FOR THE COURT

CHIEF JUDGE

MEDPI\GO35

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Plaintiff,	CASE NO. CV
v.	CERTIFICATION OF DISCUSSION OF ADR OPTIONS
Defendant.	

Instructions: Pursuant to General Order 35, within 110 days after the filing of the Complaint or Notice of Removal, counsel and client shall sign this Certification, file it with the court and serve it on all other parties.

ADR options are explained in the brochure entitled "Dispute Resolution Procedures in the Northern District of California." The court encourages attorneys and clients to call its ADR Program Director or Deputy Director at (415) 556-3167 to discuss the various options and their suitability for particular types of cases.

We hereby certify that we have (1) read the brochure entitled "Dispute Resolution Procedures in the Northern District of California," (2) discussed the available court and private dispute resolution options and (3) considered whether this case might benefit from any of them.

Client: _____ Date: _____

Attorney: _____ Date: _____

Party: _____
Plaintiff / Defendant

CHAPTER V--ARBITRATION

RULE 500

MANDATORY ARBITRATION

500-1. Scope and Effectiveness of Rule.

This Rule governs the mandatory referral of certain actions to court-annexed arbitration. It shall remain in effect until further order of the court. Its purpose is to establish a less formal procedure for the just, efficient and economical resolution of controversies involving moderate amounts of money damages while preserving the right to a full trial.

500-2. Actions Subject to this Rule.

(a) Categories of Actions. All civil actions falling within any of the following categories shall be subject to this Rule, except as otherwise provided:

(i) Actions in which the United States is not a party which--

(A) Seek relief limited to money damages not exceeding $150,000, exclusive of any punitive or exemplary award that might be entered and of interest and costs; and

(B) Are founded on diversity of citizenship (28 U.S.C. § 1332), federal question (28 U.S.C. § 1331) or admiralty or maritime jurisdiction (28 U.S.C. § 1333) and arise under a contract or written instrument, or out of personal injury or property damage.

(ii) Actions in which the United States is a party which--

(A) Seek relief limited to money damages not exceeding $150,000, exclusive of

interest and costs, and which arise under the Federal Tort Claims Act or the Longshoremen's and Harbor Workers Act (33 U.S.C. § 901 et. seq.), or under the suits in Admiralty Act (46 U.S.C. § 741 et seq., § 781 et seq.) and involve no general average, or

(B) Arise under the Miller Act (40 U.S.C. § 270b), with the United States having no monetary interest in the claim, and seek relief limited to money damages not exceeding $150,000, exclusive of any punitive or exemplary award that might be entered and of interest and costs.

(b) Determination of Monetary Claim.

(i) In all civil cases that otherwise are subject to compulsory non-binding arbitration under this Rule, the court shall presume that damages are not in excess of $150,000, exclusive of any punitive or exemplary award that might be entered and of interest and costs, unless --

(A) Counsel for plaintiff, at the time of filing the complaint, or in the event of the removal of a case from state court or transfer of a case from another district to this court, within 30 days of the docketing of the case in this district, files a certification with the court that the damages sought exceed $150,000, exclusive of any punitive or exemplary award that might be entered and of interest and costs; or

(B) Counsel for a defendant, at the time of filing a counterclaim or cross-claim, files a certification with the court that the damages sought by the counterclaim or cross-claim exceed $150,000, exclusive of any punitive or exemplary award that might be entered and of interest and costs.

(ii) In cases where a certification has been filed in conformity with subparagraph (i), above, the assigned judge, acting sua sponte or in response to a motion, may make a determination,

after consulting with the parties, that despite the certification the amount in controversy cannot reasonably be said to exceed $150,000. After making such a determination, the assigned judge may order the case designated for arbitration, provided the other criteria fixing the jurisdiction of the mandatory arbitration program are satisfied.

500-3. Referral to Arbitration.

(a) Time for Referral. Every action subject to this Rule shall be referred to arbitration by the clerk in accordance with the procedures under this Rule upon the filing of the last responsive pleading. If any party notices a motion to dismiss or for summary judgment or similar relief, the motion shall be heard by the assigned judge.

(b) Authority of Assigned Judge. Notwithstanding any provision of this Rule, every action subject to this Rule shall be assigned to a judge upon filing in the normal course in accordance with the court's assignment plan, and the assigned judge shall have authority, in his discretion, to conduct status and settlement conferences, hear motions and in all other respects supervise the action in accordance with these Rules notwithstanding its referral to arbitration.

(c) Relief from Referral. At any time prior to the expiration of the twenty-day period following the filing of the last responsive pleading, any party may move for relief from the operation of this Rule by demonstrating that the case involves novel or complex legal issues or significant and complex factual issues, that legal issues predominate over factual issues, or other grounds for finding good cause. Such motion shall conform to Rule 220 and shall be supported by a memorandum and, if appropriate, declarations showing good cause. If, after such a showing or sua sponte, the assigned judge concludes that compelling the action to comply with this Rule would not achieve the objectives of arbitration, the judge shall exempt the action from application of this Rule.

500-4. Selection and Compensation of Arbitrators.

(a) Selection of Arbitrators. The clerk shall maintain a roster of arbitrators who shall hear and determine actions under this Rule. Arbitrators shall be selected from time to time by the court from applications submitted by or on behalf of attorneys willing to serve. To be eligible for selection by the court an attorney (1) must have been admitted to practice for not less than ten years, (2) must be a member of the bar of this court, and (3) must either (i) have committed for not less than five years 50% or more of his professional time to matters involving litigation, or (ii) have had substantial experience serving as a "neutral" in dispute resolution proceedings, or (iii) have had substantial experience negotiating consensual resolutions to complex problems. Each person shall upon selection take the oath or affirmation prescribed in 28 U.S.C. § 453 and shall complete the training required by the court.

Whenever an action is referred to arbitration pursuant to this Rule, the clerk shall forthwith furnish to each party a list of ten arbitrators whose names shall have been drawn at random from the roster of arbitrators maintained in the clerk's office. The parties shall then confer for the purpose of selecting a single arbitrator or, if both parties so request in writing, a panel of three arbitrators in the following manner:

(i) Each side shall be entitled to strike two names from the list, plaintiff(s) to strike the first name, defendant(s) the next, then plaintiff(s) and then defendant(s);

(ii) The parties shall then select the panel from the remaining six names by alternating selecting one name, defendant(s) to make the first choice, plaintiff(s) the next, and continuing in this fashion.

(iii) At the conclusion of this process, the parties shall list the six names in the order selected and submit them to the clerk within ten days of receipt by them of the original list of ten names. In the event the parties fail to submit such a list within the time provided, the

clerk shall make the selection of arbitrators at random from the original list of ten names;

(iv) The clerk shall promptly notify the person or persons whose names appear as the first choice or choices of the parties of their selection, or, if no choices have been made, the persons he has selected. If any person so selected is unable or unwilling to serve, the clerk shall notify the person whose name appears next on the list. If the clerk is unable to select an arbitrator or constitute a panel of arbitrators from the six selections, the process of selection under this Rule shall begin anew. When the requisite number of arbitrators has agreed to serve, the clerk shall promptly send written notice of the selections to each arbitrator and to the parties.

(b) Disqualification. No person shall serve as an arbitrator in an action in which any of the circumstances specified in 28 U.S.C. § 455 exist or may in good faith be believed to exist.

(c) Withdrawal by Arbitrator. Any person whose name appears on the roster maintained in the clerk's office may ask at any time to have his name removed or, if selected to serve on a panel, decline to serve but remain on the roster.

(d) Compensation and Reimbursement. Arbitrators shall be paid $250 per day or portion of each day of hearing in which they participate serving as a single arbitrator or $150 for each day or portion of a day if serving as a member of a panel of three. At the time when the arbitrators file their decision, each shall submit a voucher on the form prescribed by the clerk for payment by the Administrative Office of the United States Courts of compensation and out-of-pocket expenses necessarily incurred in the performance of the duties under this Rule. No reimbursement will be made for the cost of office or other space for the hearing.

500-5. Hearings.

(a) Hearing Date. The clerk shall set a date for hearing not less than 20 nor more than 120 days

after the clerk has been informed of the parties' ranking in accordance with Rule 500-4(a) (or of the clerk's random selection in accordance with Rule 500-4(a)(iii)). This date shall not be continued except for extreme and unanticipated emergencies as established in writing and approved by the judge assigned to the case. However, unless the parties consent, or unless the assigned judge orders otherwise for good cause, no arbitration hearing may commence until 30 days after disposition by the court of any motion to dismiss the complaint, motion for judgment on the pleadings, motion to join necessary parties, or motion for summary judgment, provided such motion was filed and served within 30 days after the filing of the last responsive pleading. Discovery shall terminate 20 days prior to the hearing.

(b) Default of Party. Subject to the provisions of subparagraph (a) above, the hearing shall proceed on the noticed date. Absence of a party shall not be a ground for continuance but damages shall be awarded against an absent party only upon presentation of proof thereof satisfactory to the arbitrators.

(c) Conduct of Hearing. The arbitrator is authorized to administer oaths and affirmations and all testimony shall be given under oath or affirmation. Each party shall have the right to cross-examine witnesses except as herein provided. In receiving evidence, the arbitrator shall be guided by the Federal Rules of Evidence, but shall not thereby be precluded from receiving evidence which he considers to be relevant and trustworthy and which is not privileged. A party desiring to offer a document otherwise subject to hearsay objections at the hearing may serve a copy on the adverse party not less than ten days in advance of the hearing indicating his intention to offer it as an exhibit. Unless the adverse party gives written notice in advance of the hearing of intent to cross-examine the author of the document, any hearsay objection to the document shall be deemed waived. Attendance of witnesses and production of documents may be compelled in accordance with Rule 45, Federal Rules of Civil Procedure.

(d) Transcript or Recording. A party may cause a transcript or recording to be made of the

proceedings at its expense but shall, at the request of the opposing party, make a copy available to the party at no charge, unless the parties have otherwise agreed. Except as provided in Rule 500-7(b), no transcript of the proceedings shall be admissible in evidence at any subsequent de novo trial of the action.

(e) Place of Hearing. Hearings shall be held at any location within the Northern District of California designated by the arbitrators. Hearings may be held in any courtroom or other room in any federal courthouse or office building made available to the arbitrators by the clerk's office. When no such room is available, the hearing shall be held at any suitable location selected by the arbitrator. In making the selection, the arbitrator shall consider the convenience of the panel, the parties and the witnesses.

(f) Time of Hearing. Unless the parties agree otherwise, hearings shall be held during normal business hours.

(g) Authority of Arbitrator. The arbitrator shall be authorized to make reasonable rules and issue orders necessary for the fair and efficient conduct of the hearing before him. Any two members of a panel shall constitute a quorum, but (unless the parties stipulate otherwise) the concurrence of a majority of the entire panel shall be required for any action or decision by the panel.

(h) Ex Parte Communication. There shall be no ex parte communication between an arbitrator and any counsel or party on any matter touching the action except for purposes of scheduling or continuing the hearing.

500-6. Award and Judgment.

(a) Filing of Award. The arbitrator shall file the award with the clerk's office promptly following the close of the hearing and in any event not more than ten days following the close of the hearing. As soon as the award is filed, the clerk shall serve copies on the parties. In addition, immediately after receiving a copy of the arbitration award, the party

that prevailed in the arbitration shall serve a copy of the award on the other parties and shall promptly file proof of said service.

(b) Form of Award. The award shall state clearly and concisely the name or names of the prevailing party or parties and the party or parties against which it is rendered, and the precise amount of money and other relief if any awarded. It shall be in writing and (unless the parties stipulate otherwise) be signed by the arbitrator or by at least two members of a panel. No member shall participate in the award without having attended the hearing. Costs within the meaning of Rule 265-1 of these Rules may be assessed as part of an arbitration award.

(c) Entry of Judgment on Award. Unless a party has filed a demand for trial de novo (or a notice of appeal, which shall be treated as a demand for trial de novo) within 30 days of notice of the filing of the arbitration award, the clerk shall enter judgment on the arbitration award in accordance with Rule 58, Federal Rule of Civil Procedure. A judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise.

(d) Sealing of Arbitration Awards. The contents of any arbitration award made under this chapter shall not be made known to any judicial officer who might be assigned to preside at the trial of the case or to rule on potentially case dispositive motions--

(i) until the district court has entered final judgment in the action or the action has been otherwise terminated, or

(ii) except for purposes of preparing the report required by section 903(b) of the Judicial Improvements and Access to Justice Act.

500-7. Trial De Novo.

(a) Time for Demand. If either party files and serves a written demand for a trial de novo within

30 days of entry of judgment on the award, that judgment shall immediately be vacated by the clerk and the action shall proceed in the normal manner before the assigned judge.

(b) Limitation on Admission of Evidence. The court shall not admit at the trial de novo any evidence that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless--

(i) the evidence would otherwise be admissible in the court under the Federal Rules of Evidence, or

(ii) the parties have otherwise stipulated.

500-8. Voluntary Submission to Arbitration under this Rule.

The parties to any civil action in this court, regardless of the amount in controversy or the nature of the relief sought, may jointly request that their case be designated for arbitration under this Local Rule. Such a request shall be presented in writing to the assigned judge and shall be signed by every party and, if represented by counsel, by its lawyer. In any such request the parties shall expressly acknowledge that they are freely and voluntarily asking that their case be designated for the arbitration program under Rule 500, that the court is in no sense pressuring them to make this request, and that they understand that any party or lawyer who is asked by others to sign any such request, but who declines, shall suffer absolutely no prejudice as a result of that declination. The assigned judge shall have full discretion to decide whether to grant or deny any such joint request. A case designated for arbitration by the assigned judge in response to a request made under this paragraph shall proceed under the same rules and procedures that apply under this Rule to cases that are mandatorily subject to this Rule.

Preliminary Study

of the

Case Management Pilot Program

in the

District Court for the Northern District of California

Appendix A to the Annual Assessment
of the
Civil and Criminal Dockets
and of the
Civil Justice Expense and Delay Reduction Plan

October , 1993

This study of the court's Case Management Pilot Program is part of the Annual Assessment of the District Court for the Northern District of California prepared in compliance with the Civil Justice Reform Act of 1990, 28 USC §475, which requires each court that has adopted a Civil Justice Expense and Delay Reduction Plan to "assess annually the condition of the court's civil and criminal dockets with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation practices of the court."

EXECUTIVE SUMMARY

Key Preliminary Findings about the Case Management Pilot Program

- Substantial compliance
- Net positive effect in middle range of cases
- Net effect not clearly positive in some other kinds of cases
- Widespread endorsement of meet and confer requirement
- Substantial disaffection with presumptive stay on discovery
- Early preliminary statistical analysis inconclusive

Precautionary Statement

This report is based largely on in-depth interviews of 25 lawyers who appeared in cases subject to the Case Management Pilot Program rules, a preliminary statistical analysis of docket entries, review of Case Management Statements filed in Pilot Program cases, and, to a lesser extent, observation of Case Management Conferences and informal conversations with lawyers and court personnel.

When considering the data reported here it is essential to bear in mind **the early stage at which the program is being observed.** Although the court and others are eager to measure the effects of the Pilot Program, it is difficult to accurately measure results of the program within one year of implementation.

Cases in the Pilot Program sample in this study were filed in only the first five months after the effective date of GO34. Thus, all the cases in the sample were relatively young,

ranging in age from 1 day to no more than 11 months. Moreover, some lag time beyond this early period can be expected before the "true" program effects can be observed, because (1) the most costly and delay-prone cases commonly last longer than 11 months, (2) judges and their staffs must adjust their work practices and (3) attorneys must accustom themselves to new procedural requirements. Since this first evaluation draws its experimental sample entirely from what might be considered a "settling" period for the Pilot Program, the results should be considered as tentative indications of trends, rather than as concrete conclusions about the program's true effects. Studying the program in future years will yield more useful and reliable information about its impacts.

Results of Attorney Interviews

A preliminary survey conducted by telephone of 12 plaintiffs' and 13 defendants' attorneys with experience under the Case Management Pilot Program suggests that the Pilot Program has had a net positive effect on some cases subject to it. **The Pilot Program appears to be most beneficial for the middle range of cases filed in this court.** These moderate or "mainstream" cases are cases that remain on the court's docket long enough for the requirements of the Pilot Program to be meaningful, that need some discovery before they can be resolved, that require resolution of substantial factual matters, and that are not truly complex cases.

Over half of the attorneys involved in such mainstream cases thought that the Pilot Program was an improvement over earlier practices in this court. Several other attorneys who were involved in these same mainstream kinds of cases thought the net effect of the Pilot Program was mixed. These attorneys thought that the Pilot Program was an improvement over earlier practices in the court except for the presumptive requirement that discovery be stayed pending the Case Management Conference. Some of the positive effects mentioned by attorneys were: the Pilot Program controls initial discovery, gets rid of run of the mill discovery disputes, streamlines issues, encourages parties to focus discovery on issues that are central to the case, makes parties think and plan ahead, and forces parties to look at the whole case and investigate early.

There was no identifiable difference between plaintiffs' attorneys opinions and defendants' attorneys opinions. Indeed, there was a remarkable symmetry between the opinions of the attorneys involved in the same case.

The survey also suggests that there are groups of cases on the court's docket for which it is not clear that the Pilot Program has had a net positive effect. They include cases that can be resolved very early in the pretrial period because (1) they self-resolve without much, if any, judicial intervention, (2) their resolution depends on an issue of law that can be decided relatively soon after filing without much discovery or (3) they will be removed from the docket through rulings on jurisdiction or venue. The effect of the Pilot Program also is not clear in cases whose principal objective is emergency equitable intervention and truly complex cases.

The observation that the Pilot Program has been useful to some types of cases but may not have a net positive effect in others must be coupled with another set of comments made by the attorneys interviewed. Contrary to what the court expected, we have some reason to believe that an appreciable number of attorneys seem reluctant to request that the Pilot Program be modified to better fit the needs of an individual case. Some such attorneys do not want to be perceived as trying to escape compliance with the Pilot Program. In addition, some cases for which the Pilot Program is not appropriate are so small that the cost that would be incurred to request the modification cannot be justified. One of the goals of the court in the next years of the Pilot Program should be to determine ways to identify, as early as possible (perhaps even by criteria applied when the complaint is filed), those mainstream cases that the Pilot Program is most clearly likely to benefit.

Attorneys also were surveyed about the effects of specific provisions of the Pilot Program. **Attorneys mentioned the meet and confer requirement, the disclosure requirement, and the Case Management Conference, in order of frequency, as the most valuable aspects of the Pilot Program.**

An overwhelming majority of the attorneys interviewed who had completed the Case Management Statement thought that enough was accomplished by the meet and confer process and preparation of the Case Management Statement to justify the resources the parties committed to them. Attorneys gained a better understanding of their opponents' views of the case, discussed alternative dispute resolution, developed a motion practice plan, and planned discovery. Attorneys also mentioned that they were able to discuss a road map for the case or agree to limit discovery temporarily to the threshold issue in the case.

Of the 25 attorneys interviewed, more (9) thought that the disclosure requirements had a net positive effect in their

cases than (5) thought the disclosure requirement had a net negative effect. Some attorneys thought that they obtained useful information earlier through disclosure than they would have through traditional discovery. Several attorneys responded that disclosure did obviate the need for some discovery. One attorney specifically mentioned that the disclosure requirement obviated the need to send the standard set of interrogatories that are reflexively served after receiving the complaint. Another attorney commented that disclosure smoothed out the discovery and avoided the routine disputes in early discovery.

Nearly all attorneys involved in Case Management Conferences held under the Pilot Program thought that enough was accomplished to justify the resources committed to the conference. Parties found that the most useful aspects of the conference were getting feedback from the judge, either concerning a potential discovery dispute or the substantive issues in the case, and having the judge try to settle the case at the conference or refer it to an alternative dispute resolution procedure such as Early Neutral Evaluation or a settlement conference. In general, attorneys found conferences in which central issues were discussed more worthwhile than conferences that consisted only of setting dates. Attorneys thought that if the purpose of the conference was simply to set dates, that could be accomplished with less cost either by telephone or in writing.

The presumptive requirement of the Pilot Program that discovery be stayed pending the Case Management Conference was not as popular among the attorneys interviewed. **In response to questions about whether the Pilot Program had any negative effect or whether any provisions of Pilot Program were actively counterproductive, nine attorneys interviewed mentioned the stay on discovery before the Case Management Conference.** No other provision of the Pilot Program was mentioned as actively counterproductive. A substantial number of attorneys thought that the stay on discovery delayed their ability to get the information that they really wanted. They noted that the case is not going to settle before they have an opportunity to see the documents that hurt their opponent's case.

The disaffection with the stay on discovery suggests two possible responses. The court could abandon the presumptive stay on discovery or the court could expand the reach of the disclosure obligation to embrace not only exculpatory but also inculpatory documents. The court and its Advisory Group will be investigating ways that the Pilot Program can be improved so that the disclosure and meet and confer provisions of the Pilot Program can remain useful in streamlining discovery while

minimizing the negative impact of a stay on discovery in certain cases.

Compliance With The Pilot Program

Compliance with the Pilot Program has been good. In a review of over 200 Case Management Statements showed that more than 75% of these filings described disclosures from both the plaintiff and the defendant in the case. In a sample of 400 cases, of the 268 cases that were on the docket for at least 140 days, Case Management Statements were filed in 198 cases (74%). Although all requirements of the Case Management Statement were not always fulfilled, nearly all parties supplied useful substantive information in the Case Management Statement. Case Management Conferences were held in 164 of the 261 cases (63%) that were on the court's docket for at least 150 days.

Docket Statistics

The court, with the assistance of an outside consultant, performed a statistical analysis of objective data collected from the court's docket. The database contained 837 control cases filed from July 1, 1991 through November 30, 1991 and 933 Pilot Program cases filed from July 1, 1992 through November 30, 1992. As expected, the results of the analysis reflect the early stage at which the Pilot Program's effects were observed. The oldest cases in the Pilot Program sample had been on the docket for only 11 months, and some were on the docket for as little as one day.

In this early study, no significant difference could be measured in the time to termination between Pilot Program and control cases. However, first motions are occurring earlier and the time from the date the complaint is filed to the first answer is shorter. Event frequency measures, such as number of motions and number of docket events, which are intended to monitor improvements over longer periods, showed no significant change. Of course, this means that while no significant improvement was detected, neither was there any significant deterioration in these docket measures, disproving any notion that the Pilot Program is actually increasing cost and delay in ways that frustrate its intent.

Despite the lack of statistical significance between most Pilot Program and control case measures, the objective statistics, together with the encouraging rate of compliance with the Pilot Program's requirements, do make one thing clear: the sky has not fallen. While the Pilot Program may be counterproductive in a few cases, this study shows no general

deterioration of the adversary process, no deleterious effect on the attorney/client relationship, and no widespread rebellion against the rules of this court. While it is too early to pronounce the Pilot Program a resounding success, it also is clear that the Pilot Program has not had any of the disastrous consequences feared by some.

It is important that the Pilot Program be assessed in light of its purpose. It is an experiment. The preliminary study conducted by our court shows that the program is having some beneficial effects on the cases subject to it. However, it also appears that the program has had some unintended effects on a subset of cases subject to it. At this stage of its development, any assessment of the program should focus on determining how the program can be improved to have more positive effects and better fit the cases subject to it rather than on declaring the program a success or failure.

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I. Introduction -- The Purpose Of This Study

This report evaluates the first year of the Case Management Pilot Program ("Pilot Program"), implemented under Title I of the Civil Justice Reform Act ("CJRA") by the United States District court for the Northern District of California. This evaluation was designed and conducted by Nina Srejovic, the court's Case Management Pilot Program Coordinator, and Larry Rosenthal, a statistical consultant to the court.

The court recognizes that studying less than one year of the Pilot Program provides only a preliminary sense of its effectiveness. It is expected that some time will pass before judges and litigants are accustomed to the new procedures under the program. Studying the program in later years, when more comparatively older cases have been subject to the Pilot Program procedure, will yield a more accurate picture of the program's effect on those kinds of cases most prone to excessive cost and delay. Nevertheless, a preliminary study is useful in determining some of the early effects of the Pilot Program. In addition, a thorough study was designed and tested at this early date to refine a research method which will be used at a later date when more useful information is available.

The court is eager to develop a method for studying the effects of the Pilot Program and to report initial findings. However, it must be recognized that this first evaluation comes at a very early stage of the program. Cases in the Pilot Program sample were filed in only the first five months after the effective date of G034; they were observed for a maximum of 11 months. Some lag time beyond this period can be expected before the "true" program effects can be observed, particularly because the most costly and delay-prone cases commonly last longer than 11 months. This lag time is expected because (1) judges and their staffs must adjust their work practices and (2) attorneys must accustom themselves to new procedural requirements. Problems will arise, and they will be addressed gradually over time. Since this first evaluation draws its experimental sample entirely from what might be considered a "settling" period for the Pilot Program, the results should be considered as tentative indications of trends, rather than as concrete conclusions about the program's true effects. Naturally, studying the program in future years will yield more useful and reliable information about its impacts.

In order to measure whether G034 has reduced cost and delay or has achieved any of the more specific goals set forth in the general order itself, the researchers chose measurable pieces

of information available from the court's docket and from the Case Management Statements filed by the parties. As a supplement to the information that can be gathered from the court's files, attorneys were interviewed to determine their subjective views of the efficacy of the program.

In June 1993, staff from the Federal Judicial Center conducted interviews of all judges participating in the Pilot Program. Unfortunately, at this early date, the Federal Judicial Center was not able to provide any information to the court for inclusion in this study. The researchers felt that it would not be a wise use of resources to conduct another round of interviews of the judges at this time. Therefore, the opinions of the individual judges of this court notably are missing from this report. The conclusions of the researchers have been informed, however, by the informal contacts that the Case Management Pilot Program Coordinator has had over the past year with the judges of this court and other court personnel.

II. The Pilot Program -- Its Operation and Objectives

The Pilot Program was adopted on July 1, 1992. On that date General Order No. 34 ("GO34"), which governs Case Management Pilot Program cases, took effect.[1] GO34 addresses three major causes of expense and delay: (1) excessive reliance on motion work and formal discovery to determine the essence of claims and defenses and to identify supporting evidence, (2) inattention to civil cases in their early stages, and (3) insufficient involvement of clients in decision-making about the handling of their cases. GO34 introduces several new procedures to address these concerns:

- accelerated deadlines for service of process;
- a presumptive stay on discovery until after a Case Management Conference is held with the court;
- early mandatory disclosure of certain kinds of core information, independent of formal discovery;
- a mandatory meet and confer session between counsel;

[1] A copy of General Order No. 34 as amended on July 1, 1993 is attached hereto as Exhibit 1. For more background on General Order No. 34, see the Civil Justice Expense and Delay Reduction Plan for the United States District Court, Northern District of California, December 1991.

- a joint Case Management Statement filed by the parties which includes the principle issues in the case, any unresolved preliminary issues, the parties views on the use of ADR in the case, the mandatory disclosures of the parties, a discovery plan, and a proposed schedule for resolution of the case;

- an early Case Management Conference before the judge;

- and a Case Management Order setting forth the judge's case management plan for the case.

Eleven of the court's twelve active judges and two senior judges chose to participate in the Pilot Program. All cases assigned to a participating judge, except for cases in categories specifically excluded under GO34[2], are governed by GO34. Of the 5810 civil cases filed in this court from July 1, 1992 to June 30, 1993, 2322 were assigned to the Pilot Program. The largest categories of excluded cases were student loan cases and prisoner petitions.

III. Research Methods

A. A Comparative Population Approach

In order to demonstrate GO34's effects on the docket in general, it is useful to begin by considering the docket as a kind of "census" of the court's "population" of cases at any given time. That population is always welcoming new members -- filings -- and bidding farewell to others -- terminations. The process is constantly in flux; there are roughly 5,000 civil

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[2]The following types of cases, based on information set forth on the Civil Cover Sheet, are excluded from the Pilot: class actions, multidistrict litigation, transferred cases, cases filed by pro se plaintiffs, cases remanded from appellate court, reinstated and reopened cases, and cases in the following nature of suit categories indicated on the Civil Cover Sheet: Prisoner Petitions (510 - 550), Forfeiture/Penalty (610 - 690), Bankruptcy (422 - 423), Social Security (861 - 865), Contracts (only nos. 150 (Recovery of Overpayment and Enforcement of Judgment), 151 (Medicare Act), 152 (Recovery of Defaulted Student Loans), and 153 (Recovery of Overpayment of Veteran's Benefits)), Civil Rights (only no. 441 (Voting)), and other Statutes (only nos. 400 (State Reapportionment), 460 (Deportation), 810 (Selective Service), 875 (Customer Challenge 12 USC 3410), 892 (Economic Stabilization Act), 894 (Energy Allocation Act), 895 (Freedom of Information Act) and 900 (Appeal of Fee Determination Under Equal Access to Justice)).

cases at the court at any given time, and approximately equivalent numbers arrive and depart annually. Therefore, it is important to recognize that any depiction of docket conditions must extrapolate stable measures (e.g., mean age at termination, median number of motions) from a dynamic set of cases which changes constantly. It becomes necessary to insure that fluctuations in docket conditions, perhaps attributable to a procedural change like GO34, are not instead due simply to random variations in an inherently unstable case population.

Furthermore, cases are heterogeneous. They vary by nature of suit, complexity of legal issues, numbers of parties, law versus equity, amount at stake, jurisdictional origin, etc. Changes in docket conditions may be due to changes in the case mix. For example, if the average number of motions per case increases, it may be because a case type that is prone to greater motion activity now makes up a relatively larger proportion of the cases being studied.

Hence, the adoption of GO34 is not the only potential cause of changes in docket conditions. Variations in litigation behavior can also be caused by phenomena outside the confines of a district court and its procedures: bad economies generate a more disputatious business atmosphere, causes of action fall in and out of favor over time (e.g., asbestos, antitrust), and federal budgets and judicial expenditures experience feast and, more commonly, famine. When these kind of "environmental" influences are most severe, it becomes difficult to attribute changes in docket conditions to procedural initiatives alone. At the same time, it is not feasible to control for every possible influence on case behavior. The best that can be done, particularly within a confined research budget, is to be mindful of changes in these factors and to be wary about purely statistical measures of success.

Fortunately, the structure of GO34 provides a kind of "ready made" experimental method to grapple with some of these challenges. July 1, 1992, the effective date of the program, establishes a watershed between cases affected by GO34 and ones that are not. No cases filed before that date received the early case management treatment required under GO34; that population presents a natural control group for studying GO34's effects. After that date, the new civil cases which match certain criteria have been subject to GO34. Cases sampled from the pre-GO34 population can be compared to a sample of GO34 cases in order to capture GO34's overall impact on the types of cases assigned to GO34. At a later date, when more data is available, it may be interesting to study the effect of GO34 on the docket as a whole rather than simply on the types of cases assigned to GO34.

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The ever-changing nature of the court's caseload dictates a kind of "snapshot" approach toward monitoring docket conditions. This approach entails studying specific subsamples of case durations to model general docket conditions over a larger period. Observed effects can be controlled by case mix differences (e.g., nature of suit, nature of jurisdiction). While the method described herein fails to scientifically control for every possible influence on docket conditions, there seems no cheaper or more effective way to begin to ferret out the effects attributable to GO34 alone.

Some efforts, such as choosing control and GO34 cases from the same part of the calendar year, were made to control for external influences on the court's docket. However, in future years when more thorough data is available, further effort can be undertaken to account for influences extraneous to the civil docket. For example, one might compare bankruptcy filing rates as a proxy variable representing extant business conditions. (Bankruptcy matters are excluded from GO34 and therefore from the cases sampled for this study as well.) Economic conditions might be controlled for in the study by observing changes in the gross domestic product and interest and inflation rates. Additionally, cases outside GO34, such as criminal matters and student loan cases, might be counted in order to monitor the extent to which they burden judicial resources. These more detailed (and more expensive) study methods seem most appropriate in future years, when GO34's effects are likely to become more pronounced than at present.

B. Sample Size

For this first annual study of GO34, it was necessary to sample cases of sufficient longevity to insure that many of them had the opportunity to proceed through the GO34 case management process in its entirety. Most of the early management requirements of GO34 are scheduled to take place within 130 days after the complaint is filed. Therefore, it was decided that at this early stage of the program, cases that had the opportunity to be on the docket for at least 180 days would be studied. The observation date was chosen to be June 1, 1993 so that the study could be used as part of this annual assessment. Therefore, all cases that met the criteria set forth in GO34 and were filed at least six months before June 1, 1993 (from July 1, 1992 through November 30, 1992) were included in this study. For consistency in the selection of control cases, the control sample comprises cases that meet the same criteria and were filed in the same time period one year earlier (from July 1 through November 30, 1991).

The resulting database contains 933 GO34 cases and 837 control cases. The nearly 100 case discrepancy in the sizes of these samples is likely due to random docket fluctuations. The discrepancy poses little difficulty statistically because docket trends can be measured through percentages and frequencies rather than raw counts.

C. Variables Studied

The following categories of information were analyzed to determine GO34 effects:

Event Frequency Variables

(1) **Raw number of docket events.** One readily available, if rather simplistic, measure of cost is the number of documents filed with the court. Fewer docket events per case may indicate reduced cost and delay. Consistently increasing docket events per case would suggest GO34 is having an effect opposite to that intended.

(2) **Motions.** Motions are among the costliest and lengthiest types of proceedings recorded on the court's docket. Both motions in general, and substantive motions, those which potentially dispose of parties or claims, in particular, were studied.

(3) **Discovery disputes.** GO34 aims directly at reducing excessive discovery and discovery disputes. Discovery disputes requiring judicial intervention will decrease if the program is effective.

(4) **Extensions of time.** Extensions of time were counted for two purposes: as an indicator of delay and also to see whether the fairly uniform deadlines of GO34 were causing parties to have to seek extensions due to the peculiarities of each individual case.

(5) **Number of Case Management Statements.** The number of Case Management Statements filed was measured primarily to determine compliance with GO34.

(6) **Number Case Management Conferences held.** The number of Case Management Conferences held was measured primarily to determine compliance with GO34.

(7) **Completion of initial disclosures.** Initial disclosures were surveyed primarily to determine compliance with GO34.

Time Variables

(8) **Time from filing to termination.** One major objective of GO34 is to reduce delay. As discussed below, although delay may be more accurately measured by subjective perceptions, one objective measure of delay is time to disposition of case.

(9) **Time from filing to first conference.** Time to first conference was measured both to monitor compliance and as a possible indication of delay reduction. Shortened times before a first case management (or status) conference might reflect more aggressive judicial attention to cases. On the other hand, increased times to first conference under GO34 might represent early-case delay tolerated, indeed required, in the process in order to increase the value of such conferences.

(10) **Time from filing to first motion.** A decrease in the time from filing to first motion may indicate that motions required to settle important procedural and legal questions are being resolved sooner. Alternatively, a decrease in the time from filing to first motion may indicate that more motions are being filed earlier causing an increase in cost.

(11) **Time from filing to at-issue status.** At-issue status is assigned to all cases upon the filing of a first answer. If this process is accelerated, GO34's requirements regarding early service of process will be deemed effective.

In future years the statistical methods developed in this study can be applied to a number of interesting variables for which information was simply too sparse in the sampled early-stage cases. These variables include frequencies of sanctions motions and grants, contempt motions and grants, duration of phases such as first conference to discovery cut-off, filing to pre-trial, filing to trial, and length of trial itself. Each of these measures may be significantly improved by the more careful and aggressive case management techniques intended under GO34.

D. Collecting the Data

1. ICMS

Researchers collected data already stored in the court's computerized docket management system (ICMS), as a way of studying case event patterns in a cost-effective manner. Many events are coded by case system administrators when they make

docket entries on the computer. Data on these events was transferred directly from the court's computer system to the researchers in raw form.[3]

These variables were compiled in two separate files, one for GO34 cases and one for control cases. Many of the variables, such as those relating to pretrial and trial dates, cannot be expected to yield enough information in the early stage of cases in the GO34 sample to show any recognizable effects. Greater attention will be paid to these kinds of latter-stage variables in future implementations of the study plan, when more mature GO34 cases can be included.

2. Text Searches of Docket Clerks' Notations

A number of important docket variables, such as dates of conferences and discovery motions, cannot be adequately or accurately observed from a code search of ICMS alone. This is because the event codes attached to such events, which make the variables listed above relatively easy to ascertain, vary greatly depending upon judge and clerk practice. This information is more descriptive in nature and is stored as text in clerks' notations. This kind of data, considerably more varied and complex than the event codes, was captured through text searches of those notations. Notations corresponding to text search queries were read carefully by the researchers and entered into the study's database. The development of this text search method was an important achievement which allowed the researchers to study the docket in greater depth than was otherwise possible.

Through the text search, the researchers concentrated on gathering docket events that referred to four different categories of events.[4] The categories are conferences between the parties and the judge, time related events such as requests for extensions of time or continuances, discovery related events, and sanction or contempt related events.

It was determined that only 400 control cases and 400 GO34 cases, drawn randomly, would be studied using the text search method. From a statistical standpoint, 400 cases is sufficient. For a sample mean, a sample size of 400 yields a 98% likelihood that the sample mean will be within one-tenth of a

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[3]The actual variables transferred from the court's database to the researchers' spreadsheet are listed in Exhibit 2.

[4]The actual terms used to search the database are attached as Exhibit 3.

standard deviation within the true mean. Hays, Statistics, 4th ed. (1988). For example, if the population has a true mean of 60 docket events per case per year with a standard deviation of 3 events, sampling 400 cases permits us to assume that only 1 out of every 50 samples will yield a sample mean more than 3 events above or below the true mean of 60.

As a trial application of this principle, it was observed that the 5,468 terminations during the 1991-92 court year (July 1, 1991 to June 30, 1992) had an average age-at-termination of about 370 days with a standard deviation of 490 days. It is sensible to refer to this average as the best estimate of the "true" average. A sample size of 400 cases creates confidence that an error of 49 days or larger (1/10th of 490) will occur only 1 in 50 trials. Because even an error of a month in these estimates is tolerable, the 400-case sample was deemed sufficient.

3. Analysis of Case Management Statements Filed

In the 400 GO34 case sample described above, 86 cases terminated before the Case Management Statement was due. Case Management Statements were filed in 212 of the remaining 314 cases. The Case Management Coordinator was able to locate and review 203 of Case Management Statements filed. A review of these Case Management Statements was made with two purposes in mind. The court thought that it was important to determine what percentage of the parties completed the initial disclosures. In addition, a sample of the requirements of the Case Management Statement was studied to gauge overall compliance with the rules regarding preparation of the Case Management Statement.

4. Attorney Interviews

An analysis of the docket and of the information filed in the Case Management Statements left a hole in the information that the court wished to gather. Unfortunately for the data collectors, much of the activity that the court wishes to affect with GO34 happens outside of the courthouse and is not directly reflected in the court's files. In addition, the court wished to get a general view of how satisfied the users of the judicial system were with GO34. In order to gather information about activities outside of the courthouse and about the satisfaction of the users of the judicial system, telephone interviews were conducted of a small sample of attorneys with experience under GO34.

A random sample of 22 cases was initially selected. Four cases were excluded from the sample for varying reasons.

One case was excluded because the defendant proceeded in pro per and because the case terminated after only 41 days. Two cases were excluded because one of the parties' attorneys was the same as an attorney in another case in the sample. A copyright case was excluded because the defendant had not yet appeared and the parties had not filed a Case Management Statement or attended a Case Management Conference. Another copyright case was randomly selected as a substitute.

Finally, another case in which a Case Management Statement was filed and a Case Management Conference was held was randomly selected to obtain more information about cases that had been subject to all of the provisions of GO34. An additional case was randomly selected to obtain more information about cases that had been on the court's docket long enough to be subject to all of the provisions of GO34. This slight deviation from randomness was considered proper because the object of this part of the study was not to gauge compliance with GO34 and because the sample was necessarily small.

Plaintiffs' and first named defendants' attorneys were noted. The case selection process resulted in a list of 40 attorneys. The case management coordinator wrote each attorney and followed up with several telephone calls. Six attorneys were excluded at this point because the cases in which they participated were either excluded from or not subject to GO34. During the time allowed for the study, nine attorneys were not available to be interviewed. In all, 12 plaintiffs' attorneys and 13 defendants' attorneys were interviewed.[5]

IV. Analysis of First Year Experience

At this early stage of the Case Management Pilot Program, our annual assessment of the program sought to evaluate:

1) **Compliance with GO34.**

2) **Reduction of case delay.**

3) **Reduction of the cost of litigation, including**

   a) **More efficient and productive discovery and less discovery overall,**

   b) **Attention to cases at early stages, and**

[5]A copy of the interview protocol is attached as Exhibit 4.

c) **Reduction in reliance on motion work.**

4) **Litigant and attorney satisfaction.**

A. Compliance with GO34

Because of the early stage at which this study was conducted, one of the primary goals was simply to determine how case activity in reality conformed to the model outlined in GO34. In other words, whether the parties and the court were complying with the procedures and schedule outlined in GO34. Before it is possible to measure whether the provisions of GO34 have had any effect on cases filed in this court, it is necessary to determine whether cases actually are behaving as we assume them to be under the GO34 model. If litigants are not behaving in compliance with GO34, we cannot attribute perceived benefits, or problems, to a change in litigant behavior caused by the provisions of GO34.

In order to measure compliance with the general order, the researchers used the information in the docket to detect whether a Case Management Statement was filed and whether a Case Management Conference was held. The researchers also collected information from a sample of the Case Management Statements filed to determine whether the parties complied with the disclosure and other requirements of the general order.

1. Case Management Statements

GO34 requires the parties to file, 110 days after the complaint is filed, a joint Case Management Statement. Of the 400 sampled cases, 86 cases terminated before the Case Management Statement was due. Of the remaining 314 cases, Case Management Statements were filed in 212 cases (67 %). Nearly all of the statements were filed jointly.

Of the remaining 102 cases in which a Case Management Statement was not filed, 48 terminated by day 140. This is significant because often a dismissal is not entered in the court's docket on the precise date that the dispute between the parties is resolved. If the parties have settled the case, preparing the Case Management Statement presumably would be a waste of resources. Overall, Case Management Statements were filed in 198 of the 268 cases (74 %) that were on the court's docket at least 140 days.

GO34 requires parties to set forth in the Case Management Statement the principal issues, any unresolved preliminary issues, the parties' views on alternative dispute

resolution procedures, the parties' disclosures, a calculation of damages, suggested limitations on discovery, and a proposed schedule for the resolution of the case. Many of these requirements are routinely fulfilled. For example, nearly all Case Management Statements contained a description of the principal legal and factual issues in the case. However, in general, parties found it more difficult to comply with the requirements of the Case Management Statement when faced with the possibility of precluding themselves from taking a different position later.

Nearly all parties provided a list of principal issues. Even though parties complied with this portion of the Case Management Statement, judges in our court have commented that the list is often too long and over inclusive and does not help to narrow the issues in the case. However, parties do not want to shorten the list because they do not want to limit their ability to introduce at a later date issues not on the list.

The Case Management Statement also requires parties to suggest limitations on discovery which would be appropriate for their case. In the Case Management Statements filed, numerical discovery limits were proposed in 75% of the statements. However, this number probably does not tell the whole story. From attending Case Management Conferences, the court's Pilot Program coordinator observed that parties admit that the limits suggested in the Case Management Statement are high because they are unsure about what discovery will be needed at this time and they do not want to voluntarily foreclose themselves from taking any discovery at this early stage. However, the numerical limits proposed by the parties do serve as a starting point for judges to set reasonable and realistic limits at the Case Management Conference. Substantive discovery limits were proposed in a little over a quarter of the Case Management Statements filed.

Parties were not as diligent in providing a calculation of damages claimed. Although over 65% of the Case Management Statements contain a calculation of damages by at least some parties claiming damages, about half of those calculations are incomplete, without much more information than what presumably would be contained in the complaint.

2. Disclosure

Ninety days after the complaint or notice of removal is filed, GO34 requires parties to disclose the identity of persons known to have discoverable information relevant to the case, unprivileged documents that tend to support the positions that the disclosing party is reasonably likely to take in the case,

copies of insurance agreements, a computation of damages, and all documents that relate to damages. As part of the information required to be included in the Case Management Statements, parties must describe the disclosures completed by the parties. Over 75% of the Case Management Statements filed described initial disclosures from both a plaintiff and a defendant in the case.

This figure probably overestimates the rate of compliance with the disclosure requirement because only cases in which a Case Management Statement was filed are counted. If attorneys fail to comply with the Case Management Statement requirement of GO34, they also are likely to fail to disclose documents as required by GO34. However, a 75% compliance rate in cases in which a Case Management Statement was filed does indicate that a relatively large number of attorneys are complying with the disclosure requirement of GO34. In addition, 18 of the 25 attorneys interviewed indicated that they had completed disclosures in their cases.

Rarely did parties simply ignore the disclosure requirement. If parties did not comply with the disclosure requirement, they often provided a reason why the requirement was inappropriate in their case. Some of the reasons attorneys gave for not completing disclosures were: discovery was initiated immediately after the answer was filed in order to discover factual matters to support a motion to dismiss on jurisdictional grounds, making the disclosure moot; the case was resolved on cross-motions for summary judgment; an extension to complete disclosures was granted and the disclosures were never completed; and the parties agreed not to complete disclosures.[6]

3. Case Management Conference

GO34 states that the judge will conduct a Case Management Conference approximately 120 days after the complaint is filed. 111 of the 400 sampled cases terminated before day 125, the approximate date on which the Case Management Conferences are held. Case Management Conferences were held in 171 of the 289 remaining cases. Of the cases in which a Case Management Conference was not held, an additional 22 terminated within 150 days after the complaint. One can presume that in these cases, a Case Management Conference less than 30 days before the case terminated would not have benefitted the parties

[6]Some attorneys indicated that the parties stipulated around the disclosure requirement despite the fact that GO34 forbids parties from modifying the order by stipulation.

enough to justify the resources committed to such a conference. Overall, Case Management Conferences were held in 164 of the 261 cases (63%) that were on the court's docket for at least 150 days.

Although the number of Case Management Conferences is relatively high, we have heard anecdotal evidence that at times parties are disappointed that a Case Management Conference is not held. Although some judges think that a Case Management Conference is not cost effective for cases in which parties appear to have a good relationship and agree on the major issues in the case, the court should be mindful not to exclude all cases in which a thorough and thoughtful Case Management Statement has been filed from the cases in which a Case Management Conference is held. One of the purposes of GO34 is to promote active case management by the court.

B. Case Delay

1. Time to Disposition

Reducing case delay is one of the primary objectives of the court's Case Management Pilot Program as well as of the CJRA as a whole. Traditionally, delay has been considered excessive time to disposition. In keeping with that tradition, as part of this assessment, the court has studied whether its Case Management Pilot Program has reduced the time to disposition for cases filed since July 1, 1992.

The Administrative Office of the United States courts ("AO") frequently reports median age at termination. This statistic reflects the length of time necessary for half of a sample of cases to terminate. However, median case durations provide a rather incomplete picture of the actual state of the docket and therefore can be misleading. The median is only one selected point in a distribution of ages at termination. The termination rate of the oldest cases -- presumably those most prone to delay -- may increase significantly, yet if that change is not accompanied by a similar shift in the termination rate of younger cases, the median may not be altered appreciably. For this and other reasons, observing median case ages alone may mask GO34's impact on the docket.

The alternative approach, utilized in this study, is to portray graphically the rate at which every case in a sample terminates over time. These graphs are known as "survival curves." For each point in time after filing, a survival curve shows the actual likelihood that cases will terminate before and after that time. The curve also accounts for the way cases enter

and exit a docket sample over time. Unlike the AO's calculation of medians, the sample need not be limited to terminated cases. For these reasons, survival curves allow docket conditions to be examined in a more continuous way for open and terminated cases of all ages in the sample. The graphs can be compared visually, and visual differences can be tested to determine whether they are simply random docket fluctuations or significant changes. Using survival curves therefore increases the value of two-sample comparisons such as the present study of GO34 and control cases in the Northern District.

The survival graph of termination rates over time shows visible differences between GO34 and control samples. The difference is most pronounced in the graph based on raw case ages (not weighted by nature of suit category). Figure 1. In that graph, after the first month and up to the end of the seventh month, it appears that GO34 cases are exiting the docket faster than control cases. Near day 200 the curves intersect and thereafter it seems the control cases terminate slightly faster. These differences are much less pronounced in the graph of weighted termination ages, in which the GO34 and control curves track each other very closely over time.[7] Figure 2.

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[7]"Weighting" case ages involves multiplying actual ages by weights established for various substantive case categories based on longitudinal time studies conducted by the Administrative Office of the United States Courts. Weighting controls for differences by nature of suit, and a statistical effect observed in both raw and weighted case measures is deemed highly reliable.

Figure 1

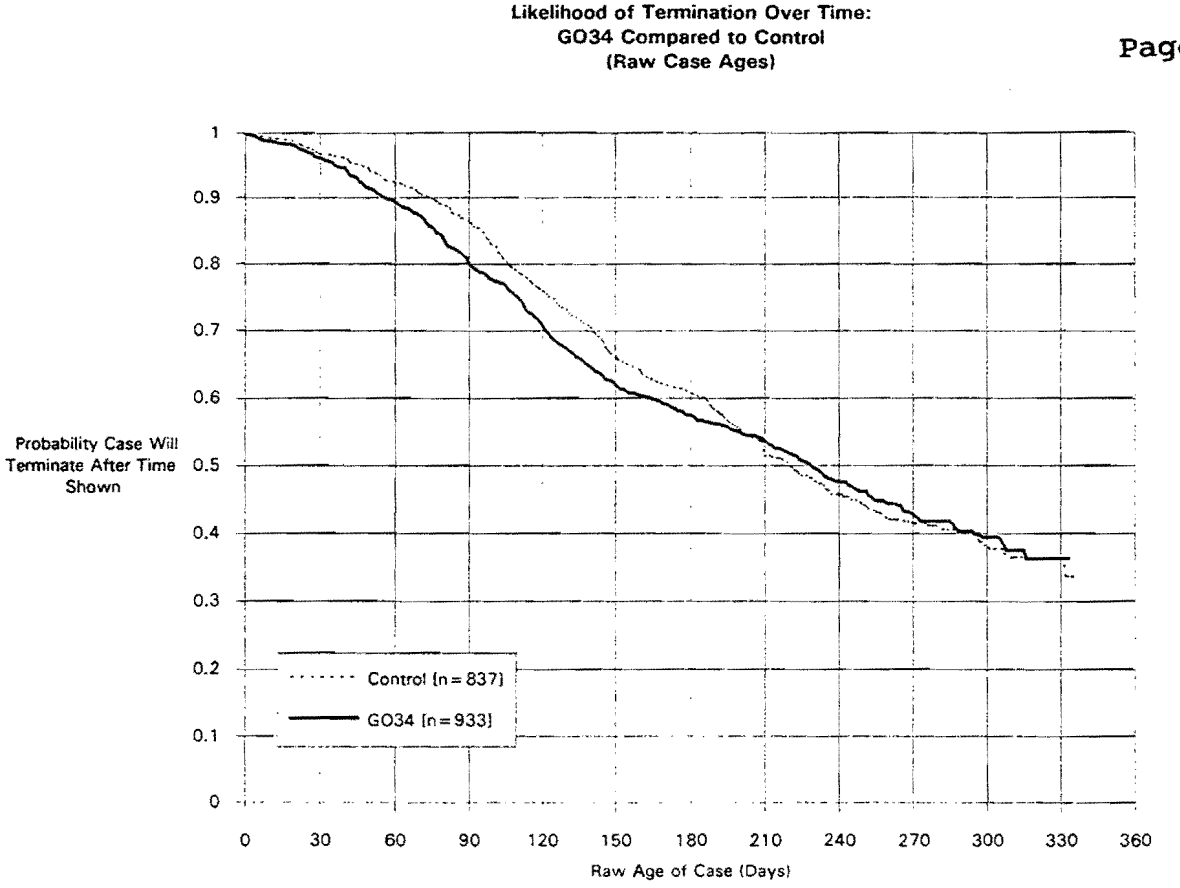
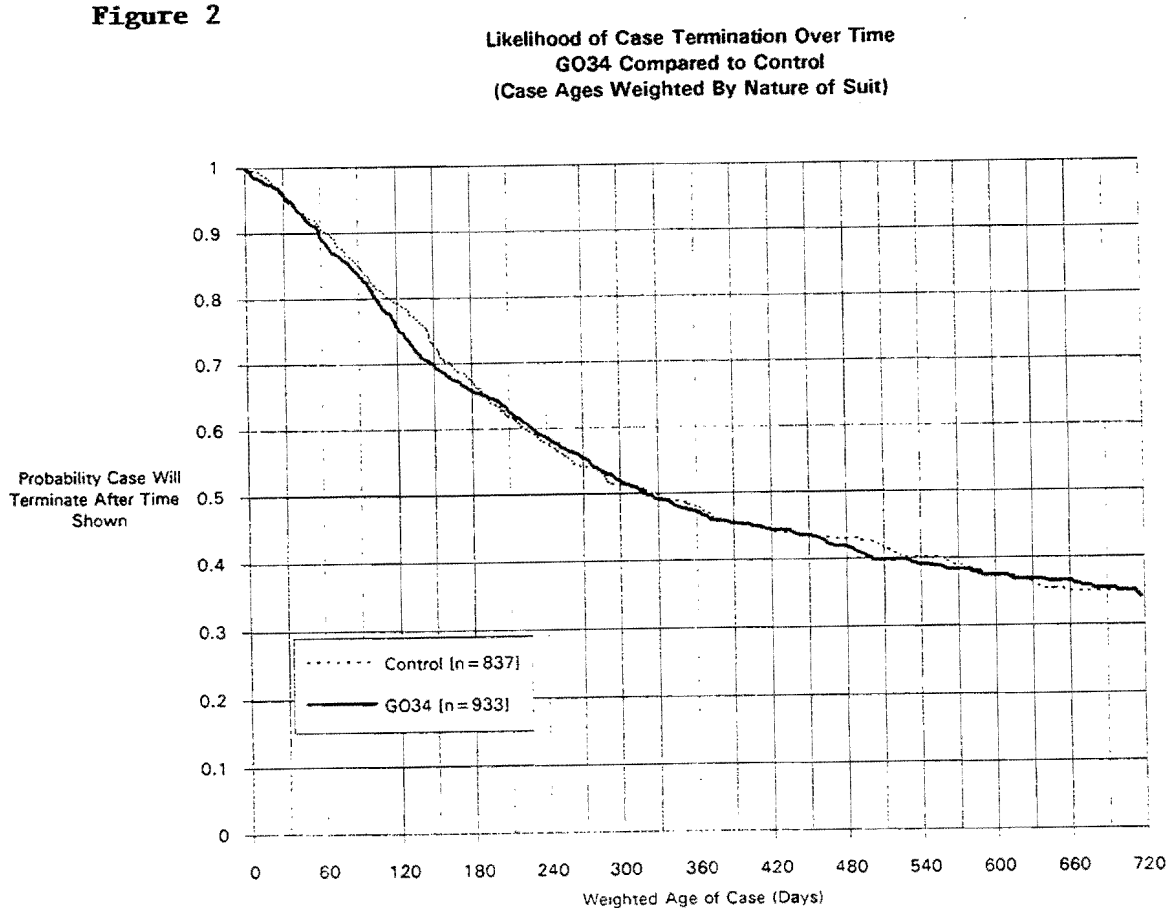


Figure 2



The visual difference in the raw case age graph must be tested to determine whether, in statistical terms, we may conclude that the graphs depict a "true" difference between the termination behavior of GO34 and control cases or, alternatively, whether that difference is likely the result of merely random fluctuations in the docket. In this case, the statistical test shows the difference to be insignificant, i.e., likely random in nature. One reason for the lack of statistical significance is that the relative speed to termination of GO34 cases is not consistent over the entire length of the curve. At certain times the GO34 cases terminate sooner, while at other times they terminate later than the control cases. Similarly, the statistical test is insignificant for the weighted curves as well, in which no consistent difference persists over time. Hence we cannot conclude that GO34 is having any significant impact on the overall rate at which cases terminate. However, the eldest cases in each sample are only 11 months old, and more significant effects may become evident when, in later years of study, the samples include older cases.

2. Interview Results

The statistical information is supported by the responses of attorneys to questions concerning the timing of termination and settlement discussions. Eleven of the 17 attorneys interviewed who were involved in cases that had terminated thought that GO34 had no effect on the time at which their cases terminated.

Nearly half (12) of the attorneys interviewed thought that GO34 had no effect on the timing or substance of settlement discussions in their cases. Seven attorneys thought that the parties discussed settlement earlier because the case was subject to GO34. Several attorneys credited the fact that an early discovery cut-off and trial date were set. Others attributed the early discussions to settlement conferences set by the judge at the Case Management Conference. One attorney thought that the parties put the important information on the table sooner due to GO34.

Five attorneys thought that GO34 delayed effective settlement discussions. Far from constituting a condemnation of GO34 as a whole, this effect can be tied to a single provision of the program. Every attorney who thought the settlement discussions were delayed by GO34 cited the presumptive stay on discovery as the cause of the delay. The stay on discovery is discussed at more length on page 31, below. One attorney thought that her case terminated later because of GO34. She also mentioned the stay on discovery as the cause of the delay.

3. Other Time Variables

For time variables other than time to termination, survival analyses of the occurrence of the events measured (i.e. first conferences, first motions, and at-issue status) tend to demonstrate that GO34 is achieving its goals. First motions are occurring consistently earlier in GO34 sample cases compared to control cases. Figure 3. Statistical analysis of these changes shows that the differences are "significant," meaning that the court can reliably assume that they are not merely the result of random docket fluctuations. Indeed, each of these results is confirmed when "weighted" rather than "raw" case ages are used in evaluating these durations. Figure 4.

Figure 3

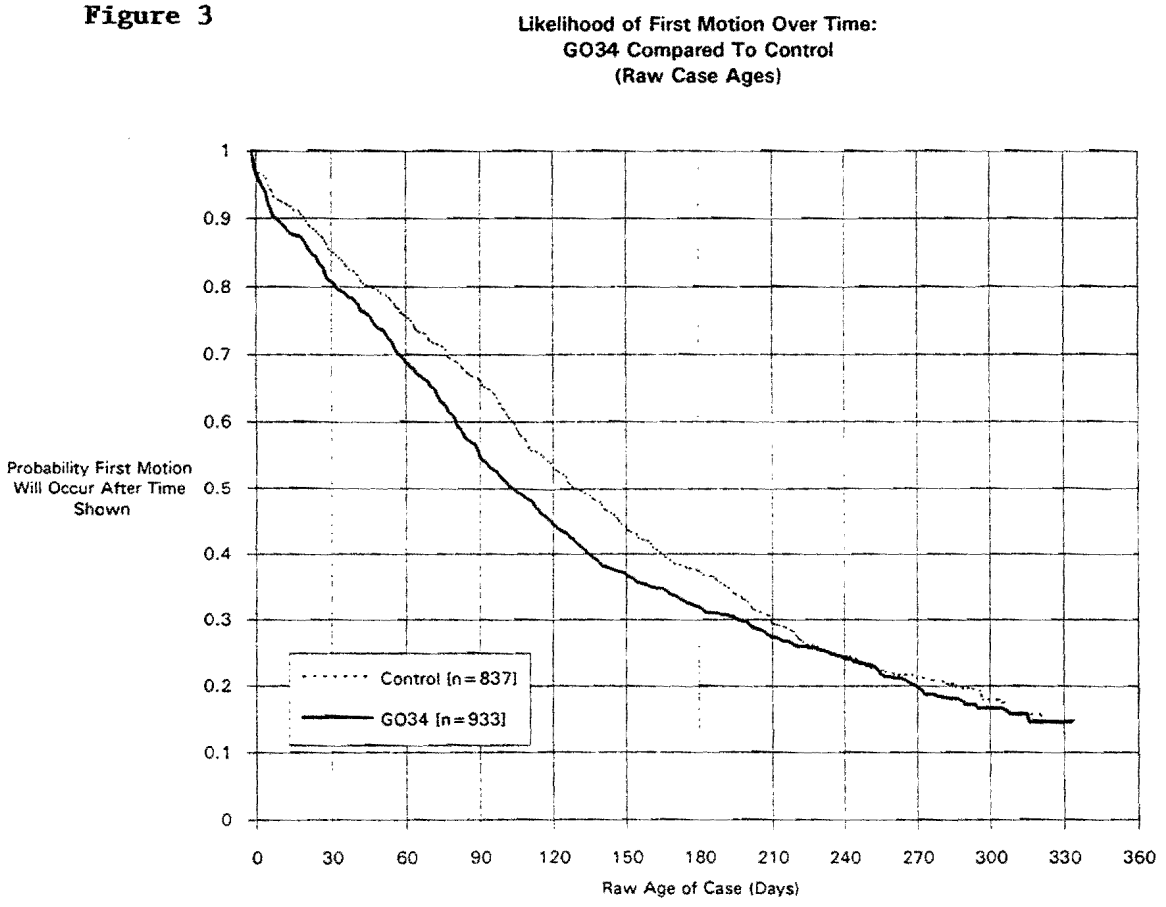
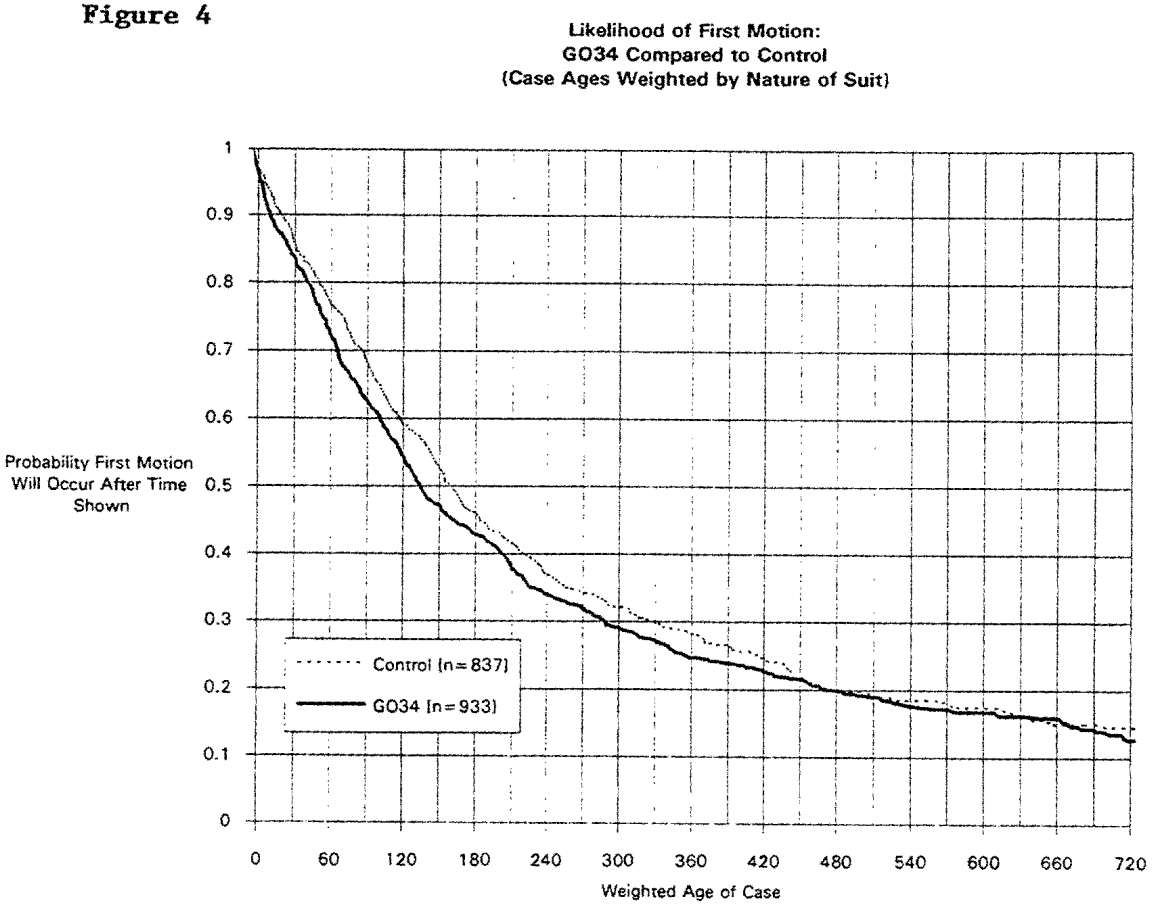
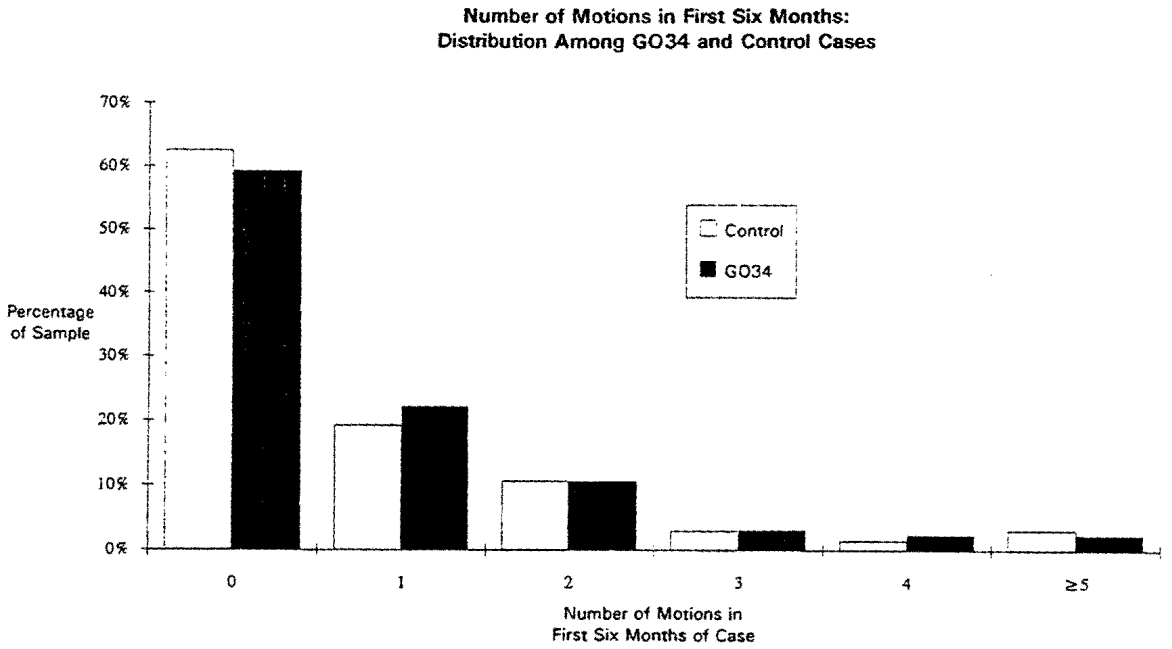


Figure 4



A determination that first motions are happening at an earlier date in GO34 cases than control cases can be interpreted two ways. Either the same motions as would have been filed if a case had not been subject to GO34 are being filed, but they are being filed earlier; or more motions are being filed in cases subject to GO34, and they are being filed earlier. An analysis of the number of motions filed in control cases and GO34 cases reveals that a comparable number of motions are being filed in the first six months of case life in both groups of cases. Figure 5. Therefore, it appears that the same motions are being filed earlier in GO34 cases. Unfortunately, we cannot be sure of this conclusion at this early date because only the first six months of case activity can be measured.

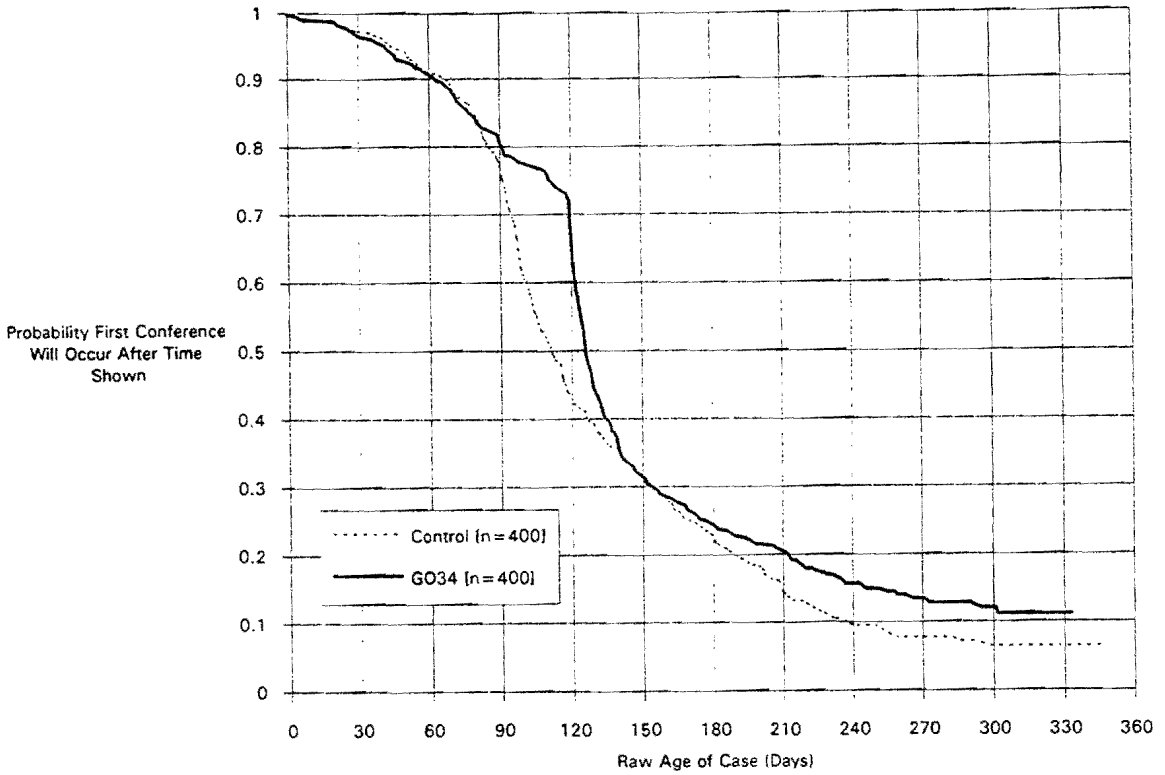
Figure 5



First conferences in GO34 cases, particularly those in the fourth month of the case, are experiencing significantly greater delay, yet this is an intended effect of the program. Figure 6. This delay occurred despite the fact that cases in the control group were subject to Local Rule 235-3 which, like GO34, requires judges to hold a status conference within 120 days of the filing of the complaint. Presumably, that delay is necessary for the stay of discovery, the early disclosure of information, the meet-and-confer process, and the drafting of the joint conference statement to enhance the case management power of that first conference. Early data clearly show that this planned delay is occurring. Yet overall time to termination, and event frequency measures discussed below, have not changed significantly. Only later study of future years of the program will determine whether overall cost and delay is reduced as a result of the more deliberate, and therefore delayed, first conference.

Figure 6

Likelihood of First Conference Over Time:
GO34 Compared to Control
(Raw Case Ages)



The attorney interviews indicate that the delay in conferences with the court is not a problem for litigants. Of the 13 attorneys who stated an opinion, nine thought that Case Management Conferences were held at about the right time in their cases. Three attorneys thought that the Case Management Conference was held too late, but like statements concerning the timing of settlement discussions, this opinion was more a result of the presumptive stay on discovery pending the Case Management Conference than of GO34 as a whole. Each attorney who thought that the conference was too late stated that the reason it was too late was that the parties could do no discovery before the conference.

4. Extensions of Time

Information concerning extensions of time was compiled and analyzed for this report. However, the reader should be cautioned against drawing strong conclusions based on this statistic. Statistics concerning extensions of time compiled from the court's docket are especially suspect because of the practice of some judges' staffs of informally entertaining and

1. GO34 As a Whole

Responses to questions about the positive and negative effects of the GO34 as a whole spanned the whole range of possible opinions. Some attorneys felt that no rules of this type make a difference; what really matters is the judge. One attorney stated that any additional formal procedures that are imposed on attorneys are good. Other attorneys said the GO34 rules cause parties to streamline issues and "cut to the chase" earlier, while still others thought that GO34 stalls everything about discovery. One attorney thought that GO34 was cost effective in smaller cases but worried about GO34 swamping a party in a larger case. Another attorney thought the GO34 did not have much of an effect in his case, but he predicted that it would be useful in a more complex case. One comment that was repeated frequently was that the relative benefit of GO34 "depended on the case."

There was no identifiable difference between plaintiffs' attorneys opinions about the program as a whole and defendants' attorneys opinions. Indeed, there was a remarkable symmetry between the opinions of the attorneys involved in the same case. This fact supports the attorneys' conclusion that the net effect of GO34 "depends on the case."

Attorneys thought GO34 had an overall positive effect in a subset of the cases that were subject to it. GO34 appears to be most beneficial for middle range of cases filed in this court - cases that do not terminate soon after being filed and are not complex cases with a large number of parties and extensive discovery needs. These cases usually survive through the pleading stage, involve a moderate amount of discovery and then settle, sometimes with the assistance of a settlement conference or other ADR process, or proceed to trial. In our study, these "mainstream" cases were the cases that were in existence long enough to complete the requirements of GO34 and were not exempted from some provisions of the program because of their complexity.

Thirteen attorneys interviewed had participated in cases which were considered "mainstream" cases: two insurance cases, one that was still pending and set for trial and one that settled in arbitration; one marine case which settled after the Case Management Conference but before a scheduled settlement conference; four civil rights cases, one that settled after some discovery had been completed, one that settled through mediation and two that are set for trial in November 1993 and June 1994; and one trademark case still pending and halfway through discovery.

Over half of the attorneys involved in such mainstream cases thought that GO34 was an improvement over earlier practices in this court. Several other attorneys who were involved in these same mainstream kinds of cases thought the net effect of GO34 was mixed. These attorneys thought GO34 was an improvement over earlier practices in the court except for the presumptive requirement that discovery be stayed pending the Case Management Conference. See page 27, above. Some of the positive effects mentioned by attorneys were: GO34 controls initial discovery, gets rid of run of the mill discovery disputes, streamlines issues, encourages parties to focus discovery on issues that are central to the case, makes parties think and plan ahead, and forces parties to look at the whole case and investigate early.

Of the attorneys who did not think that GO34 was useful in their cases, one commented that he could anticipate the value of GO34 in a case where one party said he would "fight every inch" and that GO34 might prevent a party from stonewalling. However, this potential benefit did not outweigh the delay caused by the stay on discovery, even though he may have received documents through disclosure with "less hassle." The two other attorneys who did not find GO34 useful were involved in the same case. One attorney noted that the parties focused on complying with the procedural requirements rather than the substantive issues.

Attorneys were not as satisfied with the effects of GO34 in cases on either end of the spectrum: cases that can be resolved very early in the pretrial period because (1) they self-resolve without much, if any, judicial intervention, (2) their resolution depends on an issue of law that can be decided relatively soon after filing without much discovery or (3) they will be removed from the docket through rulings on jurisdiction or venue. The net effect of GO34 also is not clear in cases whose principal objective is emergency equitable intervention and in truly complex litigation.

Twelve attorneys interviewed had participated in cases which were not considered "mainstream" cases: two antitrust cases, one involving a TRO and a preliminary injunction; a labor case resolved on cross-motions for summary judgment before the disclosures were made; an ERASE case which settled before disclosure; and a copyright case which settled before a responsive pleading was filed; and an insurance case that settled immediately after the answer was filed.

The comments of attorneys in these cases were mixed. One attorney in each of two cases found that GO34 had no effect on their cases. Opposing counsel in each of those cases found

that GO34 had a negative effect. One plaintiff's attorney noted that she was required to spend her client's money doing disclosures when based on her experience, the defendant would default. One defendant's attorney found GO34 frustrating because he was required to comply with all the provisions of GO34 before his motion for summary judgment would be heard. He recognized that GO34 would be useful in factually intense litigation but found it counterproductive in declaratory relief actions or cases that depend on an issue of law. Attorneys in the antitrust actions found that GO34 had no real effect on the case. They commented that the judge had the greatest effect on how the case would be managed. One attorney thought that disclosure was a good idea, but in his case GO34 was not an improvement over earlier practices in the court. It created more paperwork for attorneys. Two attorneys did find GO34 useful in forcing attorneys to focus on the case earlier.

The observation that GO34 has been useful to some types of cases but may not have a net positive effect in others must be coupled with another set of comments made by the attorneys interviewed. Contrary to what the court expected, we have some reason to believe that an appreciable number of attorneys are reluctant to request that GO34 be modified to better fit the needs of an individual case. Some such attorneys do not want to be perceived as trying to escape compliance with GO34. In addition, some cases for which GO34 is not appropriate are so small that the cost that would be incurred to request the modification cannot be justified. One of the goals of the court in the next years of the Pilot Program should be to develop ways to identify, as early as possible (perhaps even by criteria applied when the complaint is filed), those mainstream cases that the program is most clearly likely to benefit.

2. Case Management Statements

In an effort to investigate which aspects of GO34 are most useful to litigants, the court also surveyed attorneys concerning the effects of specific provisions of GO34. Attorneys mentioned the meet and confer requirement, the disclosure requirement, and the Case Management Conference, in order of frequency, as the most valuable aspects of GO34.

An overwhelming majority of the attorneys interviewed who had completed the Case Management Statement thought that enough was accomplished by the meet and confer process and preparation of the Case Management Statement to justify the resources the parties committed to them. Attorneys gained a better understanding of their opponents' view of the case, discussed alternative dispute resolution, developed a motion

practice plan, and planned discovery. Attorneys also mentioned that they were able to discuss a road map for the case or agree to limit discovery temporarily to the threshold issue in the case.

It is possible that one reason attorneys found the meet and confer process valuable is that it is preceded by the disclosure requirement. If parties are required to disclose information in advance of the meet and confer session, their discussions can be more informed and hopefully more productive.

3. Disclosure

Of the 25 attorneys interviewed, more (9) thought that the disclosure requirements had a net positive effect in their cases than (5) thought the disclosure requirement had a net negative effect. Some attorneys thought that they obtained useful information earlier through disclosure than they would have through traditional discovery. Several attorneys responded that disclosure did obviate the need for some discovery. One attorney specifically mentioned that the disclosure requirement obviated the need to send the standard set of interrogatories that are reflexively served after receiving the complaint. Another attorney commented that disclosure smoothed out the discovery and avoided the routine disputes in early discovery.

4. Case Management Conferences

Nearly all attorneys involved in Case Management Conferences held under GO34 thought that enough was accomplished to justify the resources committed to the conference. Parties found that the most useful aspects of the conference were getting feedback from the judge, either concerning a potential discovery dispute or the substantive issues in the case, and having the judge try to settle the case at the conference or refer it to an alternative dispute resolution procedure such as Early Neutral Evaluation or a settlement conference. In general, attorneys found conferences in which central issues were discussed more worthwhile than conferences that consisted only of setting dates. Attorneys thought that if the purpose of the conference was simply to set dates, that could be accomplished with less cost either by telephone or in writing.

V. Conclusion

It is important that GO34 be assessed in light of its purpose. It is an experiment. The preliminary study conducted by our court shows that the program is having some beneficial effects on the cases subject to it. However, it also appears

that the program has had some unintended effects on a subset of cases subject to it. At this stage of its development, any assessment of the program should focus on determining how the program can be improved to have more positive effects and better fit the cases subject to it rather than on declaring the program a success or failure.

GO34 is still new. Fortunately, Senator Biden has stated that regardless of the rules adopted on a national level, the Civil Justice Reform Act authorizes individual districts to experiment with programs such as GO34. See the Statement of Chairman Joseph R. Biden, Jr. on The Proposed Changes to the Federal Rules of Civil Procedure Submitted to The Subcommittee on courts and Administrative Practice of the Senate Committee on the Judiciary, July 28, 1993. Our court will continue its innovative experiment in the hope that later studies will reveal whether creative ideas such as mutual disclosure and active case management will benefit the administration of justice.

AMENDED GENERAL ORDER NO. 34
CASE MANAGEMENT PILOT PROGRAM

I. PURPOSE

The Northern District of California is one of three federal courts specifically mandated by Congress, under the Civil Justice Reform Act of 1990, to "experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution." 28 U.S.C. §471 Note. The Case Management Pilot Program (the "Pilot") is designed to enable parties to civil litigation who are proceeding in good faith to resolve their disputes sooner and less expensively.

The Pilot rules address three major causes of expense and delay: (1) excessive reliance on motion work and formal discovery to determine the essence of claims and defenses and to identify supporting evidence, (2) inattention to civil cases in their early stages, and (3) insufficient involvement of clients in decision-making about the handling of their cases.

Accordingly, the Pilot strives to replace some formal motion and discovery proceedings with early exchange of core information and meaningful dialogue about the merits and posture of the cases, including the Case Management Statement and Proposed Order which reflects the clients' cost-benefit analyses and which suggests specific limits on formal discovery.

II. SCOPE

All civil actions filed on or after July 1, 1993 that are assigned to the judges listed in Appendix A, except those types of cases listed in Appendix B, shall be included in the Pilot and governed by this Amended General Order. Pilot cases also shall remain subject to this court's Local Rules, but the provisions of this General Order shall supersede any conflicting provisions of the Federal Rules of Civil Procedure and the court's Local Rules (including Local Rule 220-10). The major deadlines are set forth in Appendix C.

III. SERVICE

A. Timing

As soon as practicable, but no later than 40 days after filing the complaint, plaintiff shall serve, on each defendant, the summons, complaint, a copy of this General Order, the Order Re Court Procedures, and the booklet entitled "Dispute Resolution Procedures in the Northern District of California."

B. Filing Proof(s) of Service

Proof(s) of service of process shall be filed with the court no later than 45 days after the complaint is filed.

C. Order to Show Cause

If by the 46th day after the complaint was filed, plaintiff has not filed proof of service showing that at least one defendant has been served, the court automatically will issue an Order To Show Cause why the complaint should not be dismissed or other sanctions imposed.

D. Additional Parties

Any party who, after the filing of the original complaint, causes a new party to be joined in the action shall promptly serve on that new party a copy of all items described in paragraph A of this section. Such additional parties must make the disclosures set forth in paragraph B of Section VII no later than 90 days after the filing of the complaint, or no later than 50 days after they were served with the complaint, whichever occurs later.

IV. REMOVED CASES

In cases removed to this court from a state court, the removing defendant(s) shall serve on the plaintiff(s) and all other parties, at the time of service of the notice of removal, a copy of this General Order, the Order re Court Procedures, and the booklet entitled "Dispute Resolution Procedures in the Northern District of California." The deadlines set forth in this General Order for disclosure and the meet and confer shall run from the date of the filing of the Notice of Removal.

The filing of a motion for remand does not relieve the moving party of any obligations under this General Order unless the assigned judge specifically grants such relief.

V. TRANSFERRED CASES

Within 30 days after the filing of a case transferred from another court, the assigned judge's courtroom deputy will notify counsel of the scheduling of a status conference at which the judge will decide whether the parties must comply with the obligations of this General Order. No obligations of this General Order shall apply unless the judge so orders.

VI. TEMPORARY SUSPENSION OF ALL FORMAL DISCOVERY ACTIVITY

Except by stipulation of all parties, or on written order of the court, no formal discovery, including discovery from third parties, shall be initiated until after the initial Case Management Conference.

VII. DUTIES OF DISCLOSURE AND SUPPLEMENTATION

A. Timing of Initial Disclosures

No later than 90 days after the complaint was filed, each party, regardless of whether defendant(s) has filed an answer, shall serve on every other party who has been served in the action, the disclosures set forth in paragraph B of this section.

B. Content of Initial Disclosures

After making in good faith such inquiry and investigation as is reasonable under the circumstances, each party shall disclose:

1. The full name, title, work or home address and telephone number of each person known to have discoverable information about factual matters relevant to the case.

2. All unprivileged documents in the party's custody or control that are then reasonably available that tend to support the positions that the disclosing party has taken or is reasonably likely to take in the case.

3. Copies of any apparently pertinent insurance agreements.

4. A computation by claimant(s) of any category of damages sought or likely to be sought, e.g., in a counterclaim.

5. All unprivileged documents and other evidentiary material in the party's custody or control that are then reasonably available that relate to damages, except punitive damages.

C. Procedures and Expenses re Inspecting and Copying Documents Subject to Disclosure

1. A party disclosing 100 or fewer pages of documents pursuant to this section may make copies, forward them to counsel for the other parties, and bill them at a reasonable rate.

2. A party whose disclosure would include more than 100 pages of documents shall telephone counsel for the other parties no fewer than five court days before the date the disclosure must be made under this General Order. The disclosing party shall describe to other counsel the volume and nature of its documents subject to disclosure. Each party to whom the disclosure would be made may elect to (a) inspect the documents to identify those it will arrange to have copied, (b) ask that the disclosing party copy and forward only specified categories of the documents subject to disclosure, or (c) ask that the disclosing party copy all the documents subject to disclosure. A party copying documents at another party's request under this section may bill the receiving party for the copying at a reasonable rate. A party who requests copies of fewer than all of the documents subject to disclosure by another party does not thereby waive a right subsequently to inspect and/or obtain copies of the remaining documents.

D. Protective Order

If one or more parties desires protection of documents or other information disclosed under paragraph B of this section, the parties shall enter a reasonable protective order to govern the disclosed documents or information until further order of court.

E. Duty to Supplement

Each party shall have a continuing duty to supplement its disclosures (to the extent that the information has not already been revealed in discovery) on a timely basis. In a Case Management Order, the court may, on its own initiative or upon request, set time intervals for supplementation.

F. Format and Certification of Disclosures

Every disclosure and supplementation shall be:

1. Served with a document entitled "Initial Disclosure of [*name of party*] or "[*number of*] Supplemental Disclosure of [*name of party*]," and

2. Signed by at least one attorney of record whose signature constitutes a certification that, to the best of his or her knowledge, information, and belief, formed after an inquiry that is reasonable under the circumstances, the disclosure or supplementation is complete and correct as of the time it is made.

VIII. MEET AND CONFER RE CASE MANAGEMENT

No later than 100 days after the complaint was filed, lead counsel for each party shall meet and confer regarding the following matters. The meet and confer session shall be conducted in a face-to-face meeting unless the offices of the parties' lead trial counsel are separated by more than 100 miles, in which case counsel may conduct the conference by telephone.

A. Principal Issues and Evidence

1. Identify the principal factual and legal issues that the parties dispute.

2. Discuss the principal evidentiary bases for claims and defenses.

B. Alternative Dispute Resolution

Discuss utilization of alternative dispute resolution procedures. Options are discussed in the booklet entitled "Dispute Resolution Procedures in the Northern District of California" available in the clerk's office.

C. Jurisdiction by a Magistrate Judge

Discuss whether all parties will consent to jurisdiction by a magistrate judge under 28 U.S.C. § 636(c).

D. Additional Disclosure

1. Discuss whether additional disclosure of documents or other information should be made and, if so, when.

2. Recommend the dates or intervals for supplementation of disclosures.

E. Motions

Identify any motions whose early resolution would likely have a significant effect on the scope of discovery or other aspects of the litigation.

F. Discovery

1. Negotiate a plan for at least the first phase of discovery, specifically identifying the discovery tools the parties plan to use, the names of persons who will be deposed or who will receive discovery requests, the dates on which any depositions will occur or any requests will be served, and the purpose for each deposition or discovery request.

2. Discuss limitations on each discovery tool and, if appropriate, on subject areas, types of witnesses, and/or time periods to which discovery should be confined.

3. Recommend protective orders, if appropriate.

G. Scheduling

1. Discuss dates by which discovery should be completed, expert witnesses disclosed, motions directed to the merits of all or part of the case heard, the papers required for the final pretrial conference filed, the final pretrial conference held, and the trial commenced.

These items also are set forth on the Form for Case Management Statement and Proposed Order attached as Appendix D.

IX. THE CASE MANAGEMENT STATEMENT AND PROPOSED ORDER

No later than 10 days before the initial Case Management Conference, counsel shall file a concise, joint Case Management Statement and Proposed Order, in the Form attached as Appendix D, which shall:

A. Principal Issues

Include a brief statement of the principal facts and events underlying the action.

Identify the principal factual and legal issues that the parties dispute.

B. Alternative Dispute Resolution

Identify the alternative dispute resolution procedure which counsel intend to use, or report specifically why no such procedure would assist in the resolution of the case.

C. Jurisdiction by a Magistrate Judge

Indicate whether all parties consent pursuant to 28 U.S.C. § 636(c), to have a magistrate judge preside over a jury or court trial, with appeal lying to the United States Court of Appeals for the Ninth Circuit.

D. Disclosure

1. List by name and title the persons whose identities have been disclosed.

2. Describe by category the documents that have been disclosed under section VII.B. of this Order or produced through formal discovery.

3. Set forth the computations of damages.

4. Describe each additional category of documents that will be disclosed without imposing on other counsel the burden of serving a formal request for production of documents.

5. Recommend the dates or intervals for supplementation of disclosures.

E. Motions

Identify any motions whose early resolution would likely have a significant effect on the scope of discovery or other aspects of the litigation.

F. Discovery

1. Describe all discovery completed or in progress.

2. With respect to at least the first phase of discovery, the parties shall stipulate to a discovery plan. The plan shall detail the discovery tools the parties plan to use (e.g., depositions, interrogatories, document production requests). In addition, the discovery plan shall include the names of persons who will be deposed or who will receive discovery requests, the dates on which any depositions will occur or any requests will be served, and the purpose for each deposition or discovery request.

3. Recommend limitations on each discovery tool and, if appropriate, on subject areas, types of witnesses, and/or time periods to which discovery should be confined.

G. Trial

State the month and year in which the parties recommend the trial should commence, the anticipated length of trial and whether the trial will be before the court or a jury.

H. Additional Scheduling

1. Recommend time limits to conclude discovery and to hear motions.

2. Recommend the date for the pretrial conference and for filing the papers required for the pretrial conference.

X. THE INITIAL CASE MANAGEMENT CONFERENCE

Within 120 days of the filing of the complaint, or on the first date thereafter available on the judge's calendar, the judge will conduct the initial Case Management Conference, which shall be attended by lead trial counsel for each party. The judge may enter an order requiring the parties to participate, in person or by telephone, in the conference.

At the conference the court will:

A. Principal Issues

1. Identify, at least tentatively, the principal factual and legal issues in dispute.

2. Fix time limits to join other parties and to amend the pleadings.

B. Alternative Dispute Resolution

Consider referring the case to an alternative dispute resolution procedure.

C. Jurisdiction by a Magistrate Judge

Determine whether all parties consent to a jury or court trial presided over by a magistrate judge under 28 U.S.C. § 636(c).

D. Disclosure

1. Review the parties' compliance with their disclosure obligations.

2. Consider whether to order additional disclosures and fix the dates or intervals for supplementation of disclosures.

E. Motions

Determine whether to order early filing of any motions that might significantly affect the scope of discovery or other aspects of the litigation.

F. Discovery

1. Determine the plan for at least the first stage of discovery.

2. Impose limitations on each discovery tool and, if appropriate, on subject areas, types of witnesses, and/or time periods to which discovery should be confined.

G. Trial

Fix the date or the time period (by month and year) for commencement of the trial.

H. Additional Scheduling

1. Fix time limits to conclude discovery and to hear motions.

2. Fix the date for the pretrial conference and for filing the papers required for the pretrial conference.

I. Fix the date for the next case management/status conference.

XI. THE INITIAL CASE MANAGEMENT ORDER

No more than ten calendar days after the initial Case Management Conference, the judge will enter the initial Case Management Order which will address all of the matters covered in the initial Case Management Conference.

XII. SANCTIONS

The court has authority to impose sanctions for violation of any provisions of this General Order, including violations of the duties to disclose and/or supplement.

XIII. RECONSIDERATION BY DISTRICT JUDGES OF MAGISTRATE JUDGES' RULINGS ON DISCOVERY MATTERS

A party who seeks reconsideration by the assigned district judge of a magistrate judge's ruling on a discovery matter shall do so by filing a motion in conformity with Local Rule 410-2. Unless otherwise ordered by the assigned judge, no response need be filed and no hearing shall be held. The judge may deny the motion by written order at any time, but shall not grant the motion without giving the opposition an opportunity to brief the matter. If no order denying the motion or setting a briefing schedule is made within 15 calendar days of the filing of the motion, the motion shall be deemed denied.

XIV. TENTATIVE RULINGS; NOTICE RE ISSUES ON WHICH JUDGE WANTS ORAL ARGUMENT TO FOCUS

A. Any judge may elect to issue a tentative ruling with respect to any motion scheduled for hearing. Counsel shall ask at the initial Case Management Conference whether the judge will be issuing tentative rulings and, if so, how they will be communicated.

B. When a judge identifies, before a hearing on a motion, issues or other matters on which he or she wants oral argument to focus, or about which he or she wants additional information or authority, the judge will endeavor to provide advance notice to counsel in writing, by telephone, or by such other means as the judge deems appropriate.

XV. RELATIONSHIP BETWEEN THE CASE MANAGEMENT PILOT RULES AND THE COURT'S ADR MULTI-OPTION PILOT, ARBITRATION AND EARLY NEUTRAL EVALUATION PROGRAMS

A. Cases Assigned to the ADR Multi-Option Pilot

Except as may be otherwise ordered in individual matters, counsel in cases that are subject to this General Order and that are assigned to the ADR Multi-Option Pilot under General Order No. 36 shall comply with the provisions of both General Order No. 36 and this General Order.

B. Cases Assigned to Arbitration

Except as may be otherwise ordered in individual matters, counsel in cases that are subject to this General Order and that are assigned to arbitration under Local Rule 500 shall comply with the provisions of both that Local Rule and this General Order. In such cases, the clerk shall set a date for the arbitration hearing not more than 135 days after the Case Management Conference, in order to allow parties to conduct discovery after the Case Management Conference. In addition, the assigned judge will hold a status and trial setting conference within 30 days of a timely filed demand for trial de novo after an arbitration hearing.

C. Cases Assigned to Early Neutral Evaluation (ENE)

Except as may be otherwise ordered in individual matters, counsel in cases that are subject to this General Order and that are assigned to the ENE program shall proceed simultaneously in compliance with both this General Order and General Order No. 26 (governing ENE).

XVI. PROHIBITION AGAINST MODIFYING PILOT REQUIREMENTS SIMPLY BY STIPULATION; REQUIREMENT OF COURT ORDER

Except as expressly provided in Section VI, provisions of this General Order may be modified or vacated only by written order of a judge of this court following a timely showing that the interests of justice clearly would be harmed if the provisions in question were not modified or vacated. Counsel may contact the chambers of the assigned judge to determine whether he or she will hear requests to modify provisions of this General Order by telephone conference.

XVII. REQUIREMENT OF CLIENT APPROVAL FOR CERTAIN CONTINUANCES

Any request to continue the trial shall be signed by both lead trial counsel and the client.

XVII. FILING MOTIONS DOES NOT RELIEVE PARTIES OF PILOT PROGRAM OBLIGATIONS

The filing of a motion of any kind does not relieve any party of the obligations imposed by this General Order.

XIX. QUESTIONS ABOUT CASE MANAGEMENT PILOT

Parties may direct general questions about the operation of the Case Management Pilot to the court's Case Management Coordinator, telephone number: (415) 556-2972.

ADOPTED: July 1, 1992
AMENDED: July 1, 1993

APPENDIX A
PARTICIPATING JUDGES

The following judges are participating in the Case Management Pilot:

Chief Judge Thelton E. Henderson
Judge William H. Orrick, Jr.
Judge Marilyn Hall Patel
Judge Eugene F. Lynch
Judge Charles A. Legge
Judge D. Lowell Jensen
Judge Fern M. Smith
Judge Vaughn R. Walker
Judge James Ware
Judge Saundra Brown Armstrong
Judge Barbara A. Caulfield
Judge Ronald M. Whyte

APPENDIX B
CATEGORIES OF CASES EXCLUDED FROM THE PILOT

The following types of cases, based on information set forth on the Civil Cover Sheet, will be excluded from the Pilot: class actions, multidistrict litigation, transferred cases, cases filed by pro se plaintiffs, cases remanded from appellate court, reinstated and reopened cases, and cases in the following nature of suit categories indicated on the Civil Cover Sheet: Prisoner Petitions (510 - 550), Forfeiture/Penalty (610 - 690), Bankruptcy (422 - 423), Social Security (861 - 865), Contracts (only nos. 150 (Recovery of Overpayment and Enforcement of Judgment), 151 (Medicare Act), 152 (Recovery of Defaulted Student Loans), and 153 (Recovery of Overpayment of Veteran's Benefits)), Civil Rights (only no. 441 (Voting)), and other Statutes (only nos. 400 (State Reapportionment), 460 (Deportation), 810 (Selective Service), 875 (Customer Challenge 12 USC 3410), 892 (Economic Stabilization Act), 894 (Energy Allocation Act), 895 (Freedom of Information Act) and 900 (Appeal of Fee Determination Under Equal Access to Justice)).

APPENDIX C
CASE MANAGEMENT PILOT TIMELINE

DAY[1]	ACTIVITY
0	complaint filed, case assigned to pilot judge
40	last day to serve all defendants
45	last day to file proof(s) of service
46	court issues Order to Show Cause why the complaint should not be dismissed if plaintiff has not filed proof that at least one defendant has been served
90	last day to complete required disclosures
100	last day to complete meet and confer re case management
110 [2]	last day to file and serve Case Management Statement and Proposed Order
120 [3]	judge conducts initial Case Management Conference
130	judge issues initial Case Management Order

[1] These deadlines represent the number of days after the filing of the complaint. All activities must occur no later than the listed date, unless the court orders otherwise.

[2] The last day to file and serve the Case Management Statement and Proposed Order will be 10 days before the scheduled initial Case Management Conference.

[3] The date for the initial Case Management Conference will be set as close as feasible to the 120th day after the filing of the complaint.

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

	CASE NO.
	JOINT CASE MANAGEMENT STATEMENT AND PROPOSED ORDER
	CASE MANAGEMENT CONFERENCE
	DATE:
	TIME:

Pursuant to this Court's General Order No. 34, the court conducted a Case Management Conference on _____. Each party was represented by lead counsel responsible for trial of this matter and was given an opportunity to be heard as to all matters encompassed by this Case Management Statement and Proposed Order filed prior to the conference.

According to their written and oral submissions, the parties contend that the principal facts and events underlying the action are:

FACTS AND EVENTS UNDERLYING THE ACTION

A. PRINCIPAL ISSUES

1. The principal factual issues that the parties dispute are:

   a.

   b.

   c.

2. The principal legal issues that the parties dispute are:

   a.

   b.

   c.

3. The following issues as to service of process, personal jurisdiction, subject matter jurisdiction, or venue remain unresolved:

4. The following parties have not yet been served:

5. Any additional parties that a party intends to join are listed below:

Party	Additional Parties	Deadline

6. Any additional claims that a party intends to add are listed below:

Party	Additional Claims	Deadline

B. ALTERNATIVE DISPUTE RESOLUTION (Choose one of the following three options.)

☐ This case already has been assigned or the parties have agreed to use the following court sponsored or other ADR procedure (please list the provider if other than the court):

Date by which ADR session to be held:

☐ The parties have been unable to agree on an ADR procedure. The party[ies] listed below believes that the case is appropriate for the ADR procedure indicated:

☐ All parties share the view that no ADR procedure should be used in this case. The specific basis for that view is set forth below:

The Court hereby orders: _____

_____

_____

C. CONSENT TO JURISDICTION BY A MAGISTRATE JUDGE

Parties consent to a jury or court trial presided over by a magistrate judge ☐ yes ☐ no

The Court hereby refers this case for the following purposes to a magistrate judge:

_____

_____

_____

D. DISCLOSURES

The parties certify that they have made the following disclosures:

1. Persons disclosed pursuant to section VII.B.1. of General Order No. 34:

a. Disclosed by _____:

(1)

(2)

(3)

(4)

b. Disclosed by _____:

(1)

(2)

(3)

(4)

c. Disclosed by _____:

(1)

(2)

(3)

(4)

2. Categories of documents disclosed under section VII.B. of General Order No. 34 or produced through formal discovery:

a. Categories of documents disclosed by _____:

(1)

(2)

(3)

(4)

b. Categories of documents disclosed by _____:

(1)

(2)

(3)

(4)

c. Categories of documents disclosed by _____:

(1)

(2)

(3)

(4)

3. Each party who claims an entitlement to damages or an offset sets forth the following preliminary computation of the damages or of the offset:

4. The parties will disclose the following additional information by the date listed:

Party	Disclosure	Deadline

5. **Disclosures** will be supplemented at the following intervals:

E. EARLY FILING OF MOTIONS

The following motions expected to have a significant effect either on the scope of discovery or other aspects of the litigation shall be heard by the date specified below:

Moving Party	Nature of Motion	Hearing Date

F. DISCOVERY

1. The parties have conducted or have underway the following discovery:

2. The parties have negotiated the following discovery plan:

3. Limitations on discovery tools (specify number):

a. depositions (excluding experts) by:

plaintiff(s): _____ defendant(s): _____

b. interrogatories served by:

plaintiff(s): _____ defendant(s): _____

c. document production requests served by:

plaintiff(s): _____ defendant(s): _____

d. requests for admission served by:

plaintiff(s): _____ defendant(s): _____

4. The parties agree to the following limitations on the subject matter of discovery:

5. Discovery from experts. The parties plan to offer expert testimony as to the following subject matter(s):

6. The Court orders the following additional limitations on the subject matter of discovery: _____

_____

_____

_____

G. TRIAL

1. Trial date:

2. Anticipated length of trial (number of days):

3. Type of trial: ☐ jury ☐ court

H. ADDITIONAL SCHEDULING

1. Final pretrial conference date: _____

2. Date for filing papers required for the final pretrial conference: _____

3. Deadline to hear motions directed to the merits of all or part of the case:

_____

4. Deadlines for completion of discovery:

a. all discovery except from experts: _____

b. disclosure of identities and resumes of expert witnesses:

plaintiff(s): _____

defendant(s): _____

c. discovery from experts: _____

I. Date of next case management/status conference: _____

J. OTHER MATTERS

K. IDENTIFICATION OF PARTIES

To facilitate survey research of the pilot program, please identify by name, title, work or home address and phone number of a client representative of <u>each</u> party:

L. IDENTIFICATION AND <u>SIGNATURE</u> OF LEAD COUNSEL

Identify by name, address, and phone number lead counsel for each party.

IT IS HEREBY ORDERED:

Dated: _____

_____
U.S. District Judge

With the helpful assistance of the Court's Automation Support team, the following information was collected on each of the Pilot and control cases, by way of a raw-text data transfer to a spreadsheet for statistical analysis:

- Case number
- Judge
- Title of case
- Nature of suit (from the Civil Cover Sheet)
- File date
- Termination date (if any)
- Age of case at observation (or termination, if earlier)
- Number of total docket entries in the first 6 months
- Number of motions in the same period
- Number of motions in the same period which can potentially dispose of parties or claims
- Date of first motion
- Date of first potentially dispositive motion **(if available)**
- Number of parties
- Number of attorney representations
- Number of attorneys
- Number of attorney offices
- Reported claim (if any)
- Nature of judgment
- Origin (original, removal, etc.)
- Class action status
- Nature of jurisdiction
- At-issue date
- Pretrial conference date
- Discovery cut-off date
- Trial commencement date
- Trial completion date
- Procedural progress at termination
- Nature of Disposition
- Arbitration status
- Early neutral evaluation status

Search terms for conferences
conference

Search terms for discovery related events
deposition
discovery
interrogator
compel
subpoena
request*admi
protective order
produc
document*request
request*document
examin
privilege

Search terms for sanction or contempt related events
contempt
sanction

Search terms for time related events
continu
shorten
extend
extens
enlarg
reschedul
reset

EXHIBIT 3 TO APPENDIX A

Respondent No.

Interview Protocol for Attorneys
Case Management Pilot Program
July, 1993

Hello, my name is Nina Srejovic. I'm calling from the U.S. District Court. I wrote to you last week about the court's study of its Case Management Pilot Program also known as General Order 34. According to our records, you represented _____in case ___ _____ Is that correct? As I mentioned in my letter, as part of the Court's study of its Case Management Pilot Program, I am interviewing a sample of attorneys who have represented parties in cases governed by GO 34. In the limited time available, we are trying to talk to as many attorneys as possible. The interview should take about 20 minutes. Are you the most knowledgeable attorney with regard how GO 34 affected your case?

[If not, determine who is.]

By interviewing attorneys who have had experience with GO 34, the court hopes to gather information about what effects the GO has had on cases subject to it. This is not a statistical survey. Your responses do not need to be limited to brief answers to the specific questions asked. Most of the questions are meant to be open-ended. Please feel free to volunteer whatever information you feel would be useful to the court.

This is a confidential interview. There will be no identification of individuals or cases in any report. The court appreciates your willingness to participate in our study.

[Explain topical progression.]

1. A few question about your professional experience.
2. Questions about the effect of General Order No. 34 as a whole.
3. Questions about specific provisions of General Order No. 34.

Respondent No.

BACKGROUND INFORMATION

1. When were you first admitted to the Bar of any state?

2. During the last five years, what percentage of your time has been committed to plaintiff's matters?

3. During the last five years, in what work setting have you spent the most time?

- ❑ small firm private practice (1-5 lawyers)
- ❑ medium-sized firm private practice (6-40 lawyers)
- ❑ larger firm private practice (more than 40 lawyers)
- ❑ employed by private company (corporate or house counsel, legal dept. of insurance co., etc.)
- ❑ legal aid, public interest
- ❑ employed by government
- ❑ other (please specify)

GENERAL ORDER NO. 34

4. Are you familiar with GO 34?

- ❑ yes
- ❑ no

5. Just to make sure we are focused on the same thing, what do you think of as the major components of GO 34?

[If needed, suggest: stay on discovery, disclosure requirement, meet and confer, Case Management Statement, Case Management Conference and Case Management Order.]

Respondent No.

6. Is the case still pending?

❑ yes — At what stage is the case presently?

❑ no — At what stage did the case terminate?

Do you think that the Pilot Program had any effect on the time or stage that the case terminated?

7. Did you do anything differently in this case because it was subject to GO 34 than you would have if this case had not been subject to GO 34?

8. Did the provisions of GO 34 have any kinds of positive effects on how this litigation proceeded or on its outcome?

9. Did the provisions of GO 34 have any kinds of negative effects on how this litigation proceeded or on its outcome?

Respondent No.

10. On balance, taking into account both any positive and any negative effects on the litigation that you attribute to GO 34, is the GO 34 system an improvement over earlier practices in this court?

❑ yes Why or in what ways?

❑ no Why not?

11. Which parts of the new system, or which of its requirements, were most valuable or contributed most?

12. Which parts of the new system, or which of its requirements, were least valuable?

13. Were any parts of the new system actively counterproductive?

Respondent No.

14. At this point in the litigation, do you have an opinion about whether enough was accomplished by the requirements of GO 34 process to justify the resources the parties committed to them?

❑ yes Please explain.

❑ no Please explain.

15. Did the provisions of GO 34 have any impact on the discovery process in this case?

❑ yes What effect?

To what parts of the GO 34 system do you attribute that effect?
- disclosure,
- the presumptive prohibition on discovery before the first case management conference,
- the meet and confer requirement,
- the need to prepare a case management statement,
- the initial case management conference with the court]

❑ no

Respondent No.

15a. Did the provisions of GO 34 make any of the formal discovery better focused or more efficient?

❑ yes

To what parts of the GO 34 system do you attribute that effect?
- disclosure,
- the presumptive prohibition on discovery before the first case management conference,
- the meet and confer requirement,
- the need to prepare a case management statement,
- the initial case management conference with the court]

❑ no

15b. Did the provisions of GO 34 make any of the formal discovery more productive or useful? For example, did they enable the parties to frame their discovery in ways that generated more useful learning or evidence?

❑ yes

To what parts of the GO 34 system do you attribute that effect?
- disclosure,
- the presumptive prohibition on discovery before the first case management conference,
- the meet and confer requirement,
- the need to prepare a case management statement,
- the initial case management conference with the court]

❑ no

15c. Did the provisions of GO 34 have any effect on discovery disputes during this case?

❑ yes

What effect? [Reduce number, increase number, chage the material/content?]

To what parts of the GO 34 system do you attribute that effect?
- disclosure,
- the presumptive prohibition on discovery before the first case management conference,
- the meet and confer requirement,
- the need to prepare a case management statement,
- the initial case management conference with the court]

❑ no

15d. Did the provisions of GO 34 result in more discovery being conducted in this case than would have been conducted without the provisions of GO 34?

❑ yes

Were the ends of justice served, on balance, by the additional discovery?

or did the additional discovery prove, on balance, unproductive?

❑ no

15e. Did the disclosure requirement or any other provision of GO 34 obviate the need for any formal discovery?

❑ yes — To what parts of the GO 34 system do you attribute that effect?
- disclosure,
- the presumptive prohibition on discovery before the first case management conference,
- the meet and confer requirement,
- the need to prepare a case management statement,
- the initial case management conference with the court]

❑ no

16. Did you obtain the information central to the case earlier, later, or at about the same time as you would have under the rules before GO 34 was adopted? Explain.

❑ earlier

❑ later

❑ about same time

17. Did the GO 34 system result in opposing counsel communicating earlier than they otherwise would have?

❑ yes — Which part of the GO 34 system caused the first communication between counsel?
- disclosure,
- the presumptive prohibition on discovery before the first case management conference,
- the meet and confer requirement,
- the need to prepare a case management statement,
- the initial case management conference with the court]

❑ no

Respondent No.

18. Did the GO 34 system have any effect on motion activity in this case?

❑ yes What effect?

To what parts of the GO 34 system do you attribute that effect?
- disclosure,
- the presumptive prohibition on discovery before the first case management conference,
- the meet and confer requirement,
- the need to prepare a case management statement,
- the initial case management conference with the court]

❑ no

18a. Did the provisions of GO 34 cause the parties to formulate a motion practice plan earlier than they otherwise would have? Explain.

❑ yes

❑ no

18b. Did you file any motions in this case that you would not have filed if the case had not been subject to GO 34? Explain.

❑ yes

❑ no

18c. Did the way the GO 34 system played out in this case cause you not to file any motions that you probably would have filed if the case had not been subject to GO 34? Explain.

❑ yes

❑ no

Respondent No.

19. Did the parties use an ADR procedure in this case? [If unclear, suggest ENE, court sponsored arbitration, private arbitration, mediation, settlement conference with a judicial officer.]

❑ yes

Did the parties agree to use the procedure or did the court order it?

Did the provisions of GO 34 affect the parties decision to use an ADR procedure?

❑ no

20. Did the GO 34 system have any effect on the timing or substance of settlement discussions?

❑ yes

What was the effect?

To what parts of the GO 34 system do you attribute that effect?
- disclosure,
- the presumptive prohibition on discovery before the first case management conference,
- the meet and confer requirement,
- the need to prepare a case management statement,
- the initial case management conference with the court]

❑ no

Respondent No.

21. Did the GO 34 system cause your client or you to investigate or analyze the case earlier than you otherwise would have for cases in this district court?

❑ yes

To what parts of the GO 34 system do you attribute that effect?

- disclosure,
- the presumptive prohibition on discovery before the first case management conference,
- the meet and confer requirement,
- the need to prepare a case management statement,
- the initial case management conference with the court]

❑ no

DISCLOSURE

22. Were the disclosures substantially in compliance with the requirements of GO 34 as you understand them?

❑ yes

❑ no

Please describe how (or in what ways) the disclosures fell short of what GO 34 requires?

Why, in your opinion, were the disclosures not substantially in compliance with the GO?

Respondent No.

23. Did the disclosure process result in you acquiring useful information earlier in the case than you probably would have if there had been no disclosure requirement?

❑ yes In what way?

❑ no

24. On balance, did the disclosure requirements:

(a) make a net positive contribution?

(b) make no real difference?

or (c) have a net negative effect?

25. Could the net effect of the disclosure system be improved if the content of the disclosure obligation were changed?

❑ yes What changes in the content of the disclosure obligation would cause such an improvement?

❑ no

Respondent No.

26. In this case, in your opinion, did the disclosure requirements give an unfair advantage to any one party?

❑ yes Please explain.

❑ no

MEET AND CONFER AND CASE MANAGEMENT STATEMENT

Did the parties file a Case Management Statement (from computer) _____.

27. Did the parties meet and confer before preparing the Case Management Statement?

❑ yes

❑ no

28. Was the meet and confer in person?

❑ yes

❑ no

29. What was accomplished during the meet and confer process?

Respondent No.

30. Did the meet and confer process appreciably improve your understanding of your opponent's perspective on the case?

❑ yes Please explain.

❑ no

31. Did the meet and confer process contribute appreciably to your analytical understanding of the merits of the case?

❑ yes Please explain.

❑ no

32. On balance, was enough accomplished through the meet and confer process to justify the resources the parties committed to it?

❑ yes Please explain.

❑ no Please explain.

Respondent No.

33. On balance, was enough accomplished by preparation of the Case Management Statement to justify the resources the parties committed to it?

❑ yes Please explain.

❑ no Please explain.

34. Was settlement discussed in connection with the meet and confer process?

❑ yes

❑ no

CASE MANAGEMENT CONFERENCE

Age of case at time of conference from court computer _____.

35. Was a case management conference held in this case?

❑ yes Was the conference conducted in phone or in person?

❑ phone Would the conference have been more productive if it had been in person?

❑ yes
❑ no

❑ person

❑ no Skip to question number 39.

36. [If Case Management Conference held greater than 140 days after complaint filed.] Why was the conference postponed?

37. Was the Case Management Conference held too early, too late or at about the right time?

38. Was there any difference between the initial Case Management Conference in this case and the initial Rule 16 conferences that you would have expected in this court prior to the adoption of GO 34?

❑ yes What was different about the Case Management Conference?

❑ no

39. On balance, was enough accomplished at the Case Management Conference to justify the resources the parties committed to it?

❑ yes Please explain.

❑ no Please explain.

Respondent No.

40. What aspect of the Case Management Conference was most useful to the parties?

41. How could the Case Management Conference been of more use to the parties?

CASE MANAGEMENT ORDER

42. Was a Case Management Order issued in this case?

- ❑ yes
- ❑ no Skip to question no. 43.

43. Have subsequent activities in the case conformed to the Case Management plan in the Order? [Suggest if needed, for example, discovery limitations, motion hearing deadlines, trial date.]

- ❑ yes
- ❑ no In what way have subsequent activities differed from what was outlined in the Order?

44. Have any of the parties requested that the Case Management Order be modified in any way?

❑ yes Why was the modification requested?

How was the modification made? [By stipulation, by order after contested hearing, by order over written objection but without a hearing.]

❑ no

45. Has the Case Management Order issued by the Court been useful to the parties in resolving any potential or actual disagreements in scheduling, discovery or with respect to any other matter?

❑ yes Please explain.

❑ no

46. Do you have any other comments you wish to make?