Report to the Judicial Conference Committee on Court Administration and Case Management

A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990

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This report was undertaken in furtherance of the Federal Judicial Center's statutory mission to provide research and planning assistance to the Judicial Conference of the United States and its committees. The views expressed are those of the authors and not necessarily those of the Judicial Conference, the Committee, or the Federal Judicial Center.

Table of Contents

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Overview of This Report

Background to This Report

The Civil Justice Reform Act of 1990 designated five federal district courts as demonstration districts. It instructed two of these districts, the Western District of Michigan and the Northern District of Ohio, to "experiment with systems of differentiated case management that provide specifically for the assignment of cases to appropriate processing tracks that operate under distinct and explicit rules, procedures, and time-frames for the completion of discovery and for trial."[1] The other three districts, the Northern District of California, the Western District of Missouri, and the Northern District of West Virginia, were instructed to "experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution...."[2]

The statute also instructed the Judicial Conference of the United States to report to Congress on the "experience of the courts under the demonstration program."[3] The Judicial Conference delegated responsibility for that report to its Committee on Court Administration and Case Management, which in turn asked the Federal Judicial Center to conduct a study of the demonstration programs. This report presents the findings from that study.

Purpose and Format of This Report

The demonstration districts must be distinguished from the pilot districts established by the Civil Justice Reform Act.[4] The statute directs the Judicial Conference to select ten districts to serve as pilot courts for implementation of six case management principles considered promising by Congress. On the basis of the experience of the pilot courts, and a comparison of their experience to that of ten other courts not required to adopt the six case

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[1] Pub.L. 101-650, Sec. 104, as amended Pub.L. 104-33, §1, Oct. 3, 1995, 109 Stat. 292.

[2] *Id.*

[3] *Supra* note 1.

[4] Pub.L. 101-650, Sec. 105, as amended Pub.L. 104-33, §1, Oct. 3, 1995, 109 Stat. 292.

management principles, the Judicial Conference is to make recommendations to Congress regarding the most effective case management practices for the federal courts. The experience of the pilot courts is, then, to form the basis for general principles to be applied, if proven effective, in all federal district courts.

The responsibility of the demonstration districts is somewhat different. They were asked to take two case management innovations—differentiated case tracking and alternative dispute resolution—and to demonstrate how to make these innovations work in their particular circumstances. The courts' experiences, rather than serving as the basis for general principles, serve more as lessons or models for other districts that may wish to make similar efforts. Thus, in keeping with their designation as *demonstration* programs, this report provides sufficient detail about each court to permit other districts to consider whether the procedures illustrated by these courts would be appropriate for them. In separate chapters, one for each demonstration program, the report describes the issues considered by each district in designing their programs and the steps taken, such as staffing changes and budget adjustments, to implement them. It also discusses the benefits the courts say they have realized from these programs.

At the same time, the courts' experiences converge in certain ways and thus the report provides a synthesis that summarizes, across the three districts, the findings on the effectiveness of specific practices as implemented in these districts. The questions we address—after first describing briefly the programs the courts adopted, relevant conditions in the districts, and the extent to which the courts have implemented their programs—are the following:

> Have these programs reduced litigation time and costs?
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> What other benefits, if any, have the courts realized from these programs?
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> What do these courts' experiences tell us about the effectiveness of specific case management and alternative dispute resolution (ADR) practices?
>
> Does the effectiveness of the court's procedures vary by type of case?
>
> How is a case management tracking system different from individualized case management?
>
> How many cases are referred to ADR?
>
> Do ADR programs promote settlement?
>
> What factors contribute to the effectiveness of ADR?
>
> What are the effects of giving parties a choice of ADR options?
>
> Are any special conditions necessary for implementing these programs?

To accomplish these purposes, this report on the demonstration programs is presented in an executive summary and six chapters, the first three on the case management demonstration programs and the second three on the ADR demonstration programs. While

there are only five districts, there are six chapters because the Northern District of California, under the statute's broad language to experiment with cost and delay reduction methods "including" ADR, adopted two distinct pilot programs, one for case management and one for ADR, each of which is discussed in a separate chapter.

A Note on the Five Districts That Are the Subject of This Report

All five districts discussed in this report are designated by name in the Civil Justice Reform Act (unlike the pilot courts established by the Act) and were explicitly invited by Congress to be demonstration districts. The reason for this attention is similar across the courts. For the Northern District of California, the late Judge Robert Peckham had worked closely with Congress to craft a statute that would take into consideration some of the concerns judges had expressed about the first draft of the CJRA. Furthermore, the court had long been a leader in case management and ADR innovations and for both reasons was invited by Congress to serve as a demonstration program.

The Northern District of Ohio and the Western District of Michigan were also invited because judges in these districts—Judge Thomas Lambros in Ohio Northern and Judge Richard Enslen in Michigan Western—had been active in the development of ADR. In addition, Judge Enslen had testified to the value of individualized judicial case management during Congressional hearings on the CJRA.

The Northern District of West Virginia and the Western District of Missouri were also invited because the then-chief judges in those districts—Judge Robert Maxwell in West Virginia Northern and Judge Scott Wright in Missouri Western—had been active in the development of ADR.

Each of these districts entered into their demonstration programs, then, as willing participants in the project and with a history of attention to case management, ADR, or both. Each district also provided us substantial assistance and their full cooperation in all our research efforts, for which we are grateful.

A Note on the Methods and Limits of This Report

The findings presented in this report are derived from three principal sources. First, in each district we interviewed members of the advisory group, court staff, and judges within the first year of program implementation and then interviewed the judges again after several years of experience with the program. The interviews addressed the purpose of the demonstration program, the issues encountered in implementing it, and assessments of its impact on the court and the cases managed under it.

We also drew a sample of cases that were filed and terminated during the demonstration program and sent questionnaires in 1995 and 1996 to the lead attorneys who handled these cases and, in California Northern, to the neutrals who conducted ADR sessions in these cases. The questionnaires asked the attorneys to estimate the impact of

procedures adopted under the program on the time and cost expended to litigate their case. Attorneys in the case management districts were asked, for example, whether the initial case management conference with the judge "moved the case along," "slowed the case down," or had "no effect." Likewise, they were asked whether this conference "decreased the cost of this case," "increased the cost of this case," or had "no effect." Additional questions about the case and the attorney provided information about characteristics likely to affect the time or cost of the case. In the ADR districts, the questionnaires inquired not only about impacts on cost and time but also asked attorneys to identify the features of the ADR process that were helpful in their case.

We did not survey litigants in the sample cases because litigant names and addresses must be obtained from their attorneys, and in pretests of the questionnaires we found that only a small percentage of attorneys provided that information. Coupled with the typically low response rate on litigant surveys, we decided not to collect data that would not provide a sound basis for generalizations.

Our third source of data was the information routinely kept about each case on the courts' docketing systems, which we used primarily for examining the courts' caseload trends and, in Missouri Western, for determining time to disposition for each case.

It is important to keep in mind that findings from the interviews and questionnaires rest on judges' and attorneys' estimates of the demonstration programs' effects. While their beliefs about the programs' value are important factors in weighing program impact, judges' and attorneys' perceptions do not provide conclusive evidence of actual program impact. Although this is a limitation, their estimates provide valuable information about the perceived impact of the courts' new procedures.

Appendix A provides more information about the research methods used in this study.

Executive Summary

A Synthesis of Findings From the Study of the CJRA Demonstration Districts

A Description of the Programs Adopted by the Five Districts

The Case Management Programs

Each of the three courts that adopted case management programs—the Northern District of California, the Western District of Michigan, and the Northern District of Ohio—designed programs that emphasize early judicial attention to each eligible civil case and that include the following elements:

- an early case management conference with the judge and attorneys;
- a requirement that attorneys meet and discuss the case, its needs, and its schedule before the case management conference;
- a requirement that before the case management conference attorneys submit a joint case management report based on their discussions;
- issuance of a case management order, at or soon after the conference, that sets a schedule for the case, specifies limits on discovery, and addresses a number of other matters; and
- availability of an array of court-based ADR programs, including mediation, arbitration, and early neutral evaluation.

The goals the courts hoped to achieve with these programs are manifold and vary from court to court: to reduce cost and delay, as the statute instructs; to bring greater uniformity to case management; to establish firm judicial control of cases; to eliminate unnecessary discovery; to create a system of accountability for judges and cases.

The approach to achieving the goals is, in each court, to engage judges and attorneys in the issues of the case at an early stage in the litigation, thus enabling them to resolve or narrow issues before discovery expenses are incurred; to define the scope and timing of discovery; to discuss settlement and/or the use of ADR; to consider consent to trial by a magistrate judge; and to set a schedule for the case. The courts' case management orders set dates for such matters as the close of discovery, the filing of dispositive motions, and the commencement of trial.

Each district also provides for initial disclosure of discovery material, but their practices vary. The Northern District of California adopted disclosure before Fed. R. Civ. P. 26 was amended. It has subsequently conformed its local rule to the federal rule, but requires

parties to provide actual documents rather than a listing of documents. The Northern District of Ohio has also opted into the federal rule, but informally the court permits judges to implement it as they wish. Some judges require it, others do not. The Western District of Michigan also opted into the federal rule but in its local rule gives judges the authority to apply it at their discretion. The judges do, in some cases, order parties to disclose material on the basis of discussions at the case management conference. One judge described the court as moving toward full application of Rule 26.

While the case management demonstration programs are, then, similar in many respects, the Northern District of Ohio and the Western District of Michigan differ in two significant ways from the Northern District of California. First, their demonstration programs cover all civil cases, including cases we will for convenience call "administrative" cases (prisoner petitions, social security cases, collection cases, and so forth), which are not included in California Northern's program. Second, Ohio Northern and Michigan Western assign each civil case to a case management track—in the Western District of Michigan to one of six tracks, in the Northern District of Ohio to one of five tracks.

Each case management track is defined by suggested limits on the amount and timing of discovery and a time frame for resolution of the case. For example, the voluntary expedited track in the Western District of Michigan suggests as upper limits two depositions, fifteen single-part interrogatories, and nine months from filing to termination.[5] The discovery limits and time frames are guidelines, not rigid rules, whose purpose is to assist judges and attorneys in determining the appropriate level of management for each case. Local rules identify the types of cases likely to be assigned to a given track—for example, a case suitable for the voluntary expedited track is likely to have few parties and few disputed legal or factual issues.

Track assignments in general civil cases are made at the initial case management conference after discussion with the attorneys and are based largely on the amount of discovery each case will need. Administrative cases, which are typically resolved by dispositive motion, are automatically assigned to an administrative track at filing.

Apart from the guidance tracks provide for determining the appropriate level of management for each case, they also provide a standard by which to measure performance—i.e., whether individual cases, the dockets of individual judges, and the court's docket as a whole are staying on schedule. Both Michigan Western and Ohio Northern have established automated systems for keeping the judges informed about individual case deadlines and for monitoring the performance of the caseload on each track.

With the exception of assigning cases to explicit case management tracks, the courts' demonstration programs are, in essence, a combination of Federal Rules of Civil Procedure 16 and 26.

[5] Each court's tracking guidelines, as well as other case management specifics, are described in detail in Chapters I and II.

The ADR Programs

All three ADR demonstration district adopted programs that are mandatory for at least some cases and that apply to a wide variety of civil cases. The courts had a number of goals for these programs, which vary from court to court but include: to reduce cost and delay, as the statute instructs; to bring about earlier case resolution and more settlements; to give parties an opportunity to meet and consider each other's views of the case; and to determine what other effects, if any, mandatory ADR referral might have on cases.

The Northern District of California seeks to realize these goals through a demonstration program that adds a mediation program to the court's longstanding arbitration and early neutral evaluation (ENE) programs. The court also created the Multi-Option Program, which at this time is limited to several judges and tests the effects of permitting parties to select their own ADR option within a presumption that some form of ADR will be used. Cases assigned to other judges remain subject to the ENE and arbitration programs, in which cases meeting specified criteria are automatically assigned to one of these procedures.

The Western District of Missouri created a procedure called the Early Assessment Program, which the court has established as a experiment. Attorneys and clients in a randomly-selected one-third of the caseload must meet with the program administrator, a member of the court staff, within thirty days after a defendant is engaged in the case, to make an assessment of their case, select an ADR option, and, if feasible, attempt to settle the case. Another one-third of the caseload is eligible for voluntary participation in the program, and the remaining one-third is prohibited from participation.

The Northern District of West Virginia has sought to institutionalize a settlement week program begun in 1987. Whereas in the past the court held settlement weeks sporadically, over the last two years the program has been held on a regular schedule three times a year. Settlement weeks take place in a concentrated period of time and bring together at the courthouse the attorneys from the court's roster of mediators and the litigants and attorneys in the cases referred by the judges.

These three programs share several specific features:

- mandatory referral of at least some cases to ADR;
- a requirement that clients attend the ADR session(s);
- little or no cost to the parties to participate in ADR, other than attorneys' fees; and
- inclusion of mediation as an available ADR process.

The courts' programs also share the goal of earlier attention to and resolution of cases. The stage at which cases are referred to ADR, however, varies from court to court and even within a court. The earliest referrals occur in Missouri Western, where cases assigned to the court's Early Assessment Program meet with the program administrator within thirty days

after a defendant has some involvement in the case, which is often only two to three months after filing. On the other hand, two of the three district judges in West Virginia Northern refer cases to mediation only after discovery is substantially complete. Cases in California Northern are referred to ADR at different stages depending upon the type of ADR.

While the ADR demonstration programs are similar in many respects, there are also significant differences between them. First, the programs in the Northern District of California and the Western District of Missouri are supported by full-time professional ADR staff, while the settlement week program in the Northern District of West Virginia is administered by staff of the clerk's office at a much lower cost to the court. Second, the vast majority of ADR sessions in the Western District of Missouri are mediated by the full-time program administrator; cases in Northern California and Northern West Virginia, on the other hand, are referred to attorney neutrals from rosters maintained by the courts. Finally, cases in California Northern participate in a variety of ADR processes, including evaluative processes such as arbitration and early neutral evaluation, whereas the great majority of ADR cases in Northern West Virginia and Western Missouri participate in facilitative mediation.

Relevant Conditions in the Districts Before and During the Demonstration Period

The demonstration districts implemented their programs in the context of quite different court and caseload characteristics. First, the courts are of varying sizes: West Virginia Northern, for example, is a small court (with three judgeships), while California Northern is a large, urban court (fourteen judgeships).

Second, the courts entered the demonstration period with different backgrounds in terms of the nature and health of their caseloads. West Virginia Northern is the only one of the five for which the CJRA advisory group identified a problem with a civil case backlog at the time the court entered into the demonstration period. This was attributed in part to a very high criminal caseload, which declined during the demonstration period.

The advisory group for the Western District of Missouri concluded that delay was not a problem in that district before the demonstration period began, although national statistics show that the median disposition time for civil cases in that district had been one to two months longer than the national average in the years leading up to the demonstration period.

The Northern District of California and the Western District of Michigan each entered the demonstration period in good condition, with below-average times from filing to disposition for civil cases. The Northern District of Ohio was right at the national average. In fact, the courts were in sufficiently good shape in 1991 that their CJRA advisory groups noted the absence of substantial problems and predicted it would be difficult to measure a change. The advisory groups also noted, as did the judges, that their demonstration programs might not have a measurable impact because many of the judges were already active case managers.

Since embarking on the demonstration period, several of the courts have experienced significant changes in conditions other than their new programs. The Northern District of California experienced a sharp rise in filings in 1992, mostly civil rights cases, while the Northern District of West Virginia has seen a substantial drop in criminal filings. At the same time, the Northern District of Ohio experienced a severe shortage of judges and has undergone enormous turnover of its bench.

The Degree of Implementation of the Demonstration Programs

Although in most of these courts' the CJRA advisory groups and judges believed their districts were already actively involved in managing cases and that there might therefore be little measurable change in caseload indicators, they took very seriously the charge from Congress to design and implement new case management approaches. Substantial work by the advisory groups at the outset, followed by extensive deliberations by the judges, led to new rules or general orders on case management or ADR in each of these courts.

Full implementation of the procedures ultimately depends, of course, on the judges and their application of them. Interviews with the judges and information from the courts' docketing systems indicate the judges have implemented the key elements of their demonstration programs and are fully committed to them. In one court, West Virginia Northern, full implementation took longer than expected and in another, Missouri Western, the program took on a form that has proven very effective but was not anticipated out the outset. In the other three districts, the programs have been implemented essentially as planned.

Overall, these districts are marked by a willingness to innovate and by the hard work of the bench and bar in designing and implementing the demonstration programs. The judges believe they have realized substantial benefits from the new procedures as well as from their examination, during the design phase, of existing practices. Even where change was not expected, the judges report that there has been substantial alteration in practice. And in all districts the programs have brought changes for the bar, first through the advisory group's involvement in designing the programs, which was valued because of the opportunity provided for working with the court, and then through the impact of the programs on attorneys' practice in the court.

Findings From the Study of the Demonstration Programs

What effects have the demonstration programs had on litigation time and cost? What benefits do judges and attorneys say they have experienced? What do these programs tell us about the relative effectiveness of different case management and ADR programs? These and a number of other questions are answered below, using findings from our study. The findings arise from interviews with the judges in 1993 and 1996; responses from attorneys, based on questionnaires sent in 1995 and 1996, about the effects of the courts' programs in specific cases they litigated in these districts;[6] and an analysis of caseload trends. The

[6] The analysis is based on 582 attorney responses in MI-W (66% of those sent); 623 responses in OH-N (66% of those sent); 1314 responses in MO-W (74% of those sent);

chapters on the individual courts provide more extensive discussions of these findings and include many nuances that cannot be captured here. The reader should also keep in mind that findings from interviews and questionnaires reflect judges' and attorneys' estimates and do not necessarily provide conclusive evidence of actual program impact.

Because the case management and ADR programs give rise to different types of conclusions, we consider the two types of programs separately. First, however, we address a question that is common to all five courts.

1. How do attorneys rate the timeliness and cost of litigation in these districts?

Most attorneys in the five demonstration districts gave positive ratings to the timeliness and cost of the litigation process as they experienced it in a specific case they litigated in these districts. As shown in Table 1 close to 80% or more of the attorneys said their case moved along at an appropriate pace, while around 10% said their case moved too slowly and 6% or less said their case moved too quickly.

Table 1
Attorney Ratings of the Timeliness and Cost of Litigating a Case
(in percents)

Ratings of Litigation Timeliness and Cost	CA-N	MI-W	MO-W[7]	OH-N	WV-N
Timeliness of This Case					
Case was moved along too slowly	10.0	8.0	10.0	12.0	10.0
Case was moved along at appropriate pace	83.0	80.0	83.0	80.0	78.0
Case was moved along too fast	3.0	6.0	2.0	3.0	3.0
No opinion	5.0	6.0	5.0	6.0	9.0
Cost of Litigating This Case					
Was higher than it should have been	21.0	15.0	19.0	17.0	15.0
Was about right	62.0	67.0	63.0	65.0	69.0
Was lower than it should have been	10.0	7.0	11.0	6.0	7.0
No opinion	7.0	11.0	7.0	11.0	10.0

216 responses in WV-N (77% of those sent); 466 responses to the case management questionnaire in CA-N (64% of those sent); 425 attorney and 131 neutral responses to the ADR questionnaire in CA-N (54% and 67%, respectively, of those sent). In the tables below, percentages have been rounded and may not total 100%.

[7] The findings may overstate the percentage of attorneys who report that their case moved along too slowly and cost too much. See Chapter 5 and Appendix A.

The attorneys' responses show somewhat more concern about the cost of litigation, with 15-21% reporting that the cost of litigating their case was higher than it should have been. Around two-thirds, however, said the cost of litigating their case was about right. Attorneys in the Northern District of California were most likely to report that costs were too high, with attorneys in the Western District of Michigan and Northern District of West Virginia least likely. To what extent these judgments—or those about litigation timeliness—are related to the demonstration program is discussed below. It is interesting to note, however, that the percentage of attorneys reporting excessive costs is highest in the largest district and lowest in the smallest districts, which may reflect in part the cost of living in these districts.

Overall, most attorneys in these five districts did not experience either delay or excessive cost, the two problems the CJRA was established to combat. Delay in particular appears not to be a problem, while a notable minority of attorneys found costs to be too high.

Findings From the Case Management Programs

2. Do the case management procedures adopted by these courts reduce litigation time?

In only one of the three case management districts—Michigan Western—do caseload statistics show a clear lowering of disposition time during the demonstration period. For the other two districts, measures of disposition time remained essentially stable. Nonetheless, it is clear that in all three districts the judges disposed of older cases more quickly under the demonstration programs. While it may be tempting to attribute this improvement—as well as Michigan Western's lower disposition times—to their case management experiments, there are competing explanations, in particular the CJRA's requirement that the courts report on a regular basis, by case and judge name, the cases pending for more than three years.

Caseload statistics suggest other reasons as well for being cautious in attributing cause to the demonstration programs. California Northern, for example, has maintained a very stable and below average disposition time for the past decade, keeping up with sharp increases in caseload both before and during the demonstration period. Its practices under the CJRA appear to be another example that the court does what it needs to when confronted with a demanding caseload. Ohio Northern has historically maintained less stability in its disposition time, but caseload statistics show a trend to shorter disposition times beginning well before the demonstration program was implemented. This trend ended two years into the program, probably reflecting the high vacancies during 1992 and 1993. Whether the caseload condition might have worsened again without the demonstration program cannot, of course, be determine. One thing the caseload statistics do, however, make clear, is that cases on this court's administrative track have not fared well.

Considering caseload indicators alone, if any case management program had an impact on disposition time it was the differentiated case management system in Michigan Western. Why a program with essentially the same rules did not have the same effect in Ohio Northern is probably explained by several factors, but the vacancies in Ohio Northern are one obvious answer.

Attorney ratings of the case management programs also do not reveal a large impact of the *overall* programs on disposition time (see Table 2). Under half of the attorneys in each district reported that the case management programs expedited their cases. Most of the other attorneys said the programs had no effect on litigation time, although in the Northern District of California, a sizable minority said the program hindered the progress of their case. Nonetheless, as shown at Table 1 (above), the great majority of attorneys in all three districts found the pace of litigating their cases to be appropriate.

Table 2
Attorney Ratings of Effect of Overall Case Management Program on Litigation Time (in percents)

Effect of Overall Program on Time	MI-W	OH-N	CA-N
Expedited the case	43.0	39.0	46.0
Hindered the case	4.0	3.0	12.0
Had no effect	54.0	58.0	42.0

While the attorneys' ratings show a modest effect for the programs as a whole, in each district large majorities of attorneys identified *specific* case management practices as being helpful in moving litigation along. At Question 5 we discuss these practices, as well as those that explain the relatively high number in California Northern who say the program hindered case progress.

3. Do the case management procedures adopted by these courts reduce litigation costs?

Our only source of information about the cost effects of the court's procedures is the attorneys' ratings of these effects. Table 3 (next page) shows that even smaller percentages of attorneys rated the *overall* programs as reducing litigation costs. In Michigan Western and Ohio Northern most attorneys reported little effect on cost, though somewhat more said the effect is negative. As before, a substantially higher proportion in California Northern than in the other districts reported a negative effect from the program as a whole. Even so, as shown in Table 1 (above), about two-thirds of the attorneys in each district reported being satisfied with the cost of litigation in their case.

Table 3
Attorney Ratings of Effect of Overall Case Management Program on Litigation Cost (in percents)

Effect of Overall Program on Cost	MI-W	OH-N	CA-N
Decreased cost	30.0	25.0	34.0
Increased cost	9.0	8.0	20.0
Had no effect	61.0	67.0	46.0

While most attorneys did not find that the demonstration programs as a whole had an effect on litigation costs, they did identify a number of specific components of these programs as reducing the cost of litigation. Both the practices that increase and decrease cost are examined below at Question 6.

4. What other benefits do these procedures provide?

Although the attorney ratings suggest the courts' case management procedures have not had a large impact on litigation time or cost, they and the judges identified a number of other benefits experienced through these programs.

In Michigan Western, the greatest benefit for the judges, who were generally very positive about their DCM system, has been an increase in uniformity in their practices. While it may be obvious that uniformity is good for attorneys, the judges said it has the intangible benefit of, as one judge said, "giving the process more integrity." Another noted that the tracking system has made it clear that "the docket is the *court's* responsibility." The judges reported that the system also helps them give close attention to each case, allocate their time efficiently, and make more effective use of ADR. Attorneys noted the assistance DCM provides for planning their cases and for staying aware of deadlines. Altogether, 87% rated DCM an effective case management system.

The judges in Ohio Northern, who are also generally very pleased with their DCM system, identified as one of its most important benefits the "climate" it has established of "getting cases moving." DCM, said one judge, "sends a message to the bar and the court that there's a policy, a consensus that we have to work together." A second important benefit for the judges is DCM's assistance in structuring their work through the guidelines for each track, guidelines that have been especially helpful to the court's many new judges. The judges also identified as very important the accountability imposed by a system of tracks, which enables the court to monitor the performance of cases on each track. Like the judges, the attorneys applauded DCM for providing, as one said, "an organizing principle for the case." They also appreciated that the system forces early attention to the case. Altogether, 85% of the attorneys rated DCM an effective case management system.

The judges in California Northern identified fewer benefits from their case management program, but primarily because most of them had been managing cases in a very similar fashion before the program was adopted. They are very satisfied with the program, but expect that its effects are greater for attorneys than for the judges. The attorneys named several benefits, including earlier assessment of their cases, earlier exchange of information, and thus earlier identification of issues. It also, as one said, "sets up guidelines and imposes checks on the lawyers," a statement very similar to those made by the attorneys in Michigan Western and Ohio Northern who said DCM helps them plan and organize their case. In this district, 77% of the attorneys rated the court's procedures an effective case management system.

5. *Are some case management practices more effective than others in moving cases along?*

Our study suggests there is an identifiable cluster of case management practices that attorneys thought effective in moving cases along (though these effects may not be seen in the overall caseload trends). Table 4 (next page) lists a number of case management practices attorneys believed had beneficial effects on timeliness, along with those they reported as most responsible for slowing down litigation.[8]

Early Case Management Conference and Scheduling Order. Across all three courts around two-thirds to three-quarters of the attorneys identified two centerpieces of active case management, the early scheduling conference with the judge and the scheduling order, as helpful in moving their cases along. In written comments the attorneys' underscored the critical importance of the initial case management conference and the early contact it provides with the judge. Further evidence of the value of such contact is the 66% of Michigan Western attorneys who rated "more contact with the judges" as moving their cases along. Like the attorneys, the judges in all three districts identified the initial case management conference as one of the most important elements of their case management programs, revealing a clear meeting of the minds between bench and bar on this practice.

Use of the Telephone. Also very important to Michigan Western and Ohio Northern attorneys for reducing litigation time is use of the telephone—for resolving discovery disputes in Ohio Northern and for holding conferences with the court in Michigan Western. Over three-quarters of the attorneys rated these as helpful in moving litigation along. Here, too, the judges agreed that these are valuable practices.

[8] Attorneys were asked to rate the usefulness of these and a number of other case management practices. The table includes the practices for which around half or more of the attorneys said the practice was helpful—after these, the ratings dropped into the 20-30% range—and those for which the greatest number of attorneys said the practice was detrimental. These ratings are reported only for attorneys who said their case was subject to the particular practice.

Table 4
Percent of Attorneys Who Rated Specific Case Management Practices as Moving Litigation Along or Slowing It Down[9]

Case Management Practice	Moved Litigation Along			Slowed Litigation Down		
	MI-W	OH-N	CA-N	MI-W	OH-N	CA-N
Use of the telephone	73.0	81.0	NA	2.0	2.0	NA
Early case management conference	67.0	74.0	66.0	1.0	2.0	7.0
Scheduling order	72.0	77.0	60.0	1.0	1.0	8.0
More contact with judges	66.0	NA	NA	3.0	NA	NA
Judges' handling of motions	58.0	50.0	50.0	14.0	6.0	23.0
Assignment to a track	54.0	48.0	NA	1.0	1.0	NA
Trial scheduling practices	53.0	76.0	48.0	4.0	2.0	12.0
Joint case management report	52.0	50.0	62.0	2.0	4.0	13.0
Attorneys' meet and confer	NA	NA	63.0	NA	NA	11.0
Time limits on discovery	50.0	55.0	NA	3.0	1.0	NA
Disclosure of discovery material	49.0	57.0	59.0	6.0	4.0	6.0
ADR requirements	50.0	47.0	46.0	5.0	18.0	17.0
Paperwork requirements	31.0	32.0	30.0	11.0	11.0	19.0
No formal discovery before disclosure	NA	NA	31.0	NA	NA	28.0
No stipulations to modify schedule	NA	NA	18.0	NA	NA	24.0

Other Case Management Practices. After this first tier of practices—the initial conference and other judge contact, the scheduling order, and use of the telephone—there is a second tier of helpful practices, rated by around half of the attorneys as moving their cases along (most other attorneys said these practices have no effect). We see here some of the practices long considered central to case management—for example, how motions are handled, the use of time limits on discovery, and how trials are set (in Ohio Northern, holding the trial on the date it was scheduled). Also rated helpful by about half of the attorneys are some of the courts' newer practices—the use of case management tracks, the attorneys' meet and confer, and their joint statement.

[9] NA=Not applicable or not asked. "Use of the telephone" is for discovery disputes in Ohio Northern and conferences with the court in Michigan Western. For each item, the balance of attorneys—i.e., those who did not believe the procedure moved the case along or slowed it down—reported the practice as having no effect.

Disclosure. Of particular interest currently are the attorneys' ratings of disclosure. Although disclosure appears to be especially helpful in California Northern, in all three districts half or slightly more of the attorneys rated it as helpful in moving their cases along. In the Northern District of California, one of the first courts to fully implement the procedure, both the judges and attorneys reported their experience with disclosure as favorable. In particular, attorneys whose cases involved high levels of disclosure were more likely than attorneys in cases with little disclosure to say the case management program reduced litigation time and provided an effective system.

ADR. Also currently of interest is the use of ADR, and Table 4 shows that about half the attorneys found it helpful for moving their cases along. As with disclosure, attorneys in cases referred to ADR were more likely to report that the courts' case management practices moved their cases along.

Practices That Slow Litigation Down. In looking at ADR, however, we also begin to see some of the practices attorneys reported as slowing down their cases—a sizable minority of those whose cases were referred to ADR in Ohio Northern and California Northern, for example. How judges handle motions can also delay litigation, as can the courts' paperwork requirements.

Table 4 also reveals the practices in California Northern that explain why a relatively large percentage of attorneys reported that the court's case management program slowed down their cases: postponement of discovery until after disclosure and a rule against stipulations to change the case schedule. When these are problematic, they are clearly related to other practices. Attorneys who had engaged in more disclosure, for example, were less likely to find postponement of discovery a problem. And attorneys whose cases had been referred to ADR were more likely to find the prohibition against schedule changes a problem, suggesting the ADR process prompted a need for a schedule change that they were unable to effect without going to the judge.

Nonetheless, while the attorney responses are helpful for signaling practices where more examination may be warranted, their ratings are especially useful for identifying the significant number of practices—some old, some new—that in their experience moved their cases along.

6. *Are some case management practices more effective than others in reducing litigation costs?*

Table 5 (next page) shows the case management elements attorneys thought most likely to reduce or increase litigation costs.[10] In their experience, fewer practices reduced litigation cost than helped move a case along. However, as with timeliness, the initial case management

[10] *Supra* note 8. In this table we include practices rated as useful by 40% or more of the attorneys in at least one district, as well as the practices reported as having the most detrimental effects on costs.

conference and contact with the judge are important factors in reducing litigation costs. Using the telephone, however, is by far the most helpful way to save litigation costs, according to the attorneys in Michigan Western and Ohio Northern.

Table 5
Percent of Attorneys Who Rated Specific Case Management Practices as Decreasing or Increasing Litigation Costs[11]

Case Management Practice	Decreased Costs			Increased Costs		
	MI-W	OH-N	CA-N	MI-W	OH-N	CA-N
Use of the telephone	78.0	80.0	NA	1.0	3.0	NA
Early case management conference	42.0	43.0	41.0	8.0	13.0	19.0
More contact with judges	49.0	NA	NA	12.0	NA	NA
Judges' handling of motions	40.0	34.0	41.0	16.0	5.0	25.0
Joint case management report	26.0	26.0	40.0	21.0	15.0	31.0
Attorneys' meet and confer	NA	NA	43.0	NA	NA	27.0
Disclosure of discovery material	33.0	43.0	43.0	11.0	13.0	15.0
ADR requirements	29.0	42.0	40.0	12.0	30.0	24.0
Paperwork requirements	16.0	20.0	30.0	24.0	25.0	19.0
No formal discovery before disclosure	NA	NA	40.0	NA	NA	12.0
No stipulations to modify schedule	NA	NA	14.0	NA	NA	22.0

How the judges handle motions also emerges as an important factor in the cost of litigation, both as a way to save costs but also as a way to increase costs. In California Northern the attorneys' preparation for the first case management conference—their meeting and their joint statement—can be effective in reducing litigation costs. For attorneys in Ohio Northern and California Northern disclosure and ADR are also helpful. Interestingly, in California Northern, attorneys said that postponement of discovery had a different effect on cost than on time—more of them finding that it decreased cost than reported that it saved time.

Table 5 is perhaps most interesting for the split of opinion it reveals about a number of practices: the attorneys' meet and confer, the joint report, ADR—and even the initial case management conference in California Northern. Although it is a simplification to say that these differences of view can be explained by a single factor, in general we found that attorneys involved in cases that were complex and/or contentious were most likely to

[11] *Supra* note 9.

attribute cost increases to the various case management elements. Those who found paperwork requirements a problem were not as clearly distinguishable, although in Ohio Northern they were more likely to be handling simpler cases.

Generally, Table 5 provides much less direction regarding case management practices that are effective in reducing litigation costs. In fact, in some instances it clouds the picture regarding practices effective for reducing litigation time. As Tables 4 and 5 together make clear, several practices reported as helpful in reducing time—the initial case management conference, the attorneys' meeting, and their joint statement—are also reported as increasing litigation costs.

7. Are the courts' case management programs more effective for some types of cases than for others?

The case management procedures adopted by these three districts were generally seen as most effective by attorneys who had litigated one of two types of cases—those that were simpler and those that were standard or average. That is, the cases were marked by low to medium formal discovery and discovery disputes, they had low to medium monetary stakes and likelihood of trial, and the attorneys were generally cooperative. In cases that were more complex, more demanding, or more contentious, the attorneys were more likely to report negative effects from the demonstration programs.

There were two exceptions, however, to this general pattern. In California Northern, attorneys in small cases as well as large cases reported that the case management procedures were burdensome. And in Ohio Northern, many attorneys whose cases were on the administrative track did not find the court's procedures effective.

8. How is a case tracking system different from individualized case management?

The judges generally agreed that DCM can be characterized, in essence, as individualized case management, but they also noted some of the additional benefits afforded by DCM. It informs the attorneys about the judges' expectations for cases of various types, and consequently attorneys are better prepared to discuss the case realistically at the first case management conference. Tracks also set goals for scheduling various case events, with the target trial date being the principal guideline.

A number of judges—as well as attorneys—also said a tracking system helps them organize and plan the case. And the judges said the system helps them organize their work as well because it makes it very clear which cases have to be attended to first. For this same reason, some judges felt the system helped them decide motions more promptly because, as one said, they cannot "slide by anymore."

This latter comment points to a feature of DCM that has proven to be important to both courts, and that is the automated tracking system, which permits each judge to see the performance of his or her own caseload as well as the court's overall caseload. While this

provides a level of accountability the judges very much approved, they also cautioned—as did some attorneys—that judges must take care not to let their decisions about how a case should progress be determined by how well they are looking in the court's statistics.

Thus, it appears that a tracking system, with its explicit goals, expectations, and performance measures, provides structure, predictability, and accountability that is not always provided by individualized case management. At the same time, several judges pointed out, a tracking system is not a "panacea" or a "miracle worker." As one judge said, "You still have to be a hardworking judge, you still have to meet deadlines. But it gives the hardworking judge an organizing principle." This comment was echoed by a number of attorneys. In words very similar to the judge's, one wrote, "As with anything else, the trial judge is the most important factor in case management. A good, fair, hardworking judge, who promptly resolves discovery and dispositive motions and sticks to pre-agreed deadlines and court dates is far more important than the procedures themselves."

9. What conditions are needed to make these case management programs work?

Courts and policymakers considering whether these courts' case management procedures are appropriate for other courts will want to know whether there was anything unique about these courts that made it possible for them to implement these comprehensive, court-wide systems—and to realize substantial benefits from them.

The judges themselves pointed to several factors that were important to implementing these programs. The involvement of the bar was critical in every district. The courts' CJRA advisory groups took the first steps in designing each program, then worked closely with the courts as refinements were made. In the one instance where a substantial change was made at the last minute without bar consultation, the court came quickly to regret that oversight.

For the DCM programs, the court staff also played an important role in implementation, as new forms and procedures were developed. The automation staff proved to be particularly critical because of the need to develop systems to monitor track performance. Both courts also relied on outside consultants to help them understand the requirements of a tracking system, but both noted as well that the experienced courts can now play that role.

As important as any factor, several judges emphasized, is cooperation and flexibility on the part of each judge. Court-wide programs require a degree of compromise regarding forms and procedures. Without willing judges these programs would not have prospered. Likewise, several judges said, it was important, once the programs were adopted, for all judges to commit themselves to faithfully applying the new procedures. To do otherwise would have conveyed the wrong message to the bar—not only the bar that needed to learn the new regimen but also the bar that worked with the court to design the program. Finally, any court considering procedures such as these, said one judge, must make sure the judges understand what will be required of them—that they "must commit to sitting down with the parties."

Findings From the ADR Programs

10. How many cases are referred to ADR in these districts?

In each of the three ADR demonstration districts, a substantial number of cases are referred to ADR. Since the start of its demonstration program in January 1992, the Northern District of West Virginia has referred nearly 700 cases to settlement week, a figure that represents roughly 40% of the cases that reach issue and a substantial, but unknown, percentage of those that reach discovery completion and therefore eligibility for settlement week.

In the Western District of Missouri, one-third of the civil caseload is automatically referred to the Early Assessment Program and another one-third is invited to participate. Since January 1992, just over 1000 cases have been assigned at filing to each of these two groups. One or more early assessment meetings have been held in 845 cases.

Our best estimate in the Northern District of California is that about 2,200 cases have been referred to ADR since the court's demonstration program began on July 1, 1993. These cases represent about 15% of the total civil caseload and a substantially greater, but unknown, percentage of those that make it to a stage in the litigation where ADR might be considered.

11. Do the ADR programs adopted by these courts reduce disposition time?

Given the many fluctuating conditions in a court at any given time, it is often very difficult to discern the effects of a particular court program on litigation time. Likewise, trying to determine ADR's effects on disposition time by looking at cases subject to ADR and cases not subject to ADR is usually frustrated by the handpicking of cases for these two groups and thus an absence of true comparison groups.

The design of Missouri Western's Early Assessment Program, however, enables us to overcome these two problems. In that district, eligible civil cases were randomly assigned to three groups: those required to participate in the Early Assessment Program ("A" cases); those permitted to participate at their discretion ("B" cases); and those not allowed to participate in the program ("C" cases). Any other conditions in the court during the demonstration period should have affected each of these groups similarly and thus any effects on litigation time can be attributed to the Early Assessment Program.

After four-and-a-half years, with over 3,000 cases assigned to one of the three groups, the median age at termination for cases required to participate in the program ("A" cases) was more than two months shorter than that for cases not allowed to participate in the program ("C" cases). Specifically, "A" cases had a median age at term-ination of 7.0 months, while "C" cases had a median age of 9.7 months. This advantage

did not hold for cases that volunteered to participate in the Early Assessment Program ("B") cases, but, as is discussed in Chapter 5, this is likely due to delays in scheduling "B" cases for the EAP session and perhaps to a self-selection process in which more complicated or difficult cases chose to participate in the program. Overall, it is clear that—with all other factors held constant—participation in the Early Assessment Program reduces disposition time.

The court's program is unusual in the timing of the early assessment session, which takes place very early in the case. Conventional wisdom has held that ADR is unlikely to be effective until the parties have completed some or all discovery, but limited discovery has not, apparently, been a deterrent to early resolution under the EAP.

ADR's effects on disposition time in West Virginia Northern and California Northern are much more difficult to discern, both because the courts do not assign cases randomly and because the courts had ADR programs that preexisted the demonstration period. Caseload statistics show that the median disposition time in West Virginia Northern was about two months lower at the end of the demonstration period than it had been at the beginning (ten months versus twelve months), but it is virtually impossible to separate any effect of settlement week from other factors affecting the court during that period, including changes in filing rates and in the number of available judges.

Similarly, effects are difficult to detect in California Northern, which has maintained a relatively low disposition time throughout the demonstration period and has managed to maintain this low disposition time even with fluctuations in filing rates. Again, however, because of the many potential factors simultaneously affecting the court's case processing—including its case management demonstration program—we are unable to discern the effects of the ADR program on the court's overall disposition time. At the very least, however, it appears that the ADR programs in West Virginia Northern and California Northern have not had an adverse effect on disposition times.

In addition, as Table 6 (next page) shows, a high proportion of attorneys in each of these districts—including over 60% in California Northern—believed that ADR reduced time to disposition in their case. Most of the remaining attorneys thought that the programs had no effect on disposition time, although a significant minority (14% in West Virginia and 11% in California) thought ADR increased disposition time. In both courts, these ratings were related to whether the case settled, with attorneys who reported their cases settled as a result of the ADR process more likely to think the program reduced time and those whose cases did not settle as a result of the process more likely to think it had no effect on disposition time. In California Northern, attorneys' ratings of ADR's effect on disposition time also differed by the method of referral to ADR, with attorneys who selected their own process more likely to say the process reduced time.

Table 6
Attorney Ratings of Effect of ADR on Disposition Time in Their Case
(in percents)

Effect of ADR on Time	West Virginia Northern	California Northern
Increased	14.0	11.0
No effect	41.0	23.0
Decreased	46.0	61.0
I can't say	—	6.0

12. Do the ADR procedures adopted by these courts reduce litigation costs?

Our only source of information about the cost effects of the court's procedures is the attorneys' ratings of these effects. When asked to compare the litigation costs of their case after use of ADR to what the costs would have been without using ADR, half or more of attorneys in each of the ADR demonstration districts, including almost 70% in Missouri Western, reported that ADR decreased litigation costs in their case (see Table 7). These numbers are substantially higher than the numbers of attorneys in the case management courts who reported decreased costs, which ranged from about one-quarter to one-third of responding attorneys.

Table 7
Attorney Ratings of Effect of ADR on Litigation Cost in Their Case
(in percents)

Effect of ADR on Cost	Missouri Western	West Va. Northern	California Northern
Decreased cost	69.0	50.0	62.0
Increased cost	10.0	17.0	12.0
Had no effect	21.0	33.0	26.0

In addition, as Table 8 (next page) shows, the estimated median cost savings per party are substantial, ranging as high as $25,000 in California Northern. In Missouri Western, where our data permit a comparison between estimated savings and estimated total litigation costs for those who participated in an ADR session, the estimated savings per party may represent more than half of what the case would have cost absent the ADR program. In contrast, for the small number of attorneys who reported that costs were increased by ADR, the estimated increases were much lower, with medians of $1,500 in Missouri Western, $1,000 in West Virginia Northern, and $3,000 in California Northern.

Table 8
Attorney Estimates of Cost Savings Due to ADR in Their Case

Estimates of	Missouri Western	West Va. Northern	Ca. Northern
Median savings per party	$15,000	$10,000	$25,000
Mean savings per party	$30,007	$12,622	$43,000
Range	$500-$950,000	$300-$100,000	$1,000 - $500,000

To the extent that attorney estimates of cost are accurate, it appears that the ADR programs in these districts provide sizable savings in client costs. Conclusions must be tentative, however, until actual measures of litigation costs are obtained and, where appropriate, comparisons made between costs in ADR and non-ADR cases.

13. Do these ADR programs lead to settlements?

In the Western District of Missouri a slightly higher proportion of cases automatically assigned to the Early Assessment Program ("A" cases) terminated by settlement than did cases not permitted to participate in the program ("C" cases), while a higher proportion of "C" cases terminated by trial or other judgment than did "A" cases. In addition, of the EAP cases that settled, almost 40% did so at the EAP session itself, an event that, at least for "A" cases occurs quite early in the case.

As shown in Table 9, more than half the attorneys in California Northern and West Virginia Northern reported that their cases settled in whole or in part as a result of ADR. All of these programs, then, appear to be achieving the goal of effecting settlements.

Table 9
Attorney Ratings of Effect of ADR on Settlement in Their Case
(in percents)

Effect of ADR on Settlement	West Virginia Northern	California Northern
Entire case settled as result of ADR	39.0	61.0
Part of case settled as result of ADR	17.0	4.0
ADR did not contribute to a settlement	44.0	35.0

14. What other benefits do the ADR programs have for cases?

In each court, more than half of the attorneys reported that ADR was helpful in encouraging the parties to be more realistic about their respective positions; allowing clients to be more involved in the resolution of their case than they otherwise would have been;

and improving communication between the different sides in the case. In addition, more than 40% of attorneys who had participated in ADR in California Northern indicated that ADR decreased the number of motions and the amount of formal discovery in their case. In contrast, fewer than 20% of attorneys in West Virginia Northern, where the ADR process generally occurs later in the litigation, thought ADR reduced discovery or motions.

15. What factors appear to make ADR most effective?

Across the ADR demonstration courts, four factors—the timing of the ADR session, client attendance, the quality of the neutral, and whether the case settled—were seen by attorneys as central to the effectiveness of the ADR session.

Timing of the Session. Table 10 shows attorney ratings of the timeliness of the first ADR session. The great majority of attorneys in all courts thought the first ADR session was held at an appropriate time in the life of the case. This is particularly interesting in light of the fact that cases are referred to ADR at very different stages under these programs.

Table 10[12]
Attorney Ratings of Timing of First ADR Session in Their Case
(in percents)

Timing of ADR Session	Missouri Western	West Va. Northern	California Northern
Too early	11.0	24.0	11.0
At about the right time	89.0	76.0	83.0
Too late	0.0	0.0	6.0

When asked to explain why they thought a session was held too early, a number of attorneys indicated that discovery had not been completed or dispositive motions were undecided and therefore the sessions were not as productive as they might have been. Attorneys in West Virginia Northern, who were most likely to say the session was held too

[12] The question was asked in a slightly different way depending on the court, and this could affect responses. Attorneys in Missouri Western were presented with the statement "The early assessment process began too early in this case," and were asked to indicate whether they strongly agreed, agreed, neither agreed nor disagreed, disagreed, or strongly disagreed. In this table those who agreed or strongly agreed are listed as having indicated the timing was too early, while all others are listed as having said the session occurred "at about the right time." Attorneys in West Virginia Northern and California Northern were asked "With respect to the timing of the initial (or only) ADR session in this case, do you think it was held: 1) much too early; 2) somewhat too early; 3) at about the right time; 4) somewhat too late; or 5) much too late." The categories are collapsed in this table so that "too early" represents those who responded "much" or "somewhat" too early, while "too late" reflects those who responded "somewhat" or "much" too late.

early (though the actual timing is probably the latest of the three courts), frequently expressed the view that discovery should be at least substantially complete before settlement talks are held. On the other hand, even though many cases in Missouri Western are referred to an early assessment session just as discovery is beginning, fewer attorneys there thought the session was held too early.

These findings suggest that the appropriateness of the timing of the ADR session may depend in part on the culture of the court and in part on the attorney's expectations for what the ADR session will accomplish. For example, West Virginia Northern's "settlement week" is clearly aimed at settling cases, and an early referral may frustrate attorneys who do not believe their cases are ready to begin settlement discussions. On the other hand, the early assessment program, though it places substantial emphasis on settlement, is designed to treat cases in a more flexible way, helping parties plan discovery and other case events if the case is clearly not ready for settlement at the time of the first early assessment meeting.

Client Attendance. In contrast to the differences with respect to timing of referrals, the three ADR demonstration districts share a requirement of party attendance at ADR sessions. There is a substantial degree of compliance with this requirement in all districts, and all participants—judges, attorneys, and neutrals—believe client attendance is very important for the success of an ADR session. They also emphasized that the clients who attend must participate in good faith and must have settlement authority.

Quality of the Neutral. In each district the quality of the neutral was seen by attorneys as an important factor in the effectiveness of the ADR process. Attorney comments in Missouri Western are particularly emphatic about the central role the program administrator/mediator plays in the success of that program. His mediation skills and long experience as a litigator are seen by both judges and attorneys as important elements of the Early Assessment Program. Findings in California Northern are equally as striking, showing that the quality of the neutral is directly related to a number of measures of ADR effectiveness, including whether ADR reduced disposition time, lowered litigation costs, prompted settlement, and provided a satisfactory outcome and fair process.

Settlement. In each district, attorneys' views of ADR's effectiveness varied by whether their case had settled through the ADR process. In California Northern, for example, attorneys whose cases had settled in whole or in part through the ADR process found the process more effective in reducing litigation time and costs and were more satisfied with the outcome of their case. The effect of settlement on attorneys' views of ADR was pervasive and suggests that attorneys expect ADR to help them settle their case. When it does not, their view of the process becomes less positive.

16. Are the courts' ADR programs more effective for some types of cases than for others?

One of the longstanding questions in ADR is whether certain types of cases benefit more from ADR than others and whether certain types of cases are more amenable to certain forms of ADR. Findings from the Western District of Missouri suggest that that

court's early assessment process is particularly effective in reducing litigation time for contract and civil rights cases—a large segment of the court's civil, non-prisoner caseload—while its effect is smaller, though still positive, for labor cases.

In California Northern, where a number of different ADR processes are used, the design of the court's program did not permit examination of whether certain types of ADR are more beneficial than others for certain types of cases. However, most attorneys in this district distinguish among the different types of ADR when deciding which process to use in their case. When explaining why they selected a particular ADR process, attorneys from all processes said they chose the process in the expectation that it would reduce litigation time, lower costs, and facilitate settlement. Beyond these three principal reasons, however, attorneys selected different ADR processes for different reasons. For example, those who selected ENE were more likely to say they wanted an expert opinion of the likely outcome of the case, while those who selected a magistrate judge settlement conference were more likely to say they wanted a judge's opinion before proceeding to trial.

Attorneys also appeared to derive different kinds of benefits from each ADR process. While each process was reported as helpful in moving the case toward settlement, for example, this was more likely to be the case in mediation than in arbitration or ENE, while in the latter two forms of ADR attorneys were more likely to receive a neutral evaluation of the case and help in clarifying liability.

17. What are the effects of giving parties a choice of ADR options?

In all three districts, there is a presumption that parties will use some form of ADR, yet in all three districts high percentages of attorneys report satisfaction with the ADR process, find the process fair, and believe it has reduced litigation time and costs. The mandatory nature of the programs appears, then, not to be an impediment to program effectiveness.

Within the context of a mandatory program, however, findings from the Northern District of California suggest that the benefits of ADR are greater when the attorneys may select the particular process in which they will participate. Attorneys who had selected their process were more likely to report that it lowered litigation costs, that it reduced the amount of discovery and the number of motions, that it was a fair process, that their case settled because of the process, and that the benefits of the process outweighed its costs. Attorneys who had selected their own ADR process were also more likely to actually participate in an ADR session.

When given a choice of ADR processes, few attorneys in this district selected arbitration. Most selected ENE, suggesting that, at least in this district, attorneys want an expert evaluation when they use ADR.

In the Western District of Missouri attorneys are also given a choice of ADR options, but nearly all have chosen to mediate with the program administrator, for whom there is no fee. The experience of this district is that, given a choice between a qualified, court-

employed mediator and private sector mediators who must be paid at market rates, the parties almost without exception select the court mediator.

18. What conditions are needed to make these programs work?

Commitment of the Bar and the Judges

As in the case management demonstration programs, the judges emphasized the involvement of the bar as a critical step to implementing a successful ADR program. They also noted that it is important for the court's judges to take a uniform stand in support of the program rather than appearing splintered. It was apparent in working with these courts that judges and staff have a high level of commitment to these programs; that they have, in some instances, put aside differences to give the procedures a fair test; and that a willingness to experiment characterizes each of these courts.

Reliance on Professional ADR Staff

The viability of the Early Assessment Program in Missouri Western rests largely on its administrator/mediator, who conducts nearly all the ADR sessions. While a program that provides civil cases an early assessment and settlement opportunity would not necessarily have to rely on a single, court-employed mediator, the judges prefer the greater quality control and program efficiency offered by having the mediator on staff. The court's decision to confer substantial responsibility on the administrator/mediator, while unique among district courts, is not without precedent in the federal court system. Nearly all the courts of appeals provide settlement assistance through mediators who are members of the court staff.

Apart from the unique role played by Missouri Western's program administrator, both courts with full-time, professional ADR managers—California Northern in addition to Missouri Western—said that professional management is very important both to enhance the credibility of the program among the bar and to ensure quality control of the ADR providers. On the other hand, clerk's office staff in West Virginia Northern administer that court's ADR program, which still received relatively high ratings (although somewhat lower than the other courts).

Professional staff management comes at a cost to the courts—over $200,000 annually for the programs in California Northern and Missouri Western (and potentially more in Missouri Western if the court wishes to expand the program to more cases and to provide staff mediators for these cases). For these two courts, the cost per case referred to ADR during the demonstration period has been roughly $480 in California Northern and $700 in Missouri Western. While the judges believe they have experienced a reduction in their workloads as a result of these expenditures, the greater savings have probably been realized by the parties, whose savings, as estimated by their attorneys, were $15,000 per party in Missouri Western and $25,000 per party in California Northern. On the other hand, attorneys in West Virginia Northern also reported substantial savings, $10,000 per party, at considerably less cost to the court—about $7,000 per year or $45 per case referred to settlement week during the demonstration period.

Reliance on Volunteer Neutrals

It is apparent in the two districts that do not provide a staff mediator—West Virginia Northern and California Northern—that a viable ADR program rests heavily on the contribution of private sector attorney neutrals. The courts and litigants benefit from a very substantial amount of free labor. Were this not the case, the cost to one or both would be much greater.

Attorney Satisfaction and Perceptions of Fairness

Returning once again to consideration of all five demonstration programs, we address a final question as important as those above.

19. Do attorneys perceive the courts' procedures as fair?

Programs that reduce cost and delay would be undesirable if they achieved these results at the expense of fairness to the parties. Table 11 shows that, for most of the demonstration programs, around two-thirds of the attorneys reported that the case management or ADR procedure used in their case was very fair. If we include those who reported the procedure was somewhat fair—a category that is somewhat difficult to interpret but probably means leaning more toward fair than unfair—over 80% of the attorneys found the procedures fair.

Table 11
Attorney Ratings of the Fairness of the Procedures Used in Their Case (in percents)[13]

Attorney Ratings of Procedures' Fairness	Case Management Programs			ADR Programs		
	MI-W	OH-N	CA-N	CA-N	MO-W[14]	WV-N
Very fair	68.0	64.0	67.0	85.0	67.0	61.0
Somewhat fair	19.0	24.0	22.0	13.0	17.0	25.0
Somewhat unfair	5.0	8.0	7.0	2.0	5.0	10.0
Very unfair	8.0	4.0	4.0	0.0	1.0	5.0

[13] In the three case management programs, attorneys were asked whether they were satisfied with the court's management of their case and whether the court's management of the case was fair. Questions varied some for the ADR programs. In West Virginia Northern, cases that had participated in the settlement week program were asked whether they were satisfied with the settlement week process and found that process fair. In California Northern and Missouri Western attorneys were asked only whether the ADR process they participated in was fair.

[14] Attorneys responded to a five-point scale that included "neither fair nor unfair." Ten percent of attorneys selected that response.

Relatively small percentages of attorneys found the procedures used in their cases unfair—11-15% in most of the courts. In the case management demonstration programs, attorney ratings varied by type of case, with more attorneys whose cases were not complex reporting the procedures as fair. Attorney comments in West Virginia Northern suggest some dissatisfaction with the performance of some mediators. The percentage of attorneys in Missouri Western who rate the court's ADR procedure unfair is small relative to the other courts, but is not directly comparable because a slightly different scale—including a "neither fair nor unfair" category—was used in this district, which may lower the percentage of attorneys who rated the early assessment process fair or unfair.[15]

Although for the most part there are not great differences in ratings across courts or between case management and ADR programs, the ADR program in the Northern District of California stands out, with 85% of the attorneys rating the ADR procedures as very fair—around 20% more than the attorneys subject to the other programs—and 98% of the attorneys' ratings on the fair rather than unfair side of the scale. A somewhat higher percentage of attorneys who selected their own ADR process (rather than being ordered to a process chosen by the judge or court) rated the ADR procedures as fair, but overall the vast majority of attorneys subject to each of the court's ADR procedures, whether they selected the ADR process or not, rated the court's procedures as fair.

In most of the courts, the demonstration programs introduced innovative ideas and procedures, such as differentiated case tracking, early assessment, and multi-option ADR. Whatever the programs' effects on litigation time and cost, the findings in Table 11 give assurance that these programs have, in the experience of the attorneys subject to them, provided basic procedural fairness.

[15] On the other hand, had the same scale been used in the other districts, it is possible the positive and negative ratings in these districts might also be reduced.

Part I

The Case Management Demonstration Programs

Chapter I

The Western District of Michigan's Differentiated Case Management Program

In response to the Civil Justice Reform Act's designation of the court as a demonstration district, the Western District of Michigan adopted a differentiated case management system in September 1992. That system, also called a tracking or DCM system, is the subject of this chapter.

Like each pilot and demonstration program developed in response to the CJRA, the DCM system in the Western District of Michigan was implemented in part to reduce the time and cost of litigation. However, the court and its advisory group had a number of other goals in mind as well, which are also considered in this examination of the court's program.

This chapter is divided into three main sections. Section A presents our conclusions about the court's implementation of its DCM program and the impact of that program. Sections B and C provide the detailed documentation that supports our conclusions: section B gives a short profile of the district and its caseload, describes the court's DCM program, discusses the process by which the court designed and set up that program, and examines how the court has applied the DCM rules; section C summarizes our findings about the program's effects, looking first at the judges' experience with the program, then at its impact on attorneys, and finally at its effect on the court's caseload.

A. Conclusions About the DCM Program in This District

Set out below are several key questions about the demonstration program in the Western District of Michigan, along with answers based on the research findings discussed in sections B and C. Many of the findings summarized below are based on interviews with judges and surveys of attorneys. While their experiences are essential for understanding the effects of the DCM program, their subjective views should not be taken as conclusive evidence of DCM's actual impact.

How great a change did DCM bring to the district?

The advisory group and judges adopted the DCM program in part because of the statutory instruction to do so. They were not necessarily believers in a tracking system, nor did they think the court particularly needed such a system. The key case management element in the view of the advisory group was the initial case management conference, and they shared with the court the view that most judges in the district were already active case managers. Further, the court was moving its caseload so well that there was doubt it could be improved upon. Consequently, the expectations for change were modest. Nonetheless, the district fully implemented and supported its program, but focused less on litigation time than on other benefits that might come from it.

Four years later, 75% of the surveyed attorneys who had litigated in the district both before and after implementation of DCM think there has been some or a substantial change in the court's management of its cases. The judges, too, reported substantial change. First, one or two judges who did not routinely hold case management conferences in their cases now do so. Second, the court's practices are now uniform across the judges. And third, the automated case tracking system developed to monitor performance of cases on the DCM tracks provides information critical for keeping individual cases and the caseload as a whole on schedule. Having moved from caution to commitment, the court is preparing to incorporate the DCM system into its local rules.

Has the DCM program reduced disposition time in civil cases?

Caseload data show that disposition time in civil cases decreased during the demonstration period, particularly for the non-administrative caseload, where median disposition time dropped from nine months in 1992 to seven months in 1995 and mean disposition time dropped from about twelve months to about nine months. Early in the demonstration period the court terminated cases faster than new cases were being filed; more generally, the court has been able to terminate more cases at the very earliest stage. While the DCM program may be a cause of these improvements, we cannot say so with certainty, as there are several other possible explanations, including CJRA reporting requirements, the addition of a temporary judgeship, and the court's tickler system, which closely monitors the answer period.

Only a slight majority of attorneys said the DCM system as a whole expedited their cases, with most of the remaining attorneys saying it had no effect on time. Nearly two-thirds of the attorneys, however, reported that several specific DCM components helped move their cases along. These were the early case management conference with the judge, the judge's case management order, and the opportunity DCM provides for more contact with the judges. The practice most helpful in moving cases along, attorneys reported, was use of the telephone for conferences with the court.

Has the DCM program reduced litigation costs in civil cases?

As with disposition time, a majority of attorneys reported that DCM either reduced litigation costs or had no effect on costs, but the percentage reporting a positive effect was substantially less than those reporting a positive effect on litigation time. Cost savings were most likely to come from use of the telephone for court conferences, more contact with the judges, and the early case management conference.

More attorneys—though still a small minority—reported increased costs from DCM than reported increased litigation time. Increased costs were most likely to arise from the court's paper-work requirements, the attorneys' joint case management report, the judges' handling of motions, and the court's requirement that a party with settlement authority attend settlement conferences.

What other benefits has DCM brought to the court?

Both attorneys and judges identified a number of benefits other than reductions in time and cost. For the judges, the greatest benefit has been increased uniformity in case management across the judges. The judges also find DCM effective for giving close attention to each case, involving attorneys in case management decisions, using ADR more effectively, allocating judicial time effectively, and deciding motions promptly.

Attorneys noted the assistance DCM provides for planning their case and for staying aware of deadlines, but their written comments highlighted in particular the critical importance of contact with the judges for disposing of litigation expeditiously. The primary forum for such contact is the case management conference.

Although not a consequence of DCM per se, the judges also noted the benefit of going through the process of designing and implementing the DCM system. In doing so, they were able to discuss and examine the practices of each judge and adopt the features of each that seemed most promising.

Are particular kinds of cases more likely to be assisted by DCM?

The attorneys most likely to report that DCM moved their case along were those whose cases had been referred to ADR and those in cases with low to medium levels of factual complexity and formal discovery, lower monetary stakes, higher agreement between the attorneys on the issues involved, less contentiousness in the attorneys' relationship, and a low to medium likelihood of trial. The same pattern was generally true for litigation costs, except that referral to ADR was less likely to be associated with lower costs. Where a case was complex or contentious, attorneys were more likely to report that DCM increased costs. The DCM system in this district appears to be most effective, then, for standard or average cases.

Are certain case management practices more effective than others?

Our study suggests there is an identifiable cluster of case management practices that attorneys believe move litigation along and decrease costs. Those practices most likely to be seen as having beneficial effects on both are use of the telephone for conferences with the court, the initial case management conference, and more contact with the judges. Both judges and attorneys emphasized the critical importance of the initial case management conference.

How judges handle motions is also an important factor in litigation time and cost. Many attorneys reported that the judges' practices had a beneficial effect, but sizable minorities reported negative effects, suggesting the critical role judges' motions practices play in the progress of litigation. Although the wording of the question did not permit identification of specific judicial practices regarding motions, attorneys' written comments suggest litigation is delayed and costs rise when rulings on motions are delayed.

Two other requirements—that parties with settlement authority attend settlement conferences and that attorneys file a joint case management report before the case management conference—

also cut both ways, with more than half of the attorneys reporting that these requirements move a case along but sizable minorities reporting that they increase costs.

From the attorneys' perspective, paperwork requirements are a significant factor in increased costs and time, a finding that holds across all types of cases and attorneys. The question wording on the survey did not include any specific paperwork requirements, nor did attorneys identify any specific requirements in their written comments.

How is a system of case management tracks different from individualized judicial case management?

The judges generally acknowledged that there is little difference between a tracking system and individualized judicial case management except that a formal tracking system provides two additional benefits. First, it provides information to attorneys about how their case is likely to be managed, so they can better plan their case and so they are better prepared for the initial case management conference. Second, tracks provide a set of performance standards for each judge and the court as a whole to monitor how closely they are adhering to the court's disposition goals.

Although few attorneys reported detrimental effects from placing cases on case management tracks, a number of written comments noted that judges must take care not to apply the system rigidly. Sometimes, they said, it is appropriate to vary the track requirements or reassign a case to a different track if case developments reveal such a need. These concerns echo those of the advisory group that DCM not be applied by rote and the concerns of some judges that the measures of court performance not constrain judges from doing what is right for a case.

B. Description of the Court and Its Demonstration Program

Section B describes the demonstration program adopted by the Western District of Michigan in September 1992. To provide context for the rest of the chapter, it begins with a brief profile of the court's judicial resources and caseload. It then describes in detail the steps taken by the court to design, implement, and apply its DCM system.

1. Profile of the Court

Several features of the court are noteworthy for an understanding of its implementation of DCM and the impact of the program on the district: the stability of the bench and the civil caseload during the demonstration program; the court's decision in 1995 to request that a temporary fifth judgeship not be made permanent; the relatively low caseload per judgeship; and the very large portion of the caseload made up of prisoner petitions.

Location and Judicial Resources

The Western District of Michigan is a medium-sized court, with a main office in Grand Rapids and divisional offices in Lansing, Kalamazoo, and Marquette. The three offices in the southern part of the district each have at least one resident district and magistrate judge; the distant office in the northern part is served by a magistrate judge and periodic visits by a district judge.

In the year before the court became a demonstration district it was allocated a temporary fifth judgeship, having had four judgeships throughout the 1980s. The new judgeship, plus another that had been vacated by a judge taking senior status, were filled during the time the court was designing its demonstration program. The court's four magistrate judges also have been with the court since before the demonstration program began. During the demonstration period, then, the court's bench has been stable, with a change in the chief judge and clerk but no judicial vacancies, retirements, or changes from active to senior status.

In addition to the active district and magistrate judges, the court's two senior judges each carry 25% of a regular caseload. The court is noteworthy for having asked in 1995 that the temporary fifth judgeship not be made permanent by Congress.

Size and Nature of the Caseload

During the decade leading up to the demonstration program, the court's caseload nearly doubled, from 1,053 cases in FY80 to 2,030 in FY90.[16] About the time the program was implemented, however, the overall caseload and civil caseload dropped, with the civil caseload only recently returning to about the same level it was before the program began (see Table 12). Criminal felony filings on the whole have risen during the demonstration period. The court has not, however, seen caseload increases during the past five years that even approach the increases experienced during the 1980s. Like the court's judicial resources, then, its overall caseload has for the most part been stable throughout the court's experiment under the CJRA.

Table 12
Cases Filed in the Western District of Michigan, FY90-95[17]

Statistical Year	Cases Filed			Filings Per Judgeship	
	Total	Civil	Felony Criminal	Actual	Weighted
1990	1,909	1,753	156	477	374
1991	1,889	1,704	185	378	327
1992	1,791	1,621	170	358	305
1993	1,884	1,664	220	377	351
1994	1,894	1,684	210	379	355
1995	1,967	1,746	221	393	379

[16] Source: Annual reports of the director of the Administrative Office, 1980 and 1990.

[17] Source: Administrative Office of the U.S. Courts, Federal Court Management Statistics, 1995.

While case filings tell us something about demands on a court, a better measure is the court's weighted filings per judgeship, which takes into account the relative demand of different types of civil and criminal cases. As Table 12 shows, the court's weighted filings are somewhat less than its actual filings. Parallel with the drop, then rise, in civil case filings, the weighted filings dropped, then rose during the demonstration period. Nonetheless, the court's weighted filings remain well below the national average of 448 cases per judgeship in FY95.

The court's relatively low-weighted filings can be explained to some extent by the makeup of the civil caseload. Table 13, which identifies the principal case types filed in the district, shows that prisoner petitions—a low-weight case type—make up by far the single largest group of cases filed in the district. The court's 49% is substantially higher than the national average of 26% and is due in part to the large number of prisons in this district. The remainder of the court's caseload is made up of the same principal case types as most district courts, though proportionally its other case type filings are below the national averages due to the high number of prisoner cases. The court's caseload mix has remained quite stable since the late 1980s.

Table 13
Principal Types of Civil Cases Filed, Western District of Michigan, FY95[18]

Case Type	Percent of Civil Filings
Prisoner Petitions	49.0
Civil Rights	14.0
Torts	8.0
Contract	7.0

Unlike some of the demonstration programs, the program adopted by the Western District of Michigan applies to all case types. Thus, our examination of DCM's effects includes the entire spectrum of civil cases.

2. Designing the Demonstration Program: How and Why

The statutory obligation of this court and its advisory group was to "experiment with systems of differentiated case management that provide specifically for the assignment of cases to appropriate processing tracks that operate under distinct and explicit rules, procedures, and time-frames for the completion of discovery and for trial" (Judicial Improvements Act of 1990, Title 1, Sec. 104). Below we describe their work, relying on the advisory group's report to the court and on interviews with advisory group members, court staff, and judges.[19]

[18] *Id.*

[19] For a description of our research and data collection process, see Appendix A.

Issues Considered and Recommendations Made by the Advisory Group

The initial design of the court's differentiated case management program (DCM) was prepared by the advisory group and three consultants, who were assisted by a full-time, temporary staff of four persons. Using interviews, questionnaires, and examination of docket information, the consultants and staff developed a profile of the district's caseload and gathered other information for determining how many case management tracks should be created and what the track requirements should be.

In the course of their analyses, the advisory group and consultants made several findings about the court's caseload and management practices. Since 1987, they found, the court had been terminating cases faster than new cases were being filed, which had eliminated a substantial backlog.[20] The group found as well that the court's median disposition time was below the national average, and that only 4% of the district's civil cases had been pending for more than three years, leading them to conclude that "litigation is not excessively delayed" in this district.[21] The advisory group also found that the judges received effective support from the magistrate judges, court staff, and an advanced automation system.[22]

Among the methods used by the court in managing its caseload, the advisory group noted, was extensive use of alternative dispute resolution methods. About half of the personal injury and personal property cases were referred to one of the court's ADR programs, as were about one-third of contract and civil rights cases.[23] While attorneys in the district were thus very familiar with ADR, the advisory group was concerned that its use had become perfunctory and that some changes might be necessary.

Although the court's resources and its caseload appeared to be in good condition, the advisory group was concerned that litigants might be experiencing excessive litigation costs and delay that they as an advisory group did not perceive. In interviews with attorneys and litigants, however, they found few who believed costs or delays were too high, but they did find several areas in which case management might be improved: use of reasonable deadlines, such as sixty days, for rulings on motions; more discriminate use of ADR, with attorney participation in deciding whether one of the court's ADR methods should be used; greater use of the telephone to decide motions; and case-by-case, rather than mandatory, participation of clients in Rule 16 conferences.[24]

In addition, attorneys and litigants voiced substantial concern about two problems: the trailing trial calendar, which they said might span one to two months and led to unnecessary trial preparation, and the absence of limits on discovery, which led to excessive numbers of depositions, interrogatories, and requests for admission. Both problems were seen as causing higher-than-

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[20] Report of the Advisory Group of the United States District Court, November 22, 1991, p. 13.

[21] *Id*, p. 35.

[22] *Supra*, note 20, pp. 18, 19, 40, and 69

[23] *Supra*, note 20, p. 36.

[24] *Supra*, note 20, pp. 89-91.

necessary costs and prompted the advisory group to recommend changes. Regarding discovery in particular they stated, "[I]t is imperative that each judge embrace the case assigned to him at the earliest possible moment to provide both direction and management to litigants in all aspects of discovery."[25]

At the same time, the advisory group noted that most of the judges had historically taken an active role in case management, using Rule 16 conferences where appropriate and developing, in effect, a system of differentiated case management. In some senses, said one advisory group member, DCM was "already up and running when the statute was passed" and the group did not expect the new program to lead to great changes. In this context, their goal became to give shape to already existing practices by providing judges and attorneys guidelines—or tracks—for determining how much management each case should receive.

To determine the appropriate number of case management tracks and their requirements, the advisory group, through its consultants, examined the behavior of different types of cases in the past. They found that cases tended to clump into various categories by disposition time, and they therefore recommended six case management tracks based on the length of time and amount of judicial involvement needed for resolving cases. To encourage consents to trial by magistrate judges, the advisory group recommended that access to the fastest track be permitted only on consent to magistrate judge jurisdiction. And, at the recommendation of its consultants, the advisory group created a seventh track to which 10% of cases would be randomly assigned to create a control group for research purposes.

For each track, the advisory group recommended a time frame for resolution of the case, described the characteristics of cases appropriate for that track, recommended whether case management conferences, case management orders, and ADR should be used, and commented on likely discovery needs. The group did not, however, recommend specific limits on interrogatories and depositions because they felt these limits should be established after the court had had some experience with tracking.

Throughout its discussions the advisory group was concerned that track assignments not be made automatically or on the basis of case type. In fact, except for the statutory requirement to adopt a tracking system and the consultants' recommendation that tracking would provide a method for measuring success in case management, it is not clear the advisory group would have recommended tracks. The most important case management tool in their view was the initial Rule 16 conference, and they emphasized the role of the judge in determining, with attorney participation, the appropriate management of each case. To forestall assignment of cases by "rote formula," the group made their views explicit in their report to the court. The single most important element in effective case management," they wrote, "... is the prudent exercise of sound judicial discretion ..."[26]

[25] *Supra*, note 20, p. 120.

[26] *Supra*, note 20, p. 133.

In giving shape to existing practices through a system of differentiated case management, the advisory group hoped not so much to improve litigation timeliness, which they had not found to be a problem, but to increase uniformity among the judges in case management, increase predictability in case handling, involve attorneys and litigants in case management decisions, and maximize the use of judicial resources.[27] And in their recommendations that judges limit the trailing calendar and constrain discovery, they hoped to improve the two areas in which they thought litigation costs might be too high.

The Court's Role and Goals in Designing the DCM System

During the advisory group's development of the DCM plan, a liaison judge and the clerk of court represented the court's views to the group. Upon receipt of the advisory group's recommendations, the court accepted the basic plan of seven tracks and the requirements for each track but made one major change. Just before the plan was implemented, the court decided, in response to advice from an outside review panel, to adopt specific numerical limits on interrogatories and depositions.[28] The court had not considered such limits in prior discussions and the suggestion prompted vigorous debate, but ultimately specific limits were added to each track.

The court also did not accept the advisory group's recommendation that the trailing docket be abandoned. In the court's view, setting multiple cases for a trial term was a far more efficient use of court time than setting a single trial for specific dates. The court nonetheless promised to try to shorten the elapsed time of the docket, set fewer cases on it, and use fixed trial dates whenever possible.[29]

Among the elements of the plan that were readily accepted by the judges was the move from mandatory ADR to a case-by-case determination of ADR's suitability. Like the advisory group, the judges were concerned that the court's ADR programs had become ineffective through indiscriminate use, including multiple referrals to ADR. Thus, with adoption of the DCM plan, the court's ADR programs became voluntary (except for a specific class of cases governed by Michigan law).

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[27] *Supra*, note 20, pp. 128-129.

[28] The Civil Justice Reform Act instructed the Judicial Conference of the U.S. Courts to review the cost and delay reduction plans established by the district courts (28 U.S.C. § 474(b)). Oversight of CJRA implementation has been the responsibility of the Conference's Court Administration and Case Management Committee, which reviewed the DCM plan in Michigan Western and reported its assessment in a letter from the then-chair Judge Robert M. Parker. The letter, dated July 30, 1992, stated that the "committee ... believes limits on the number of discovery requests, interrogatories, and depositions should be considered in conjunction with limits on the length of time to complete discovery." Letter on file at the Federal Judicial Center.

[29] Differentiated Case Management Plan of the United States District Court for the Western District of Michigan. December 18, 1991, p. 5.

Although the judges accepted the DCM plan and the idea of using case management tracks, they were not sure it would bring substantial change to the court. Like the advisory group, nearly all the judges reported that the court had already been actively managing cases. "We've only renamed what we've been doing," said one judge. Several judges also noted that the court had no civil backlog and a small criminal caseload and thus was not unduly burdened. Consequently, they expected it would be hard to see a measurable change in the condition of the court's caseload after DCM implementation. Several judges expressed some concern that in fact the system might increase cost through more paperwork requirements and disputes over discovery limits.

At the same time, the judges were not opposed to tracking and hoped it would achieve several goals, including, said about half, a reduction in litigation time and cost through early attention to cases and control of discovery. About half the judges also said they supported DCM because one of its purposes was to place case management firmly in the control of the judges rather than the lawyers. A third purpose, noted by three judges, was to serve the public better through standardization of the court's practices and thus greater predictability. Several judges also said the court hoped DCM would give attorneys more contact with the judges so problems could be worked out informally. Finally, several judges noted that one reason the court accepted a tracking system was the consultant's argument that by placing cases on tracks the court would be able to measure performance of the court's case management practices.

3. Description of the DCM System

The court adopted its *Differentiated Case Management Plan* on December 18, 1991, effective September 1, 1992, for cases filed on or after that date.[30] This plan, which is described below, was issued as a general order on September 1, 1992, and has been amended through several subsequent general orders, which remain the court's local authority for DCM.

The System of Case Management Tracks

The DCM plan provides for six case management tracks, each with its own guidelines and time-frames for discovery and trial. The plan also established a seventh, non-management track, to which 10% of the court's filings were randomly assigned to create a control group for research purposes. The tracks are listed in Table 14 (next page), along with their requirements and several characteristic features of cases on each track.

Although the DCM plan sets out specific requirements for each track, including a fixed number of interrogatories and depositions, these requirements are guidelines only and may be modified by the judge at the Rule 16 scheduling conference or upon motion made later in the case. This is in keeping with the advisory group's strong recommendation against rote assignment to tracks.

[30] Pursuant to the Civil Justice Reform Act (28 U.S.C. § 474), the court's plan was reviewed and approved by the Judicial Conference and a committee of judges in the Sixth Circuit.

Table 14
Differentiated Case Management Tracks, Their Requirements, and Typical Characteristics of Cases Assigned to Each Track
Western District of Michigan

Track	Requirements and Case Characteristics
Voluntary Expedited	9 months from filing to termination Parties must waive right to Article III judge if case goes to trial; therefore assignment is voluntary with full consent of all parties Voluntary exchange of discovery encouraged Discovery completed within 90 days after Rule 16 scheduling conference 2 fact witness depositions 15 single-part interrogatories per party Few parties Few disputed legal or factual issues Small monetary amounts Use of ADR unlikely
Expedited	9-12 months from filing to termination Discovery completed within 120 days from Rule 16 scheduling conference 4 fact witness depositions 20 single-part interrogatories per party Few parties Few disputed legal or factual issues Selective use of ADR
Standard	12-15 months from filing to termination Discovery completed within 180 days from Rule 16 scheduling conference 8 fact witness depositions 30 single-part interrogatories per party Multiple parties Third party claims, multi-count complaints A number of disputed factual or legal issues ADR will almost always be used
Complex	15-24 months from filing to termination Series of case management conferences likely Discovery completed within 270 days from Rule 16 scheduling conference 15 fact witness depositions 50 single-part interrogatories per party Large number of parties Complicated issues ADR will almost always be used

Table 14, con'd

Track	Requirements and Case Characteristics
Highly Complex	24 months from filing to termination Pretrial schedule and discovery limits are at judge's discretion Series of case management conferences likely
Administrative[31]	Normally determined on pleadings or by motion Terminated within 180 days after dispositive motions are fully briefed or case is otherwise ready for disposition 15 interrogatories 5 requests for documents No depositions without consent of the judge Social security cases, bankruptcy appeals, habeas corpus, etc.
Non-DCM[32]	10% of civil caseload not assigned to a track to serve as control group for research purposes Randomly assigned at filing Minimal court-initiated management Parties may request additional management, including assignment to a track

Except for cases on the administrative and minimally managed tracks, which are assigned by the clerk's office, the track assignment is made only after the judge has considered the views of counsel and independently reviewed the case. When the DCM program began, counsel were required to file a Track Information Statement (TIS) with their complaint or first responsive pleading to allow the judge to assess the case and counsel's recommended track assignment in preparation for the Rule 16 scheduling conference. The TIS proved not to be useful, and the local rule requiring it was suspended in April 1994. To make the track assignment, the judges now use the attorneys' joint status report and discussions held at the first Rule 16 conference.

Attorneys' Joint Status Report

At least three days before the first Rule 16 conference, attorneys must file a joint status report prepared in accord with the Order Setting the Rule 16 Scheduling Conference, which is issued upon completion of responsive pleadings. The order directs counsel to address a number of matters in the joint status report, including their claims and defenses, the names of witnesses, a date for discovery completion, any limitations that may be placed on discovery, whether some form of ADR should be used, the prospects for settlement, and their recommended track assignment. The order instructs counsel that all dates they recommend must correspond to the deadlines established by the track they

[31] In November 1993, through an order amending the DCM plan, limits on discovery were added for this track.

[32] The court voted on September 27, 1996 to abolish the non-DCM track as of October 1, 1996.

propose. It also allows them to set forth special characteristics that may warrant extended discovery, accelerated disposition by motion, or other factors relevant to the track assignment they propose.

Because the court decided not to implement all the amendments of Fed. R. Civ. P. 26, attorneys are not required as part of their preparation for the Rule 16 conference to automatically disclose discovery information or hold a Rule 26(f) meeting before beginning discovery. After revision of Fed. Rule Civ. P. 26 in December 1993, the court authorized its judges to apply the rule amendments in individual cases at their discretion.

Initial Rule 16 Scheduling Conference

The court's DCM plan initially directed that the Rule 16 scheduling conference be held in all cases (except those on the administrative and minimally managed tracks) within thirty days after receipt of the last defendant's first responsive pleading. When the court found that this left too little time to schedule the conference and for counsel to prepare, the timing for the scheduling conference was changed in December 1993 to forty-five days after filing of last defendant's first responsive pleading. Because the court follows the time frames permitted in Fed. R. Civ. P. 4 and 12 for service and answer, the case management conference may occur anywhere from forty-five to 225 days after filing.

The DCM plan states that the conference will be held pursuant to Fed. R. Civ. P. 16 but does not spell out the specific topics for discussion. The order scheduling the conference states that the purpose of the conference is to review the joint status report and explore expediting the case by establishing early and ongoing case management; discouraging wasteful pretrial activity; facilitating settlement; establishing an early, firm trial date; and improving the quality of trial through thorough preparation. After the Rule 16 conference, a case management order is issued. The order states the track assignment; sets a number of dates, including dates for trial, completion of discovery, filing of motions, and the final pretrial conference; identifies whether ADR will be used; and sets out matters to be addressed in the final pretrial order.

Below is a time line setting out the schedule for pretrial events in the Western District.

Table 15
Time Line for Pretrial Events
Western District of Michigan

Event	Timing
Court issues order setting Rule 16 scheduling conference	Upon filing of last defendant's first responsive pleading (0-180 days after filing)
Counsel file joint statement	3 days before Rule 16 scheduling conference held
Court holds Rule 16 scheduling conference	45 days after filing of last defendant's first responsive pleading (45-225 days after filing)

Methods for Monitoring Schedules

To enable the court to assure timely disposition in all cases, the court adopted a new local rule as part of its DCM approach that permits the judge to issue an order to show cause why a case should not be dismissed for lack of prosecution or for failure to comply with local or federal rules (Local Rule 33). To make the rule effective, the DCM plan calls for a computerized reporting system to monitor all case management deadlines.

The plan also directs the court to develop standardized court orders, notices, and other forms to promote uniformity throughout the district and to increase efficiency and accuracy in docketing.

Alternative Dispute Resolution

Each of the DCM tracks predicts the likelihood that ADR will be used for cases on that track. For cases on the standard track, for example, ADR use is highly likely while it is very unlikely for cases on the voluntary expedited track. The DCM plan expects counsel to address the suitability of ADR in their joint status report and each judge to explore the use of ADR at the Rule 16 scheduling conference.

The court's local rules provide several ADR options and state that "[t]he judges of this District favor initiation of alternative formulas for resolving disputes, saving costs and time, and permitting the parties to utilize creativity in fashioning noncoercive settlements" (L.R. 41). The court has two long-standing ADR programs, the nonbinding, mandatory arbitration program established in the 1980s as a federal court pilot project and the case valuation program patterned after a state program.[33] Since adoption of DCM, arbitration is no longer mandatory but is offered as one of the court's ADR options.[34] The court's third and newest program is a facilitative mediation program, implemented in January 1996 and adopted because the court wanted to provide a true facilitative mediation option.[35]

Local rules spell out the procedures for the use of arbitration (L.R. 43) and case valuation (L.R. 42), including how cases are selected and referred, whether written materials must be submitted, who must attend ADR sessions, what fees must be paid, and what degree of confidentiality is required. The voluntary facilitative mediation program has not yet been incorporated into the local rules; its

[33] The case valuation program, also called Michigan Mediation, provides parties a hearing before three neutrals who place a value on the case. It is mandatory for certain diversity cases in which the rule of decision is provided by Michigan law.

[34] The court initially established its arbitration program as one of the ten mandatory arbitration pilot programs authorized by 28 U.S.C. §§ 651-658. Under DCM, with its voluntary use of arbitration, the court no longer maintains the program authorized by the statute. The mandatory program was included in the Federal Judicial Center's study of the ten mandatory arbitration programs. See B. Meierhoefer, Court-Annexed Arbitration in Ten District Court. Federal Judicial Center, 1990.

[35] In contrast to the court's "Michigan mediation" program, where a panel of three neutrals give parties an evaluation of the case's value and likely outcome if adjudicated, the "facilitative" mediation program provides a single neutral who assists parties with negotiations.

procedures are set forth in an order entered in the specific case, with the program description attached to the order. An arbitration/mediation deputy clerk manages the ADR programs.[36]

4. Implementing and Maintaining the DCM System

Once the court and advisory group had designed the DCM system, it became the task of the court to put it into place. Both court staff and judges were deeply involved in this process.[37]

The Role of Court Staff and Judges

As the advisory group and court developed the DCM plan, the court took a number of steps to make sure the new system would be fully and smoothly implemented. The court first created a DCM task force made up of each judge's case manager and courtroom deputy, representatives from the clerk's office, the automation systems administrator, and the DCM coordinator, a new position created by the court for the purpose of establishing and monitoring the DCM system.[38] To assist the task force, the court retained two consultants who had extensive experience in developing DCM systems in state courts.

The task force examined the implications of DCM for the court's internal procedures and for its communications with attorneys. The outcome of these efforts, in conjunction with the judges' policy decisions about track requirements, resulted in adoption of standardized forms and orders by all chambers. For both judges and staff, this outcome was unexpected and has been one of the primary benefits of the DCM system. It was achieved in large part by the judges' willingness to examine their practices and be flexible, but it was aided as well by participation of the judges' case managers in the DCM task force. Through the task force meetings, the case managers developed a consensus on the most effective methods and forms for carrying out their work and were able to receive the judges' approval of them. Another factor in prompting standardization was the court's commitment to monitoring the effects of the DCM system, which required that each chambers agree to submit standardized information.

From the beginning of the implementation process, the court paid particular attention to the need court staff and judges would have for adequate information about and participation in the development of DCM. To introduce the basic DCM system design and to make sure all personnel could discuss and influence its effect on their work, the court held a two-and-a-half day workshop for all judges and court staff several months before DCM's effective date. A second meeting was held during the first week of DCM operation to make sure everyone was familiar with the final

[36] Local Rule 44 provides for several additional forms of ADR—summary jury and bench trials, mini-hearings, and early neutral evaluation—which are infrequently used.

[37] This section is based on interviews and the court's 1994-1995 CJRA annual assessment, United States District Court for the Western District of Michigan, Annual Assessment, September 1, 1994-August 31, 1995, pp. 2-5.

[38] When the work of the temporary staff hired for the advisory group's study of the district was completed, a member of that staff became the DCM coordinator.

design and procedures. At the end of the first year of operation, a third meeting was held to discuss system performance and assess the need for modifications. Each meeting was attended by all court personnel, including the judges, and the members of the court's advisory group. This process of full-court meetings and participation in the procedural design is seen in retrospect as critical to the smooth transition to DCM when it took effect on September 1, 1992.

Once the DCM system was in place, the court established a DCM Implementation Committee to monitor the system's performance. The committee, which is made up of one district and one magistrate judge, the clerk of court, the advisory group chair, the DCM coordinator, and the systems administrator, meets regularly to review statistical information about the DCM system's performance. They examine, for example, such matters as the percentage of initial Rule 16 conferences held within forty-five days of responsive pleadings and the percentage of cases terminated within each track's guidelines. They investigate the cause of any anomalies they see and suggest changes as needed. The committee also proposes changes in the standardized orders to keep them uniform. And the committee monitors attorney reaction to the DCM system through a questionnaire sent at case closing and reports all of its findings, both those from the questionnaire and those based on the court's routinely kept statistics, in the court's CJRA annual assessment.

The implementation of DCM did not change in fundamental ways the role of clerk's office or chambers staff, but it has added several new elements to their routines. The docketing clerks, for example, now screen cases for assignment to the administrative track and also make some additional docket entries. The case managers' role also remains unchanged for the most part, but their centrality to monitoring the flow of cases has given the position greater status. In fact, had it not been for the already-existing position of case manager, several judges and court managers said, the court probably would have had to redefine staff roles to create such a position.

From the outset, the court's automation staff has played a particularly central role in implementation and maintenance of the DCM system. To permit monitoring of the system and to provide judges the information they would need to enforce case deadlines the staff developed a sophisticated computer tracking system. This system not only provides monthly status reports on each judge's pending cases, but through an automated tickler system generates daily reminders to the case managers about case-related events and deadlines that must be satisfied each day. Among the messages delivered by the tickler each morning might be the following: "It is 90 days after the complaint was filed in 96-cv-0000. Defendant has not yet been served. Please do Notice of Impending Dismissal to plaintiff." This system has made it much easier for staff to ensure that all events in each case are timely.

Although nearly everyone who participated in DCM's implementation attested to the hard work involved, there was little question they viewed it as worthwhile. One of the most useful parts of designing the system was the process itself, which prompted the judges to discuss their practices with each other and draw on the best of each. On the whole, the court seemed surprised at how smoothly implementation had gone, a success they attributed to the small size of the court, which permitted involvement by everyone; the already-existing position of case manager; the critical assistance of the automation staff; the DCM's coordinator's role in guiding the development of

forms and new routines; the two DCM consultants, who helped the court understand what a DCM system is and requires; and, not least, the willingness of the judges to try other procedures.

Forms Used by the DCM System

Development of standard forms and orders was a central part of the implementation process. Nearly two dozen forms, including the automated tickler system notices, were either developed or standardized as a direct result of DCM. (Altogether, more than sixty forms and orders, including several criminal orders, were standardized during the implementation process.)

The management of cases rested until recently on three principal forms. (See Appendix B for copies of the forms.) Two were used early in the case to inform attorneys of their obligations regarding the initial Rule 16 conference with the court. One, the Notice of Assignment to Non-DCM Track, notified attorneys in that 10% of the caseload that judicial involvement in the case would be minimal and that responsibility for bringing issues to the assigned judge's attention would lie with the attorneys. With the recent elimination of the non-DCM track, this form is no longer in use. The second form, the Order Setting Rule 16 Scheduling Conference, notifies attorneys in the remaining cases that the case is subject to DCM, gives them the date of the conference, and instructs them in the items to be addressed in their joint status report to the court. The court also uses a third form, the standard case management order issued to parties after the initial Rule 16 conference, which sets out the track assignment; dates for trial, discovery cut-off, and filing of motions; the ADR referral, if any; and instructions for preparing the final pretrial order.

Education of and Input by the Bar

Throughout the design and implementation process, the court and its advisory group used a variety of mechanisms for keeping attorneys informed about the changes underway and to hear their ideas. Press releases and a brochure about the DCM system were distributed and talks were given at local bar and legal secretaries' meetings. The federal bar association and court held a seminar to introduce DCM to the bar, and the court developed an informational packet to give to attorneys upon admission to practice in the court.

To provide the bar another opportunity for input regarding DCM, the court has used a short questionnaire to ask attorneys how satisfied they are with the use of DCM in their cases. Until recently, the questionnaire was sent to all attorneys upon termination of their case, and about 80% returned it, providing the court an abundance of information about attorney reactions to DCM.[39] Because the questionnaire, after four years in use, became burdensome to the court and attorneys, it is now sent to a stratified random sample of terminated cases.

Problems in Implementation

If there was any area in which implementation did not proceed smoothly it was in the matter of discovery limits. When the court decided, just a few weeks before DCM's effective date, to add

[39] For a discussion of the findings from this questionnaire, see the court's 1994-1995 CJRA annual assessment, *supra* note 37.

numerical limits on depositions and interrogatories, the bar was caught by surprise. The advisory group, one member noted, was not consulted, which "caused hard feelings." Another advisory group member said there was an outcry from the bar about imposition of rigid rules rather than a case-by-case approach to discovery. In the end, the adoption of limits turned out to be more of a public relations problem than a real problem, but the last minute change gave the program a rocky start.

The judges agreed that the late inclusion of discovery limits was, in the words of one judge, "a public relations disaster." If the court had had more time to explain it to the bar, he felt, the problem might have been avoided. Because the court has traditionally respected the bar's professionalism and sought their advice, another judge said, the abrupt decision, with its implications of bar irresponsibility regarding discovery, was felt as a particular sting. Over time, both the court and advisory group members said, the problem eased as the judges made it clear that they intended to use the discovery limits as guidelines, not as rigid rules.

The Budget for DCM

Because the court relied heavily on consultants and additional temporary staff during the design and implementation of DCM, its costs during the first two years were substantial, as Table 16 shows. During these first two years the court also had substantial costs for upgrading its computer system, for providing office space for the temporary staff, for education of the bar, for travel of the advisory group and staff, and for printing and postage related to the court's educational efforts. Funds for these expenditures were acquired under the CJRA; as a demonstration district, the court could receive additional funding.

Table 16
CJRA Expenses, Fiscal Years 1991 to 1996
Western District of Michigan

FY	Consultants	Travel	Supplies#	Space	Automation	Training	Staff	ADR	Total
1991	$30,291	$3,597	$10,831	$5,715	$24,000*	$0	$17,741	$0	$92,175*
1992	$99,794	$19,101	$26,754	$22,860	$11,000*	$21,018	$131,490	$0	$332,017*
1993	$31,233	$6,661	$10,693	$5,715	$661	$160	$89,762	$0	$144,885
1994	$17,202	$4,844	$1,948	$0	$292	$745	$83,118	$0	$108,149
1995	$12,819	$3,363	$2,432	$0	$600	$0	$92,884	$3,219	$115,317
1996+	$1,257	$0	$1,663	$0	$0	$0	$84,290	$0	$87,210
Total	$192,596	$37,566	$54,321	$34,290	$36,553*	$21,923	$499,285	$3,219	$879,753*

\+ As of 9/1/96
\# Includes supplies, furniture, printing, postage, and telephone.
* Approximate

Compared to the costs for designing and implementing DCM, the court's costs for maintaining the system are much smaller. The largest, and almost only, costs in the current calendar year are the salaries of the DCM coordinator and DCM secretary. Small expenses have been incurred for supplies and postage, principally for sending out the attorney questionnaires and for consultation with the DCM experts who helped the court design the system. In 1995 the court experienced its only ADR-related expenditure when it hired two consultants to train neutrals appointed to serve in the new facilitative mediation program.

In providing these budget figures, the court noted that its early expenditures were incurred largely because the court had to develop its demonstration program under tight time constraints and turned to experts to assist with that task. For a court not under such constraints, the court noted, developmental costs could be much less. Further, the court noted, the expertise developed by the court could well substitute for the assistance of consultants. In fact, the Michigan Western staff has already assisted several courts.[40]

5. The Court's Application of the DCM Rules

Court Application of and Attorney Adherence to the Rules

In interviews in the spring of 1996, almost four years after DCM implementation, all of the district and magistrate judges said DCM was still fully operational in their chambers (as they had reported in 1993). For one or two of the judges, the move to DCM meant considerable change in their practice because of the requirement to hold a Rule 16 conference in all eligible cases. Yet all do hold that conference, as well as assign cases to tracks and issue case management orders in every eligible case.

The judges said the attorneys, too, for the most part comply with the DCM requirements. Most, for example, submit the joint status report prior to the Rule 16 conference. While the judges said attorneys with federal court experience generally provide a better report than those with no experience, the judges on the whole find the attorneys' compliance satisfactory and the reports useful. The judges also find that attorneys are now usually prepared to discuss the case at the Rule 16 conference. At the outset, said one judge, it was hard to convince the bar that they had to be prepared for this conference, but that is rarely a problem today. He said it took two to three years for the bar to learn the expectations of the court regarding the joint report and Rule 16 conference. Attorneys appear to have adjusted very quickly, on the other hand, to the track assignments. Seldom, the judges reported, do attorneys argue with each other over the track assignment or ask later for a track reassignment.[41]

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[40] Letter from S. Rigan to D. Stienstra, September 18, 1996, on file at the Federal Judicial Center.

[41] The court's internal monitoring shows that the track assignment was changed in fewer than 1% of the cases assigned to a track. See *supra* note 37, p. 36. We have not independently verified the court's data.

As described earlier, the court prompted an outcry when it adopted numerical limits on depositions and interrogatories at the time the DCM plan was implemented. That problem has subsided because the judges use the discovery limits specified by each track as guidelines rather than rules. However, most said, while they may adjust the discovery amount upward, they usually retain the track designation and time limits of the lower level track.[42] More recently, some of the judges have been using the Rule 16 conference to have attorneys identify documents that can be exchanged and then setting a deadline for doing so. "We are moving," said one judge, "toward voluntary disclosure."

Although the court created a track for cases involving administrative reviews and prisoner petitions, several judges pointed out that these cases are not handled differently now than before DCM. Most are decided on summary judgment motions or dismissed as frivolous, as in the past, and are handled quickly. The only change under the DCM plan has been to set an outer time limit of 240 days after filing of a summary judgment motion for the magistrate judges' rulings on it.

Several judges also pointed out that the non-DCM track was not a pure control group, and as noted above, the court has recently eliminated this track. Since the inception of the DCM system, the court had been uneasy about giving these cases no attention and in November 1993 adopted a standardized case management order to provide for more uniformity in their treatment. The order, which was issued approximately forty-five days after the last responsive pleading is filed, gave a deadline for filing motions, a date and instructions for the final pretrial conference, and a trial date one year from the filing of the complaint. One judge noted, as well, that because of the CJRA requirements to report motions pending for more than six months, judges did not leave these cases unattended.

On the whole, however, the court appears to have fully implemented the DCM system and to have followed its guidelines for the past four years.

Distribution of Cases Across DCM Tracks

In applying the DCM guidelines, the judges make decisions each day about the appropriate track for new cases, with implications for the amount of discovery and length of time each case will be permitted. When making this decision, the judges said, they rely on their experience, the attorneys' advice, and several case characteristics, such as the number of parties and witnesses, whether parties and witnesses reside outside the state or country, and the number and difficulty of the issues. The significance of these characteristics is primarily their implications for discovery, because for most judges the time needed for discovery, in addition to the time needed for dispositive motions, is a key determinant of the track assignment. Table 17 (next page) shows the resultant distribution of cases across DCM tracks for the years since DCM was implemented.

[42] In 83% of the cases, according to the court's internal monitoring, the numbers of depositions and interrogatories set at the Rule 16 conference are within the guidelines of the track assigned to the case. See *supra* note 37, p. 36. We have not independently verified the court's data.

Table 17
Track Assignments of Civil Cases Filed 9/1/92-7/31/96
Western District of Michigan[43]

Track	No. of Cases Assigned	As % of all cases assigned	As % of all cases assigned to non-administrative tracks[44]
Total Cases Assigned	5065		
Voluntary Expedited	36	1.0	3.0
Expedited	382	8.0	27.0
Standard	803	16.0	56.0
Complex	175	4.0	12.0
Highly Complex	28	1.0	2.0
Administrative	3361	66.0	
Non-DCM	280	6.0	
Total Cases Unassigned	1625		
Total Cases Filed	6690		

Table 17 shows that the majority of non-administrative cases are assigned to the standard track, with a much smaller number assigned to the expedited or complex tracks, and the rare cases assigned to the court's fastest and longest tracks, the voluntary expedited and highly complex tracks. As would be expected from the high prisoner caseload, over half of the cases assigned to tracks are assigned to the administrative track.

Table 17 also reveals that about a fifth of the caseload is not assigned to a track at all. This occurs because many cases terminate before the initial Rule 16 conference, where the track assignment is made. At any given time, some pending cases will also be unassigned because they have not yet had that conference. As the table shows, however, most of the court's civil cases are assigned to a case management track.

[43] Data derived by the Federal Judicial Center from the court's electronic docketing system.

[44] Non-DCM cases not included.

C. The Impact of the Court's Demonstration Program

We turn now from description of the court's DCM system and begin to consider how it has affected the court's caseload and those who work within the system, looking first at the judge's experiences, then at the attorneys' assessments, then at the performance of cases on the DCM tracks, and finally at the condition of the caseload since DCM was adopted.

Within the context of the statutory requirement and the district's needs, the advisory group and court sought to achieve the following goals:

To reduce litigation time and costs
To control discovery
To increase uniformity in judicial case management
To provide guidelines for how much management each case needs
To maximize judicial resources
To involve attorneys in case management decisions
To provide for more discriminate use of ADR
To decide motions more quickly
To make greater use of the telephone for conferences and motions
To prompt more consents to magistrate judge jurisdiction

Our principal findings, which are discussed in substantial detail in the remainder of this report, are listed below:

- The judges are enthusiastic about the DCM program and believe that it has delivered a number of benefits, foremost among them greater uniformity in case management across the judges, including holding the initial Rule 16 conference in all eligible cases. For the judges, DCM has met most of the goals the court established for the program.

- Features of the program considered critical by the judges are the early case management conference, assignment of cases to a case management track, and use of the computer to monitor individual cases and the court's caseload.

- Only a little more than half of the attorneys reported that the DCM system *as a whole* expedited their case, but a greater percentage reported that *specific, individual* DCM and other case management components were effective in reducing litigation time. There appears to be a cluster of case management practices effective for this purpose, with the most effective being use of the telephone for court conferences, the early case management conference, the scheduling order, and more contact with the judges. The problems most likely to cause delay, reported by a minority of attorneys, are judges' handling of motions and paperwork requirements, while the scheduling of trials appears not to be a problem.

- Attorneys were less likely to think the DCM system reduced litigation costs, although nearly half found the case management conference effective for this purpose. Most attorneys found most DCM components neutral in their effect on cost, but a substantial minority identified several components as increasing cost: the joint case management report, requiring a party with settlement authority to attend settlement conferences, the judges' handling of motions, and the court's paperwork requirements.

- Attorneys most likely to say DCM expedited their case and reduced costs were those with more standard cases—i.e, of low to medium factual complexity, low to medium formal discovery and monetary stakes, higher agreement among the attorneys about the issues in the case, and low to medium likelihood of trial. Attorneys whose cases had been referred to ADR were also more likely to say DCM expedited their case.

- Most cases that survive to the case management conference are assigned to a track, and at least half and perhaps as many as three-quarters of the cases terminate within the time guideline for their assigned track.

- Consents to jurisdiction of a magistrate judge jumped sharply after implementation of the DCM program.

- An analysis of caseload trends and disposition times reveals that during the demonstration period the condition of the court's overall caseload improved, including reduction in the number of older cases, earlier disposition of cases generally, and lowered median disposition time. To what extent these improvements are due to the DCM system cannot be determined, as there are several other possible explanations, including the court's additional temporary judgeship, the CJRA reporting requirements, and the court's tickler system.

- The DCM program appears to have fulfilled many of the goals set for it by the court and advisory group. For a minority of cases, however, judges' handling of motions continues to be a problem.

The remainder of section C discusses these and related findings and brings into the picture subtleties that cannot be captured in the brief summary above.

1. The Judges' Evaluation of DCM's Effects

The Benefits of DCM

The five active district judges and four magistrate judges in this district think the court's DCM program has been very successful and has achieved the goals for which it was established. Although one judge said he did not think the court's practices had changed greatly from the past, most said both the amount of change and its effects have been substantial. This finding is particularly

interesting in light of several judges' expectations in 1993 that the program would not affect the court's practices substantially.

Time and Cost

The judges do not see DCM's effects primarily in a reduction of litigation time or costs. Only two judges mentioned cost savings from DCM, with one saying the DCM system must be saving litigation costs, but the other saying he had "heard anecdotes both ways." Several judges mentioned a reduction in litigation time as one of the outcomes, but two pointed out that such savings would probably by difficult to see in the court's statistics because, as one said, "A certain amount of time is needed [to litigate a case] and can't be improved upon without drastic action. We didn't need drastic action because we were current, so we're nibbling at the edges." This judge also pointed out that because of the time permitted for service and responsive pleadings, as well as the time needed for filing, answering, hearing, and ruling on dispositive motions, the judge controls only about six months out of a fifteen month case.

Uniformity

More frequently mentioned than any other change under DCM was the standardization of practice that has resulted from adopting DCM. Standardization has had the immediate practical benefit of making practice in the court more predictable and thus the attorneys more satisfied, but it has also had the less tangible but significant benefit of "giving the process more integrity," said one judge. "We are more of a court now," he added. Another judge said, "The judges now understand that the docket is the *court's* responsibility. It's the business of all of us to move cases along. There's far more communication, and we all know why we do what we do."

One way in which greater uniformity emerges is through the court's periodic need to make decisions about the system's guidelines and performance. As one judge said, "The system requires judges to consider issues as a group and reach consensus." Because of this, he added, "It's easier to work together today than five years ago." For the judges who spoke of the greater uniformity and collegiality brought by DCM, there was a degree of surprise that it had happened at all, but appreciation that it had.

Attention to Cases

Among the other DCM benefits mentioned, several judges said they now have more information about each case, which permits them to develop more appropriate case schedules. Cases also receive earlier attention from the court, said one judge, while several noted that cases receive more in-depth attention. "We give cases much more attention now, we don't just set dates," said one judge. "The attorneys really appreciate that."

Discovery Disputes

Several judges thought as well that DCM had reduced the number of discovery disputes and motions filed, but about as many thought it had not had this effect. One judge said his practice of

resolving discovery disputes on the telephone has had more effect on the number of disputes and motions than DCM has had. Two judges commented on the timeliness of motions, both saying they decide them more quickly under DCM. As one noted, "The computer doesn't let motions slide by anymore." The other also pointed to the computerized reports, saying they enable him to keep track of motions and plan his law clerk's time more effectively. The court's own internal monitoring shows that 68% of motions are decided within sixty days of filing of the last brief, a number approaching the court's goal of 75% decided within that time frame.[45]

Setting Trial Dates

The judges were uncertain whether DCM has had an effect on setting trial dates. As in the past, most judges set trial dates at the initial Rule 16 conference and continue to use the trailing calendar (i.e., schedule a number of cases for trial during a specified time period of one to two months and then try the cases as they come up in turn). One or two judges said they thought DCM had permitted them to set earlier and firmer trial dates but another judge noted that with a level caseload and a full complement of judges, the trailing calendars are shorter today than in the past. DCM does, nonetheless, one judge noted, provide a target date for setting the trial.

Consents to Magistrate Judges

The judges agree that since adoption of DCM the number of consents had gone up, but one judge suggested this might be due to growing confidence in the magistrate judges. The pattern of increased consents suggests, however, that DCM bears some responsibility. In 1990 and 1991, just before DCM implementation, about twenty cases consented to magistrate judge jurisdiction. In 1992, after DCM implementation, forty-three cases consented, and the number has remained in the forties since.[46]

Judicial Time

The judges had divergent views as well on whether DCM has saved them time, with about half saying DCM had not had an impact on the amount of time they spend on cases. "It's just allocated my time differently," said one judge, adding, "It requires the judge to spend more time at the front end and in the middle." The judges who believed DCM decreases their time—the remaining half of the judges—agreed that DCM has shifted their effort to the front end of the cases, but they felt this reduced the time spent later in the case. "It reduces the number of issues that come to me later," said one judge, "because so much is dealt with at the Rule 16 conference."

ADR

Several judges mentioned the change in the use of ADR since the court adopted the DCM system. While they noted that dissatisfaction with the court's ADR programs had predated DCM

[45] *Supra* note 37, Table XV, p. 37.

[46] Information provided by the court.

and changes had already been underway, they credited DCM with making ADR use more rational and timely. Because it is now discussed at the initial case management conference, explained one judge, ADR is now considered within the overall needs and schedule of the case rather than being imposed automatically as in the past. As a result, the number of referrals to arbitration, which had been mandatory in the past, has diminished to almost none (from 86 in 1990 to 3 in 1995), while the number of referrals to other forms of ADR has gone up.[47]

Bar Reaction

Having weathered the outcry from the bar over discovery limits, the court is alert to the views of the bar, but generally, the judges said, attorneys appear to have accepted the DCM system. "They're always prepared to do business when they come in," said one judge. Two other judges noted the attorneys' appreciation for predictability in practice across the court, while another two mentioned the attorneys' approval of a more meaningful Rule 16 conference.

Altogether, the judges identified a number of benefits from the DCM system. While many benefits were named by only two or three judges, nearly all mentioned the greater degree of uniformity that has been achieved through DCM. Their comments suggest as well that DCM provides both judges and attorneys useful guidelines for managing each case according to its needs. The judges also feel that the system helps them give closer attention to each case, involve attorneys in case management decisions, use ADR more effectively, allocate their time more effectively, and decide motions more promptly.

Critical Features of DCM in Achieving its Benefits

There was wide agreement among the judges that four DCM elements are central to the benefits they have experienced under DCM.

The Early Rule 16 Conference

A majority of the judges cited the initial Rule 16 conference as the crucial element of the DCM system. It is in this conference, said one judge, that we "seize hold of the case and let attorneys know we're on top of it." Another judge pointed out the importance of the Rule 16 conference for providing the judge with "more information to schedule the case intelligently and to determine the right number of depositions and interrogatories." Several judges also pointed to the value of the Rule 16 conference for getting an early understanding of the issues in the case. "Every case has an issue that will decide it," said one judge, "and we use the conference to see what's at the bottom of it." Another judge said he uses the conference to "eliminate non-issues" and "force recognition of real issues" so the judge and attorneys can identify the steps needed to resolve only those issues.

[47] Information provided by the court. The overall percentage of cases referred to ADR was the same in 1996—30%—as the percentage referred in 1990 before the demonstration program began, but the percentage has fluctuated widely during the demonstration period.

The conference is also valuable, said one judge, for educating the attorneys. He requires them to discuss in detail the scheduling and merits of the case to make sure each understands what the other is claiming. "[It's] astounding," he said, "the number of cases where the attorneys, even after submitting the joint status report, say 'I didn't know that.'" This meeting also provides the attorneys, he noted, an opportunity to get a sense of the judge's reaction to the case. When the clients are present, said another judge, the Rule 16 conference also helps them understand there's "a 99% chance the case won't go to trial," so they turn their attention to steps that can settle the case.

The judges who think the number of motions has gone down attribute this benefit, too, to the Rule 16 conference. Because of the depth of discussion at the Rule 16 conference, said one, discovery practice is now more informal and less adversarial. Fewer motions are needed, he said, because the Rule 16 conference provides attorneys a way to speak with each other without losing face.

Although the judges did not identify the attorneys' joint status report as a critical element of DCM, several noted its usefulness in preparing for the Rule 16 conference. When the attorneys in the case are good, said one judge, they work out the dates through the joint status report, which "really lessens the work of the Rule 16 conference." Several judges spoke of the "snapshot" or "bird's eye view" of the case provided by the status report, which permits the judge, said one, to "hone in on the issues immediately."

Several judges noted that because of DCM all the judges have become active case managers. In the past, they said, some judges did not hold Rule 16 conferences or held them only for some cases and much later in the case. The initial agreement by these judges to hold early Rule 16 conferences in all cases was initially prompted, one judge explained, by the judges' agreement to comply fully with the instruction to be a demonstration district. But now, he said, "they're absolutely committed to doing this. We wouldn't go back to a non-DCM world."

Automation: Ticklers and Caseload Reports

The court's automated case docketing and reporting system was mentioned by over half the judges as another key element in achieving the court's goals. This system's effects are felt in two ways. First, it provides the judges information about the status of cases, which permits them to monitor whether deadlines are met, which motions are ready for decision, and what upcoming events need their attention. Second, it generates reports that show, for each judge, the number of cases meeting each of the court's deadlines—for example, the number of cases in which the case management conference was and was not held on time and the number of motions not decided within the CJRA's six-month limit—which creates considerable peer pressure.

The degree of change brought by the automated docketing and reporting system and its consequences for the court are captured by the comment below, which reflects the views of several judges:

> Compared to the old days, we're a slick, smoothly running, automated system. We used to be a pen and ink operation, but now the computer is integrated into everything.

> We get lots of information, almost too much, but the reports help us manage ourselves and see how we measure up to the courtwide standard. It also notifies the case manager when things are due in each case. It keeps everything on track and has permitted us to become as efficient as we are.

The System of Case Management Tracks

Several judges also identified DCM's system of case management tracks as a critical element in realizing the program's goals. The tracks, said one judge, "provide workable time frames" for scheduling cases. Another noted that the tracking system benefits both judges and attorneys because the judges "can fit cases into the time frames suggested by the track and attorneys learn the time frames the court works within. They come in ready to discuss the case and to be realistic."

While most of the judges acknowledged that a tracking system is in essence individualized case management and that tracks per se are not absolutely necessary, they pointed to a number of additional benefits from using tracks. For one judge, the tracks "make credible" the court's longstanding practice of setting limits on discovery. For another, the track guidelines provide "benchmarks" that help judges limit the amount of discovery granted. Attorneys, too, can use the guidelines to limit discovery, said another judge, because it permits them to set aside the adversary's reflexive request for as much discovery as possible.

And several judges recognized the role tracks play in administration of the court and chambers. They provide, said several judges, the standards for measuring performance. They are, said one judge, "a great management tool."

The Willingness of the Judges to Change

Though not technically an element of DCM, the judges' acceptance of the DCM system was noted by several judges as a critical factor in the system's success. Some judges, especially those who did not routinely hold Rule 16 conferences, had to make substantial changes in their practice. Others had strong commitments to their own practices, but they were able—through patient guidance of the chief judge, several said—to set aside their preferences, reach consensus on the DCM procedures, and make a commitment to implement them in good faith.

Reservations About DCM

While the judges are fully committed to DCM, one concern was widely shared. In this system, as one judge explained, "one can get carried away too much with statistics." Another warned that "the judge shouldn't make decisions on a party's request based on whether he'll look good in the statistics." Nonetheless, when asked whether they would change this system or whether there is a better alternative, the judges had few suggestions. In fact, the court has voted unanimously to continue the program for another year and is planning to incorporate it into the local rules as the district's permanent case management system.

Recommendations to Other Courts

All the judges but one said they would recommend DCM to other courts. The judge who declined to recommend DCM said he would want to know more about the court before recommending it. A court heavily burdened with criminal cases, he said, probably would not benefit from DCM because no amount of management would permit them to keep up with the civil cases. Another judge qualified his response by saying he would fully recommend the case management elements but was uncertain about tracks.

The judges who would recommend DCM to other courts offered a number of suggestions. The biggest hurdle, noted one, is getting the judges to agree on a common approach to case management. "The call for uniformity can only come from another judge," he said, and suggested a court consult with judges who have worked in courts with standardized procedures and forms. Another judge pointed out that it was relatively easy to overcome this hurdle in Michigan Western because the court had an obligation as a demonstration district to adopt DCM. In other courts, he said, strong leadership by judges respected in the court will be important.

Among other steps courts should take if they want to consider DCM, the judges mentioned the following: (1) The judges must be willing to work with court staff in planning a DCM system because their role in implementing it is critical. (2) Outside assistance will be necessary to learn what DCM is and how to set it up, but courts should call on other courts who have this experience, not outside consultants. (3) A court should plan thoroughly and undertake DCM only if committed because it is worse to start it and not carry through than not to start at all. And (4) a court considering DCM should involve the bar from the outset.

Despite the value the court has found in DCM, one of the judges said he is concerned that other courts will not try it because they will see it as either too complicated or as making litigation more difficult. This has not been the case in his court, he said, and the perception needs to be dispelled. "What we're doing is just common sense, " he said.

2. The Attorneys' Evaluation of DCM's Effects

Questionnaires sent to a sample of attorneys focused on the program's impact on time and cost in a particular case litigated by the attorney is this district, but also asked attorneys a number of additional questions about satisfaction with the court and the degree of change DCM had brought to litigation in the district.

In reporting on the attorneys' responses, we examine not only their assessment of the case management program but whether that assessment is related to any of a large number of party and case characteristics such as the number of cases the attorney has litigated in this court, the degree of complexity of the case that is the subject of the questionnaire, the nature of suit for that

case, and the amount of discovery in that case. The purpose of this inquiry is to determine whether DCM is more effective for some types of cases or attorneys than for others.

The discussion proceeds first to an examination of the attorneys' assessments of program effects on time and then its effects on cost. We next discuss the attorneys' satisfaction with the court's management of their cases and whether they have found DCM as a whole to be an effective case management system. We conclude with a summary of the analysis of the attorneys' responses. Those who are not interested in the technical discussion of the questionnaire results should turn to page 71 for that summary.

As before, keep in mind throughout this discussion that the findings are based on attorneys' estimates of DCM's effects on their cases.

The Effect of the DCM System on the Timeliness of Litigation

The great majority of attorneys who litigated cases in this district between 1992 and 1995 reported that the pace of their case was neither too fast nor too slow. As Table 18 shows, 80% of the attorneys said their case moved at an appropriate pace, with only 8% saying it moved too slowly.

This general rating of timeliness does not indicate, of course, whether the attorneys found DCM helpful in setting an appropriate pace for their case or whether, perhaps, DCM is responsible for the 14% of attorneys who reported that their case moved too slowly or too fast. Two other analyses permit direct examination of this question.

Table 18
Attorney Ratings of the Timeliness of Their Case
Western District of Michigan

Rating of Time from Filing to Disposition	% of Respondents Who Selected Each Response (N=616)[48]
Case was moved along too slowly	8.0
Case was moved along at appropriate pace	80.0
Case was moved along too fast	6.0
No opinion	6.0

[48] Unless otherwise noted, all percents presented in the tables in each chapter have been rounded to a whole percent and may total to slightly more or less than 100%.

Attorney Impressions of DCM's Overall Effect on Time

Table 19 shows the attorneys' rating of DCM's overall effect on the timeliness of their case. Just over half of the attorneys said DCM had no effect on the time it took to litigate their case. A very small percentage believed it hindered their case, leaving a substantial proportion who reported that DCM expedited their case.

Table 19
Attorney Views of the Effect of DCM on the Timeliness of Their Case
Western District of Michigan

Rating of the Overall Effective of DCM on Time to Disposition	% of Respondents Who Selected Response (N=573)
Expedited the case	43.0
Hindered the case	4.0
Had no effect on the time it took to litigate the case	54.0

Our interest is in whether different types of attorneys or cases are affected differently by DCM. We found that attorneys' responses did not differ by type of party (plaintiff/defendant), type of outcome, track to which the case was assigned, type of case, or the attorney's type of practice or number of years in practice.[49]

Attorneys' assessments of whether DCM expedited their case did differ, however, by a number of case characteristics,[50] by whether the case was referred to ADR, and by the attorneys' experience in the court. Those who were more likely to say DCM expedited their case were those who reported that:

- the factual complexity of their case was low to medium;
- the amount of formal discovery in their case was low to medium;
- the level of contentiousness between the attorneys was low to medium;
- the agreement on the factual issues in the case was high;
- the likelihood of trial was low to medium;
- the monetary stakes in the case were low to medium;

[49] Unless otherwise noted, all relationships discussed in section C.2 are statistically significant in a Chi-square analysis at the $p<.05$ level or better.

[50] Attorneys were asked to rate a number of case characteristics on a scale from "very high" to "none."

- the case had been referred to ADR; and
- the attorney had not litigated in the court before it adopted DCM.

Taken together, these findings suggest that DCM is most often perceived as a case expediter in cases that are more standard or "middle of the road," that have been referred to ADR, and where the attorney has not practiced under another case management system in this district.

Attorney Assessments of the Effect Specific Case Management Components Had on Case Time

To further assess DCM's impact on litigation time, we examined the attorneys' rating of the effects of specific DCM components. Table 20 (next page) shows how attorneys rated the impact of the principal elements of the DCM system—as well as several other case management practices—on the time it took to litigate their case. Program components are listed in descending order according to the percentage of respondents who said the component moved the case along. The analysis includes only the responses of those who said the component was used in their case.

Components Thought to Move the Case Along. Table 20 shows that there is a set of DCM components and case management practices that many attorney believed moved their case along, as well as a shorter set that few attorneys found helpful. Just about half to nearly three-quarters of the attorneys cited the following specific DCM components or other case management practices as moving their case along:

- use of the telephone for court conferences (73%),
- a scheduling order issued by a judge (72%),
- an early case management conference with the judge (67%),
- more contact with the judges (66%),
- judges' handling of motions (58%),
- attendance at settlement conferences of parties with authority to bind (56%)
- assignment of the case to a case management track (54%),
- judges' trial scheduling practices (53%),
- the attorneys' joint case management report (52%),
- time limits on discovery (50%),
- the court's ADR requirements (50%), and
- disclosure of discovery materials (49%).

This long list reveals that many of the DCM components, as well as other practices used by the court, were seen by the attorneys as helpful in moving their case along. For those components where a minority of attorneys reported it as useful, they generally reported that it had no effect—seldom that it had an adverse effect.

Table 20
Attorney Ratings of the Effects of Differentiated Case Management Components on Litigation Time (in Percents)
Western District of Michigan

Components of the DCM Program	N	Moved this case along	Slowed this case down	No effect
Scheduling order issued by judge	409	72.0	1.0	27.0
Early case management conference with judge	358	67.0	1.0	32.0
More contact with judge and/or magistrate judge	278	66.0	3.0	31.0
Judge's handling of motions	355	58.0	14.0	28.0
Attendance at settlement conferences of representatives with authority to bind parties	185	56.0	3.0	41.0
Assignment of case to one of the court's case management tracks	392	54.0	1.0	45.0
Judge's trial scheduling practices	318	53.0	4.0	44.0
Joint case management report, prepared and filed by counsel prior to case management conference	336	52.0	2.0	46.0
Time limits on discovery	356	50.0	3.0	47.0
Standardization of court forms and orders	281	27.4	3.0	69.0
Numerical limits on interrogatories	305	22.0	7.0	71.0
Numerical limits on depositions	272	21.0	4.0	75.0
Other Case Management Components				
Use of telephone, rather than in-person meeting for court conferences	203	73.0	2.0	25.0
Court or judge's ADR requirements	191	50.0	5.0	45.0
Parties ordered to disclose discovery material without waiting for formal request	178	49.0	6.0	44.0
Paperwork required by the court or judge	319	31.0	11.0	58.0

Table 20 reveals as well that the attorneys found many of the same case management practices useful that the judges identified as critical elements of DCM: assignment of the case to a case management track, the attorneys' joint case management report, and particularly the early case management conference with a judge.[51] One component that is very important to the judges, however, was clearly not seen by the attorneys as moving their cases along—standardization of court forms and orders.

Interestingly, the component found most helpful by the attorneys is not part of the DCM plan, and that is the use of the telephone for court conferences. The advisory group in its report to the court had urged greater use of the telephone, and it is clear that in those cases where it has been used the attorneys have found it beneficial.

Table 20 also shows that most attorneys had no problem with how the judges scheduled their trials, with 53% of the attorneys reporting that the judges' practices moved their case along and 44% reporting no effect. Although the question did not ask about specific trial scheduling practices, the very small percentage of attorneys who said trial scheduling practices slowed down their case suggests that unhappiness over the trailing calendar may be a problem of the past. Whether this might be due to changes in judges' practices or, as one judge suggested, to fewer cases awaiting trial cannot be determined from these data.

Finally, comparing the list of case management components rated effective by half or more of the attorneys to those that only a minority rated effective, there appears to be an identifiable cluster of case management practices that move cases along. After these, the percentage of attorneys finding any given component effective drops off sharply.

Components Thought to Have Little Effect on Time. Table 20 shows that for the case management and DCM components where the attorneys did not report a positive effect on litigation time they felt the component simply had no effect. These included:

- limits on the number of depositions (75%),
- limits on the number of interrogatories (71%), and
- standardized forms and orders (69%).

The attorneys' assessment of the limits on interrogatories and depositions is perhaps the most interesting of these findings, given the controversy the limits provoked when the DCM plan was implemented. The court did not originally consider adopting such limits and did so because they were urged to consider them by the Judicial Conference committee that reviewed their CJRA plan. In the attorneys' view at least, these limits have not been helpful. On the other hand, few see them as detrimental either. In most cases the impact seems to be benign.

[51] Because of the question wording, two items on the list are difficult to interpret. While we can see that more than half of the attorneys believe the judges' handling of motions moved their case along, we do not know which particular judge practices do so. Nor do we know which ADR requirements helped move the case along. Conceivably, some attorneys might have found the absence, rather than presence, of ADR requirements helpful.

For the minority of attorneys reporting that numerical limits and standardized forms had a positive effect on time, we examined what, if anything, distinguished them from the majority of attorneys who reported no effect. The attorneys who reported a positive effect differed in only a few—but noteworthy—ways. Those without pre-DCM experience were more likely than attorneys with pre-DCM experience to say limits on interrogatories and depositions moved their case along. Attorneys with pre-DCM experience were far more likely to say numerical limits had no effect (76% and 80%, respectively, compared to 63% for both interrogatories and depositions for attorneys without pre-DCM experience). It is not clear that attorneys with pre-DCM experience are better able to judge the effects of these limits than attorneys without such experience, but it is clear that attorneys with pre-DCM experience in the court find the numerical limits on discovery at best harmless.

Aside from this effect, several case characteristics distinguished the attorneys who reported a positive effect from limits on interrogatories. The cases these attorneys represented generally had higher levels of formal discovery, more disputes over discovery, lower levels of agreement on the value of the case, a higher likelihood of trial, and higher monetary stakes. In other words, cases marked by more discovery, higher stakes, and less agreement between the attorneys appeared to benefit the most from limits on interrogatories.

Components Thought to Slow the Case Down. Very few of the court's practices were identified by the attorneys as slowing the case down. For only one DCM component and one non-DCM component did more than 10% of the attorneys report an adverse effect: the judges' handling of motions, which 14% of the attorneys said slowed down their case, and paperwork requirements, which 11% of the attorneys said slowed down their case. The wording of these questions makes interpretation difficult, but attorneys' written comments suggest that the problem with motions is delays in rulings, particularly on dispositive motions.

We examined whether certain types of attorneys found paperwork requirements and the judges' handling of motions problematic and found that neither they nor their cases differed in any significant way from attorneys who reported that these practices either moved the case along or had no effect.

Components Viewed with Differences of Opinion as to Effect on Time. There were a large number of components where attorney opinion about their effectiveness was split roughly in half, between no effect and a positive effect on litigation time. These include assignment of the case to a track, the joint case management report, time limits on discovery, the judges' handling of motions, the judges' trial scheduling practices, requiring parties with settlement authority to attend settlement conferences, disclosure of discovery material without a formal request, and the court's ADR requirements. In examining whether certain kinds of attorneys or cases found these components particularly helpful, we found few significant relationships, except that those who had litigated in the court before DCM was implemented were somewhat more likely to say that time limits on discovery moved the case along (52% compared to 46% of attorneys without pre-DCM experience).

Program Effects on Litigation Cost

As with the pace of litigation, most attorneys rated the cost of their case as about right, although the 67% who said so is substantially less than the 80% who said the pace was appropriate (see Table 21). Likewise, the 15% of attorneys who said the cost was too high is somewhat higher than the 12% who said their case moved too slowly.

Table 21
Attorney Ratings of Cost of Case From Filing to Disposition
Western District of Michigan

Rating of the Cost From Filing to Disposition	% of Respondents Who Selected Response (N=615)
Cost was higher than it should have been	15.0
Cost was about right	67.0
Cost was lower than it should have been	7.0
No opinion	11.0

To determine to what extent DCM is responsible for the attorneys' rating of litigation cost, we examined their assessment of the DCM system as a whole and their ratings of the individual components' impact on litigation costs.

Attorney Impressions of DCM's Overall Effect on Litigation Costs

About a third of the attorneys who responded to the survey reported that DCM decreased the cost of litigating their case, but nearly two-thirds reported that it had no effect (see Table 22).

Table 22
Attorney Views of the Effect of DCM on the Cost of Their Case
Western District of Michigan

Rating of the Overall Effect of DCM on Cost	% of Respondents Who Selected Response (N=567)
Decreased the cost	30.0
Increased the cost	9.0
Had no effect on the cost of the case	61.0

As before, our interest is in whether certain types of attorneys or cases are more likely to find that DCM increases or decreases litigation costs. A number of case characteristics were related to

attorneys' ratings of DCM's impact on costs and, as is clear from the list below, the pattern is very similar to the one that emerged for DCM's impact on time—DCM is particularly effective in the everyday case. The attorneys who were more likely to report that DCM decreased litigation costs were those whose cases had:

- a medium amount of formal discovery;
- a low amount of unnecessary or abusive discovery and disputes over discovery;
- a low to medium amount of contentiousness between the attorneys;
- high agreement on the factual issues in the case;
- a low likelihood of going to trial; and
- low to medium monetary stakes.

The attorneys who reported that their case was at the other extreme on each of these dimensions—i.e., high amounts of formal discovery, a highly contentious relationship between the attorneys, and so on—were more likely to report that DCM increased costs, suggesting that DCM did not, in the attorneys' view, provide a mechanism for controlling costs in this type of case.

Unlike the relationships found when examining DCM's impact on litigation time, attorneys' assessments of DCM' effects on cost did not vary by whether the case had been referred to ADR. Overall, attorneys were much less likely to report that ADR decreased cost than they were to say it decreased time.

Attorney Assessments of the Effect Specific Case Management Components Had on Cost

To further assess DCM's impact on litigation cost, we examined the attorneys' rating of specific DCM components. Table 23 (next page) shows how attorneys rated the impact of the principal elements of the DCM system—as well as several other case management practices—on the time it took to litigate their case. It is clear that, in the attorneys' experience, DCM has much less impact on litigation costs that on litigation time. For most DCM components, a large majority of attorneys said the component had no effect on litigation costs. For those components most likely to reduce costs, less than a majority of attorneys reported this effect.

Components Thought to Reduce Litigation Costs. The five practices most likely to be reported as reducing litigation costs are listed below. Note that for only one did a majority of the attorneys find that the practice reduced litigation costs.

- use of the telephone for conferences with the court (78%),
- more contact with the judges (49%),
- an early case management conference with the judge (42%),
- judges' handling of motions (40%), and
- attendance at settlement conferences of parties with authority to bind (40%).

Table 23
Attorneys' Reports of the Effect of Selected Case Management Components on the Cost of Litigating Their Case to Termination
Western District of Michigan

Components of the DCM Program	N	Lowered cost	Increased cost	No effect
More contact with judge and/or magistrate judges	236	49.0	12.0	39.0
Early case management conference with judge	302	42.0	8.0	50.0
Judge's handling of motions	291	40.0	16.0	45.0
Attendance at settlement conferences of representatives with authority to bind parties	161	40.0	19.0	42.0
Scheduling order issued by judge	340	34.0	5.0	62.0
Assignment of case to one of the court's case management tracks	334	30.0	5.0	65.0
Judge's trial scheduling practices	267	29.0	8.0	63.0
Joint case management report, prepared and filed by counsel prior to case management conference	295	26.0	21.0	53.0
Time limits on discovery	299	23.0	6.0	70.0
Numerical limits on interrogatories	253	23.0	8.0	69.0
Numerical limits on depositions	230	16.0	4.0	80.0
Standardization of court forms and orders	226	15.0	2.0	83.0
Other Case Management Components				
Use of telephone, rather than in-person meeting for court conferences	162	78.0	1.0	22.0
Parties ordered to disclose discovery material without waiting for formal request	142	33.0	11.0	56.0
Court or judge's ADR requirements	161	29.0	12.0	58.0
Paperwork required by the court or judge	269	16.0	24.0	60.0

By far the most cost-effective procedure used by the court, according to the attorneys, was substitution of telephone conferences for in-person conferences. This procedure was also the one most likely to be reported as reducing time, making it clearly the most beneficial of the practices examined here.

The second most important practice for reducing costs, the attorneys reported, was more contact with the judges, followed by the early case management conference with the judge. It is not clear through what mechanism the court provides attorneys more contact with the judges, although the Rule 16 conference, which the judges committed to holding in every case under DCM, is very likely one avenue. The findings suggest that the court's emphasis on this conference—and whatever other avenues it offers—provide attorneys assistance they believe translates into lower costs

For several of the components rated by a majority of attorneys as moving their cases along, only about a third of the attorneys reported a reduction of litigation costs. These include assignment of the case to a case management track, a scheduling order, the judges' trial scheduling practices, disclosure, and ADR. Although the percentage reporting a cost benefit from these procedures is relatively small, few attorneys reported an adverse effect either, except for a notable minority of attorneys who reported increased costs due to the court's ADR requirements and to orders to disclose discovery material.

Components Thought to Increase Litigation Costs. Although over half of the attorneys—and in many instances well over half—believed that most DCM components had little effect on litigation costs in their case, they were more likely to report an adverse effect on litigation costs than on time. For four DCM components, over 10% of the attorneys reported increased costs:

- the joint case management report (21%),
- requiring attendance at settlement conferences of a person with authority to bind (19%),
- judges' handling of motions (16%), and
- more contact with the judges (12%).

Interestingly, three of these four components—the judges' handling of motions, more contact with the judges, and requiring someone with settlement authority to attend settlement conferences—were among the components identified as most likely to reduce litigation costs, signifying a split of opinion among attorneys about the value of these components.

A number of case characteristics are related to the attorneys' perception that these practices increase cost. Generally, attorneys in cases that might be characterized as either more complex or more contentious—higher likelihood of trial, more discovery disputes and unnecessary discovery, higher monetary stakes, low agreement on the issues in the case, and more contentiousness between the attorneys—were more likely to say one or more of these components increased cost.

This analysis, along with the examination above of attorneys' overall rating of DCM's cost effects, suggests there is an identifiable minority of attorneys—and it is a very small number of

attorneys—whose cases have higher costs than they would like and which they attribute to DCM. These cases are marked by contention and higher stakes, characteristics likely to be associated with higher litigation costs, and DCM apparently does not help keep the costs in these cases down.

Other court practices reported by a notable minority of attorneys as increasing costs were:

- paperwork requirements (24%),
- ADR requirements (12%), and
- an order to disclose discovery material (11%).

We found no case or attorney characteristics to identify those who find the court's paperwork requirements a factor in cost increases. This problem, the most frequently reported by the survey respondents, appears to cut across all types of cases. (Because the question is no more specific, we cannot identify the particular requirements the attorneys found burdensome.) For the small percentage of attorneys who reported that disclosure increased costs, however, those without pre-DCM experience were more likely to say disclosure increased costs. Regarding ADR, attorneys were more likely to say ADR requirements increased costs when the relationship between both the parties and the attorneys was highly contentious. However, the number of respondents for whom these relationships were found was very small. As with most of the case management components, by far the greatest number of attorneys reported no effect or a positive effect on litigation costs.

Satisfaction with Case Outcome and the Court's Case Management

While DCM's effects on litigation time and cost are important considerations, it is also important to know whether attorneys are satisfied with the outcome in their case and find it fair. Table 24 shows that by far the greatest percentage of attorneys were satisfied with the outcome and even more thought it was fair—74% and 78%, respectively. Those who were not satisfied with the outcome or its fairness were more likely to have reported as well that DCM increased costs.

Table 24
Attorney Satisfaction With Case Outcome
Western District of Michigan

Satisfaction With Outcome	Percent Selecting the Response (N=601)	Fairness of Outcome	Percent Selecting the Response (N=601)
Very satisfied	54.0	Very fair	57.0
Somewhat satisfied	20.0	Somewhat fair	21.0
Somewhat dissatisfied	13.0	Somewhat unfair	10.0
Very dissatisfied	14.0	Very unfair	12.0

Especially likely to be satisfied and to find the outcome fair were attorneys who had been in practice longer, who had litigated more cases in the district, and who had litigated in the district

before adoption of DCM. Given the advisory group's view that DCM simply formalized already-existing practices for most of the judges, this response is perhaps to be expected. However, as Table 25 shows, 75% of the attorneys who litigated cases in this district before DCM report that there is either some or a substantial difference from past practices. The findings may suggest indirectly, then, that the court's established federal bar has not found DCM to have a detrimental effect on case outcome.

Table 25
Attorney Views of Extent to Which the DCM System Differs From Pre-DCM Practices
Western District of Michigan

Extent to Which DCM Differs From Pre-DCM Case Management Practices	% of Respondents Who Selected Response (N=350)
No difference	4.0
Some difference	44.0
Substantial difference	31.0
Very great difference	3.0
Can't say	18.0

While some attorneys were not happy with their case outcome, as might be expected, this view did not necessarily control their perception of how well their case was managed. Table 26 shows that an even greater number of attorneys reported satisfaction with the court's management of their case and said it was fair—86% and 87%, respectively—than reported satisfaction with the case outcome and the fairness of the outcome, with nearly two-thirds of the attorneys alone saying they were very satisfied. Once again, attorneys who had litigated more cases in the district and who litigated cases before DCM implementation were more likely to be very satisfied with the court's management of their case and to find it fair. And once again, those who reported that DCM increased costs were more likely to be dissatisfied and to find the court's management of the case unfair.

Table 26
Attorney Satisfaction With the Court's Management of Their Case
Western District of Michigan

Satisfaction With Management	Percent Selecting the Response (N=597)	Fairness of Management	Percent Selecting the Response (N=595)
Very satisfied	64.0	Very fair	68.0
Somewhat satisfied	22.0	Somewhat fair	19.0
Somewhat dissatisfied	6.0	Somewhat unfair	5.0
Very dissatisfied	8.0	Very unfair	8.0

Given the preceding findings on satisfaction, it is not surprising that nearly 90% of the attorneys said they think the court's DCM system is an effective system for managing cases (see Table 27). Further analysis showed that those least likely to find DCM an effective system were those involved in cases distinguished by high amounts of formal discovery, more discovery disputes, less agreement between the attorneys on issues and case value, and greater likelihood of trial, suggesting once again that DCM is most effective for middle-of-the road cases.

Table 27
Attorney Ratings of DCM's Effectiveness as a Case Management System
Western District of Michigan

Rating of the Effectiveness of DCM as a Case Management System	% of Respondents Who Selected Response (N=494)
It is an effective system of case management	87.0
It is not an effective system of case management	13.0

To understand more fully why the attorneys find DCM beneficial—especially since only a little over half said the system as a whole expedited litigation in their case and only a third said it saved costs—we examined the comments they provided and found several reasons for the attorneys' approval of this system. While the respondents identified a number of additional benefits, such as the assistance DCM provided in planning their case, many of the comments focused on the role of DCM in expediting the case, particularly through the case management conference and the deadlines set for the case. The following examples illustrate some of the benefits identified by the attorneys:[52]

"It gives certainty to the process."

"It requires the parties and counsel to pay closer attention to the case as it progresses through discovery."

"Lays an excellent foundation for the parties to know deadlines and how quickly to complete discovery."

"The deadlines forced the parties to focus on the value of the case and thus caused settlement."

"Early contact with the court and delineation of the issues and the stakes helped move the case along. It usually does."

[52] The examples are taken from 269 comments made in response to a question regarding system effectiveness.

This last comment touches on an issue several attorneys addressed directly in their comments—the relative importance of the judge versus procedures. The following comment captures the view of these attorneys:

> "The system is far less important than the judicial officer and the lawyers. Competent counsel and a reasonably attentive judge can make most any system work. By the same ken, no system will help incompetent counsel and inattentive judges. We are blessed in our district with generally effective judges and generally competent counsel."

While many of the comments praised the DCM system, a number highlighted problems, some of which were apparent in the analyses above, some of which reveal other concerns. The most common problem cited by the attorneys was inflexible application of the DCM system, and a number also suggested the system is inappropriate or burdensome for certain types of cases, as illustrated below:

> "It can be effective when the court remains flexible in its application. For example, case classification categories and requirements don't always fit the factual/legal circumstances."

> "Needs more flexibility for modification of track assignment; case may prove to be more complicated after commencement."

> "For product liability cases, there is a lack of appreciation as to what can be done informally with less immediate deadlines and lower costs."

On the whole, however, the many different ways in which we have looked at the attorneys' assessment of the DCM system reveal widespread approval and show that the attorneys believe several specific DCM features are helpful in reducing litigation time and cost.

Summary of Attorney Evaluations

The preceding discussion has shown that, from the attorneys' perspective, the adoption of a differentiated case management system in the Western District of Michigan has generally had positive results for cases litigated there, as summarized below.

Findings Regarding DCM's Effects on Litigation Time

- While just over half the respondents said the DCM system *as a whole* expedites litigation (most of the rest saying it had no effect), two-thirds identified the following *specific* case management practices as effective in moving a case along: use of the telephone for conferences with the court, a scheduling order issued by a judge, an early case management conference, and more contact with the judge.

- Several additional DCM and case management components were seen by around half of the respondents as helpful in moving cases along (the rest saying they had little effect): assignment to a track, the attorneys' joint case management report, time limits on discovery, the judges' practices for handling motions, the judges' trial scheduling practices, attendance at settlement conferences of persons with authority to bind the parties, disclosure of discovery material, and the court's ADR requirements.

- The cases most likely to be moved along by the DCM procedures are those referred to ADR and those that may be characterized as more everyday cases: those with low to medium amounts of formal discovery and factual complexity, a lower likelihood of trial, low to medium monetary stakes, higher agreement among the attorneys about the issues in the case, and lower contentiousness between the attorneys.

- Only small percentages of attorneys reported that the DCM components and other case management practices had a detrimental effect on litigation timeliness. The most frequently cited causes of delay were the judges' handling of motions and the court's paperwork requirements.

- Most attorneys did not find limits on interrogatories and depositions helpful for moving their cases along. Of the minority who did, attorneys who had not litigated in the court before DCM was adopted were more likely to find numerical limits helpful than attorneys who had litigated cases before DCM (the latter saying these limits had no effect). Regarding limits on interrogatories only, attorneys in cases with high levels of discovery, high stakes, more discovery disputes, and low agreement about case value were more likely to see them as helping to move the case along.

- The discovery devices attorneys found most effective for expediting a case were time limits on discovery and orders to disclose discovery material without waiting for a formal request.

Findings Regarding DCM's Effects on Litigation Costs

- Fewer attorneys reported that DCM reduced costs than said it moved their case along (most saying it had little effect on cost). The components that are most helpful in reducing cost, reported by 42-49% of the respondents, were use of the telephone for court conferences, the early case management conference, and contact with the judge—three of the four components also reported as moving litigation along. Also reported as helpful—by 40%—were the judges' handling of motions and the requirement that a person with settlement authority attend settlement conferences.

- Larger percentages—though still minorities—of attorneys reported cost increases from specific DCM and case management components than reported such effects for timeliness. Components most likely to increase costs were the joint case management statement, the court's paperwork requirements, judges' handling of motions, and the

requirement that a person with binding settlement authority attend settlement conferences.

- Several of the components reported as increasing costs, including the judges' handling of motions and requiring someone with settlement authority to attend settlement conferences, were among the components identified as most likely to reduce litigation costs, signifying a split of opinion among attorneys about the value of these components.

- Attorneys who were most likely to report increased costs from DCM were those whose cases were more complex or more contentious. One problem cut across all types of cases, however—the court's paperwork requirements.

Other Findings

- The attorneys' assessment of the usefulness of the DCM components coincided in some instances with the judges' assessment. Both find the early case management conference particularly effective.

- The court appears to have solved one of the issues of concern to the advisory group—the problem of the trailing calendar. Over half the respondents said the judges' trial scheduling practices moved their case along (most of the rest reporting no effect on timeliness).

- A second concern of the advisory group has not yet been completely resolved—the handling of motions. Significant minorities reported that the judges' practices increased litigation time and cost (14% and 16%, respectively). Written comments indicate the problem is delayed rulings on motions.

- Attorneys in cases referred to ADR are more likely to report that DCM moved their case along than attorneys not referred to ADR.

- Attorneys attributed to DCM a number of benefits other than time and cost reduction, including the assistance it provides in planning their case, informing their client of the expected schedule, and staying on schedule, particularly with regard to discovery.

- Attorneys' assessments of the individual DCM components, other case management components, and DCM's overall effect on litigation time and costs did not differ by the track to which the case was assigned.

- A large majority of attorneys reported satisfaction with the outcome of their case and felt it was fair. An even greater number of attorneys said they were satisfied with the court's management of their case and said their treatment by the court was fair.

Two consistent findings have emerged regarding the kinds of attorneys and cases for which DCM is most and least effective. Attorneys who reported that DCM moved their case along were more likely to have been litigating a case in which there were low to medium amounts of formal discovery, the attorneys were able to agree on the issues, the stakes involved in the case were not high, and the case was unlikely to go to trial—cases that might have been litigated expeditiously under other circumstances as well.

In contrast, attorneys who reported that DCM increased the cost of their case were more likely to have been litigating cases in which there was more discovery, higher stakes, less agreement on the issues, and more disputes between counsel—cases that may have been more costly in any case but which DCM apparently did not aid. These findings do not suggest, however, that DCM is inappropriate for most cases. Indeed, many individual components were seen by large majorities of attorneys as helpful in moving their cases along, and few attorneys reported detrimental effects. This analysis suggests only that for certain types of cases DCM appears to be particularly helpful.

3. Performance of Cases on the DCM Tracks

A measure of the effectiveness of the DCM system is whether cases are terminated within the goals set for each track. Large numbers of cases unresolved beyond the track goals may signify that the judges are not maintaining the deadlines set for pretrial events or trial and therefore that the track structure is irrelevant or that the track guidelines are unrealistic. Table 28 (next page) shows the levels of adherence to the track goals.

One way of looking at adherence to track goals is to examine the median age at termination of cases assigned to each track. Column 3 shows that the median age of cases terminated on each track is well within the target termination time for the track. For example, the median age at termination for expedited cases is nine months, well within the nine to twelve month goal for that track. We must be cautious, however, in our interpretation of the medians, especially for tracks with longer time frames. Because the median is based on terminated cases and many of the cases not yet terminated are likely to be the longest cases, the median is very likely lower than it would be if the full range of cases were included in the calculation.

Another way to look at adherence to track goals is presented in columns 4-6. The percentages in these columns are based on all cases assigned to each track, both pending and terminated cases. The first of these columns, column 4, shows the percentage of cases on each track that have terminated within the track goal. Overall, 56% of the cases assigned to tracks have terminated within track goals. For each track except the highly complex track, over half of the terminated cases have met the track goal. Cases appear to fare best on the court's two fastest tracks, where two-thirds have terminated within the goal set for the track. At first glance, it appears that cases on the highly complex track do not do very well, but keep in mind that the track goal in this instance is a lower, not an upper, limit and is not a standard in the sense that the other track goals are.

Table 28
Age of Terminated Civil Cases Filed 9/1/92-7/31/96
and Percent Terminated Within and Beyond Track Goals
Western District of Michigan

Track Name and Goal	1 Number of Cases Assigned	2 % Terminated	3 Median Age at Termination (Months)	4 % Terminated Within Track Goal[53]	5 % Pending But Within Track Goal	6 % Terminated or Pending Beyond Track Goal
Total Cases Assigned	5065	81.0	7.0	56.0	14.0	31.0
Voluntary Expedited (<9 mos.)	36	89.0	7.0	67.0	11.0	22.0
Expedited (9-12 mos.)	382	86.0	9.0	69.0	11.0	20.0
Standard (12-15 mos.)	803	75.0	12.0	58.0	22.0	20.0
Complex (15-24 mos.)	175	59.0	15.0	52.0	32.0	16.0
Highly Complex (>24 mos.)	28	50.0	24.0	25.0	25.0	50.0
Administrative[54]	3361	83.0	4.0	54.0[55]	10.0	36.0
Non-DCM (12 mos.)	280	74.0	7.4	53.0	22.0	25.0
Unassigned	1625	83.0	3.0			
Total Cases Filed	6690	81.0	5.4			

Although column 4 suggests that overall only a little better than half of the cases have terminated within track goals, it is important to keep in mind that column 4 understates the

[53] The denominator for this column and the two to the right is the total number of cases, pending and terminated, assigned to each track. If, for this column, we used instead only the number of cases terminated on each track, the percent terminated within track goal would be higher: Vol. Exp., 75%; Exp., 81%; Std., 78%; Comp., 88%; Sup. Comp., 50%; Adm., 65%; and Non-DCM, 72%.

[54] The advisory group recommended that administrative track cases be decided within 180 days of being fully briefed. Allowing 60 days for a response, a reply, and oral argument results in 240 after the date the dispositive motion is filed.

[55] We are using eight months, or roughly 240 days from filing of the case. The actual track goal is 240 days from filing of the dispositive motion, which we cannot calculate. The measure we use is more stringent. If we were able to use the actual goal for cases on this track an even greater number would have been terminated within the track goal.

percentage of cases terminated within the goal because some portion of the cases still pending on each track will be terminated within that goal. The pending cases whose age is still within the track goal are shown in column 5. If all 14% of those assigned to a track and still pending are terminated within track goals, 70% instead of 56% of tracked cases will terminate within track guidelines.

Some of these pending cases, of course, will likely be terminated outside the track goal, in which case they will add to the number of cases terminated beyond track goal. The percentage of cases that have terminated or are pending outside track goals to date is shown in column 6. Overall, 31% of the cases have not terminated within track goals and will not because their age is already beyond the goal. Setting aside the highly complex track and administrative cases because their track goals cannot be stated precisely, the DCM track with the highest percentage of cases beyond the track goal is the voluntary expedited track, with 22% living to an age beyond the track goal. Although we cannot state precisely what proportion of the assigned cases ultimately will terminate beyond track goals, it is probably safe to say that overall about a quarter to a third of the cases (excluding the highly complex) terminate beyond track goals.

How far beyond the goal do cases terminate? In other words, how old do they get? In an analysis not shown here, we found that, on most tracks, within three months beyond the track goal 90% of the cases assigned to that track had terminated. Exceptions to this pattern were the administrative track and non-DCM cases, where an additional six months were needed to terminate 90% of the cases assigned to those tracks. (Again, keep in mind that the goal for the administrative track cannot be stated precisely; the estimate we are using is very conservative.)

One other point should be made about Table 28. It shows that the large number of cases not assigned to a DCM track terminate very quickly, confirming that most unassigned cases remain unassigned because they never reach the case management conference at which a track assignment would be made.

Altogether, what can we conclude from Table 28? At least half and perhaps as much as two-thirds to three-quarters of the cases assigned to tracks appear to be terminating within the track goals. In an additional three months beyond the track goals, 90% of all cases assigned to the track have terminated. Without a standard, however, for how many cases *should* be resolved within track guidelines, it is difficult to say whether adherence to track goals is high, low, or about what might be expected. At best we can say that in a majority of the cases assigned to tracks, the judges and attorneys are maintaining a schedule that meets the DCM program's guidelines.

Although this effect could be achieved by placing cases on tracks with sufficiently long deadlines to ensure completion within the track goal, two pieces of information suggest this is not the case here. First, the distribution of cases across tracks is heavily weighted toward the fastest tracks. Second, the overall median time to disposition is only seven months.

4. Caseload Indicators of DCM's Effect

Another way to look at the effectiveness of the DCM system is to look at what has happened to the state of the court's civil caseload since DCM was implemented. In doing so, we must keep in mind that many factors influence the rise and fall of case termination measures. During the period of the court's demonstration program, a factor particularly likely to affect how many cases are terminating and at what age is the reporting requirement imposed by the CJRA in 1991. It instructs each court to report publicly, by judge name and case name, each case pending for more than three years as well as motions and bench trials undecided for more than six months. Further, two new judges, one appointed to an additional temporary judgeship, joined the court just as the demonstration program began.

Because the administrative and non-administrative cases are handled differently by the court, these two caseloads are examined separately here. Figure 1 shows several key caseload trends for the non-administrative—or general civil—caseload for fiscal years 1988 to 1995. The vertical line shows the implementation date for the demonstration program. To place the rise and fall of these various measures in context, keep in mind that the median age of the court's civil caseload is seven months, and 70% of this caseload is disposed of in twelve months.

Figure 1 shows that the court was terminating far more cases than were being filed in FY88 and FY89, an effort noted by the advisory group in its analysis of the court and one that resulted in a large drop in the number of pending cases and the age of terminated and pending cases in the late 1980s and early 1990s. As the court entered the demonstration period, its caseload had stabilized, and filings, terminations, and pendings were roughly equivalent.

In the year following implementation of the DCM system—1992 to 1993—Figure 1 shows that the number of terminations rose sharply to a level well above filings. As a consequence, the number of pending cases dropped. The slight upturn in the mean age of terminated cases suggests the court was terminating older cases at this time. With more older cases out of the system, both the mean and median ages of terminated cases fell from 1993 to 1994. We found similar trends for several specific case types, including labor, personal injury, and contract cases.

The recent higher level of terminations without a history of rising filing rates seems to suggest that the demonstration program led to increased terminations and reduced the age of terminated cases. We cannot, however, be sure of this because of the two confounding factors mentioned above—the addition of a temporary judgeship and public reporting required by the CJRA.

Figure 2 shows similar trend lines for the court's administrative caseload. The graph shows that before the demonstration period began, filings of the administrative-type cases were falling. Because of a sustained period of more terminations than filings, the court's pending administrative caseload dropped. The slight rise in mean disposition time in 1991 suggests the cases being disposed of were the court's older cases. In the following year (1991-1992), both the mean and median ages at termination dropped because fewer older cases remained in the system.

At first glance Figure 2 suggests that implementation of the DCM system arrested a series of positive trends, but it is clear that when filings rose again in 1993 the court responded by once again pushing terminations over filings and sustaining it through 1994 and 1995. The rise in mean and median age at termination suggests that once again the court was disposing of older cases. Once these cases were disposed of, the mean and median ages fell. Whether the DCM system permitted it or something else provoked it, it is clear the court was able once again to push its terminations above its filings.

Because overall disposition trends may obscure shifts in the underlying distribution of case dispositions, Table 29 (next page) shows the percentage of pre-DCM and post-DCM cases terminated in certain time intervals.[56] The table reveals that since implementation of DCM a greater proportion of cases have been terminated during the very earliest time interval (zero-to-three months)—38% of DCM cases compared to 31% of non-DCM cases. Concomitantly smaller proportions of DCM cases have been terminated between four and nine months. At ten-to-fifteen months, the proportion of DCM cases disposed of is similar to the proportion of pre-DCM cases disposed of in that time frame, but beyond fifteen months we again find differences, with fewer DCM cases terminated in the longer time frames.

Although these data show that dispositions have accelerated since DCM was implemented, we have the same problem we had when examining the caseload trends—i.e., we cannot rule out other possible explanations for the shift, in this case the additional temporary judgeship and the court's tickler system, which closely monitors the answer period.[57] Explanations we probably can rule out include the criminal caseload and changes in case mix in the civil caseload. During the demonstration period the felony criminal caseload has risen, placing more not less demand on the court. At the same time, there has been little change in the civil case mix, with the only notable change being a slight decrease in the proportion of contracts cases and an increase in the proportion of non-prisoner civil rights cases, changes that would not necessarily produce a shift to earlier dispositions.[58] We also considered whether DCM might be prompting attorneys to voluntarily dismiss their case after encountering the court's requirements but found no evidence for this. Nonetheless, the possibility remains that factors other than DCM explain the shift to earlier dispositions.

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[56] The analysis includes all civil cases, both general civil and administrative cases. The pre-DCM period includes cases filed between 9/1/89 and 8/31/92 and terminated before 12/31/92. The post-DCM period includes cases filed between 9/1/92 and 8/31/95 and terminated before 12/31/95. We do not use in this analysis or any other the court's non-DCM track, which was set up to be a control or comparison track. For several reasons, it is not a useful control group. First, parties were permitted to remove their case from the track: second, the court found it could not completely abandon these cases and began issuing scheduling orders for them part-way through the demonstration period; and third, because of the CJRA reporting requirements judges gave these cases more attention than the original design permitted.

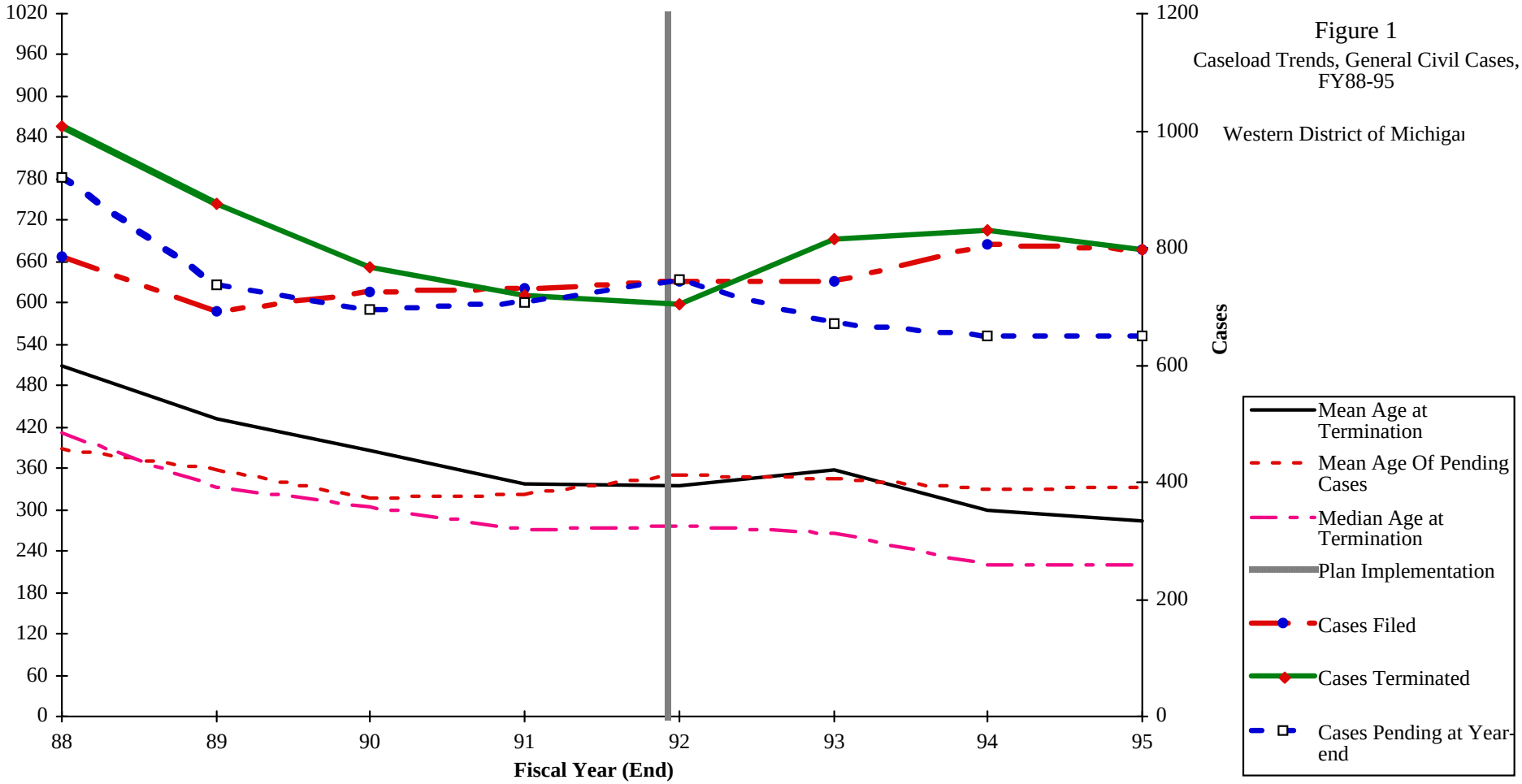
[57] Since the tickler was created under DCM, it could be argued that it is part of the DCM system. It is not, however, part of the tracking system per se.

[58] Contracts cases decreased from 12% of the caseload to 9%, while non-prisoner civil rights cases increased from 8% to 14%. All other case types remained within a percentage point of each other.

Figure 1

Caseload Trends, General Civil Cases, FY88-95

Western District of Michigan



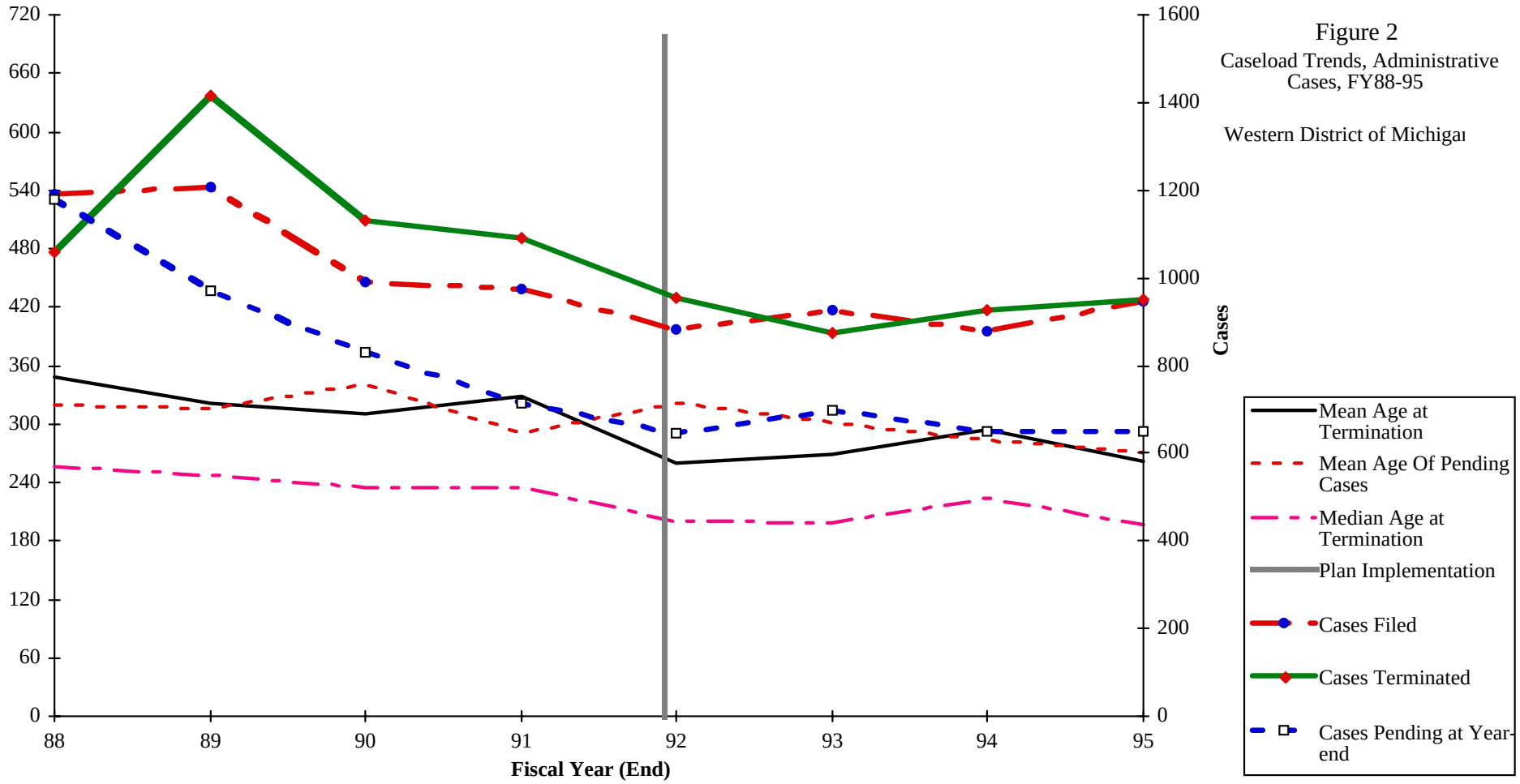


Figure 2

Caseload Trends, Administrative Cases, FY88-95

Western District of Michigan

Table 29
Percent of Cases Terminated by Time Intervals, Pre-DCM and Post-DCM
Western District of Michigan

Months to Disposition	Pre-DCM	Post-DCM
0-3	31.0	38.0
4-6	20.0	18.0
7-9	18.0	15.0
10-12	12.0	13.0
13-15	8.0	9.0
16-18	5.0	4.0
19-24	5.0	3.0
25-36	2.0	1.0
37+	0.1	0.0
No. of Cases	4,095	4,158

From these analyses of caseload trends and disposition intervals, our conclusion must be a qualified one. While it is clear that the condition of the court's caseload has improved since implementation of DCM, we cannot say with certainty that the changes are due to DCM. The court's additional temporary judgeship, the CJRA reporting requirements, and the court's tickler system very likely also played important roles.

Chapter II

The Northern District of Ohio's Differentiated Case Management Program

In January 1992, the Northern District of Ohio adopted a system of case management tracks pursuant to the Civil Justice Reform Act's designation of that district as a demonstration district. The court's system, known as a differentiated case management system, or DCM, is the subject of this chapter.

The DCM system in Ohio Northern was implemented in part to reduce the time and cost of litigation, but the court and its CJRA advisory group had a number of other goals in mind as well. In this chapter, we consider the system's success in achieving these goals in addition to its impact on litigation cost and time.

This chapter is divided into three main sections. Section A presents our conclusions about the court's implementation of its DCM program and the program's impact. Sections B and C provide the detailed documentation that supports our conclusions: section B gives a short profile of the district and its caseload, describes the court's DCM program, discusses the process by which the court designed and set up that program, and examines how the court has applied the DCM rules; section C summarizes our findings about the program's effects, looking first at the judges' experience with the program, then at its impact on attorneys, and finally at its effect on the court's caseload.

A. Conclusions About the DCM Program in This District

Set out below are several key questions about the demonstration program in the Northern District of Ohio, along with answers based on the research findings discussed in sections B and C. As before, keep in mind that findings based on interviews with judges and surveys of attorneys reflect the respondents' opinions and experiences and do not necessarily provide conclusive evidence of DCM's actual impact.

Why use case management tracks? How are they different from individualized case management?

Assigning cases to tracks with case management guidelines can be viewed as nothing more than individualized case management under a different name, and the judges generally agreed with this characterization. They added, however, that assigning a track designation sends a signal to attorneys about what the court's expectations for a case will be; sets goals for scheduling of various case events, including trial; helps the judge and attorneys organize and plan the case; and provides account-ability for judges, prompting them to take an active role in the management of their cases. Attorneys also indicated that the track assignment helps them to organize and plan their case from the beginning.

Thus, track assignments, with their explicit goals and expectations, apparently provide structure and predictability from the outset of a case that is not always provided by individualized case management. At the same time, several judges pointed out that tracks are not a "panacea." As one judge said, "You still have to be a hardworking judge, you still have to meet the deadlines. But it gives the hardworking judge an organizing principle." This comment was echoed by many attorneys, who pointed out that no system of case management can substitute for an involved judge.

Does DCM reduce litigation time?

During the demonstration period the court has for the most part maintained disposition time improvements that had been set in process before the DCM program began. To what extent DCM has enabled the court to maintain these improvements, we cannot say. Because the large degree of turnover on the bench during the demonstration period may have worked against or obscured any beneficial effect of the program on disposition time, it is possible that effects could be seen after the bench has stabilized for some period of time, but we cannot say at this time that that would be the case.

Neither judges nor attorneys generally think the DCM program as a whole has a major effect on time to disposition. For those attorneys who do think there is an effect, however, the great majority cite a beneficial rather than detrimental effect on disposition time in the cases they litigated. In addition, two-thirds to three-quarters of the attorneys identified specific components of the DCM program—including the use of telephone conferences to resolve discovery disputes; setting of a firm trial date; an early case management conference with the judge; issuance of a scheduling order by the judge; and a final pretrial conference—as helpful in moving a case to disposition. Over half identified discovery time limits and Rule 26(a)(1) disclosure as helpful.

Does DCM reduce litigation costs?

Overall, attorneys were less likely to think the program reduced litigation costs than to think it reduced time to disposition. Most thought is had no effect on cost. A majority did believe, however, that two specific case management practices—use of telephone conferences to resolve discovery disputes and keeping firm trial dates—helped to reduce cost as well as time. In addition, over 40% of attorneys cited two non-DCM case management practices—referral to ADR and Rule 26(a)(1) disclosures—as reducing costs.

Are certain case management practices more effective than others?

The answers above suggest that several practices are particularly important for effective management of cases: using the telephone to resolve discovery disputes; holding trials as scheduled; holding an early case management conference; issuing a scheduling order; holding a final pretrial conference; setting time limits on discovery; requiring Rule 16(a)(1) disclosures; and referring cases to ADR. Attorney comments noting delays in motions rulings suggests effective management of motions is also important.

ADR was also seen by a substantial minority of attorneys, however, as increasing costs and causing delay, suggesting its use must be carefully tailored to appropriate cases. Other case

management practices seen as increasing costs—by 15-25% of the attorneys—were paperwork requirements, Rule 26(a)(2) expert disclosures, and the attorneys' joint case planning report.

Does DCM benefit some types of cases more than others?

On virtually all measures—time, cost, satisfaction, and views about the overall effectiveness of DCM—attorneys who reported the greatest benefit from DCM tended to be those in relatively standard cases, marked by assignment to the expedited or standard track, little formal discovery, and general cooperation between the parties. There are two possible explanations for these results. One is that DCM truly works better in these cases. Another is that attorneys' positive evaluations of DCM reflect the relative ease with which these cases might have proceeded anyway. The data do not permit us to evaluate which of these hypotheses might be true.

Attorneys who were least likely to report benefits from the DCM program were those in administrative track cases. This is consistent with docket data showing that few of these cases terminate within the track guidelines.

Does DCM provide benefits other than reduction of time or costs?

Even though the majority of attorneys did not think the DCM program reduced time and costs, a great majority (85%) reported that it is an effective case management system, and judges were enthusiastic about the program as well. Attorneys pointed out that the program helps them organize a case; identify issues earlier; narrow discovery; and meet with the other side at an earlier point than they normally would. Judges also noted that DCM provides structure and organization for a case and further reported that the program causes judges to be more actively involved in case management, provides a system for monitoring case status, and provides accountability for judges, all of which they see as benefits.

Members of the court's CJRA advisory group also pointed out the value of having gone through the process of designing and implementing the court's new case management system. Although not a benefit of DCM directly, the process created an avenue for discussion between bench and bar that had not existed before.

B. Description of the Court and Its Demonstration Program

Section B describes the demonstration program adopted by the Northern District of Ohio in January 1992. A brief profile of the court's judicial resources and caseload provides context for the discussion, which then describes in detail the steps taken by the court to design, implement, and apply its DCM system.

1. Profile of the Court

Several features of the court are important for our understanding of the court's implementation of DCM and the impact of the program on the district: the high number of vacancies and almost

complete change in the composition of the active Article III bench during the demonstration period; the high number of asbestos filings and the way they obscure the size of the court's routine caseload; and the higher proportion, compared to courts nationally, of administrative review cases filed in the district.

Location and Judicial Resources

The Northern District of Ohio is a large, urban court, headquartered in Cleveland, with offices in Toledo, Akron, and Youngstown. Each office has at least one resident district and magistrate judge. At the time the court became a demonstration district it had just been allocated a twelfth judgeship, having had eleven since 1985. For most of the 1980s, however, the court had at least one vacancy, and it entered the demonstration period with two—three if we count the unfilled new judgeship. This condition worsened during the early 1990's, and by August 1992 five of the twelve judgeships were unfilled, a situation that persisted until May 1994 (except for six weeks in early 1994, when a new appointment briefly reduced the number to four). Not until a surge of appointments in 1994 and 1995 did the court have its full complement of judges, which lasted for only six months until a judge took senior status in mid-1996.

In addition to the active judges, the court receives substantial service from five senior judges. One serves as a backup for judges who cannot be available on a scheduled trial date. One maintains a full caseload, two carry a 50% caseload, and the remaining judge carries a 25% caseload.

Because of the large number of retirements, deaths, and changes to senior status, plus the creation of the new judgeship, the composition of the active Article III bench has changed almost completely since 1990; nine of the current eleven active judges have been appointed since 1991. Four of the current seven magistrate judges have also been appointed during or since 1991, as have the clerk of court and chief deputy clerk. Most of the district judges, then, as well as the majority of the magistrate judges and the top court managers, have developed their case management procedures within the framework of the court's demonstration program.

Size and Nature of the Caseload

During the decade leading up to the demonstration program, the court's caseload grew rapidly, with civil filings more than doubling from 3,018 in FY80 to 7,032 in FY90.[59] Much of this increase was due to a very high number of asbestos cases filed during those years. Since 1990, the growth has been slower and even dropped substantially for a couple of years, as Table 30 shows (next page).

What is most notable about Table 30 is the proportion of the civil caseload accounted for by asbestos cases—over half of all filings during the last three years. By the time the CJRA advisory group developed its differentiated case management plan for the district, these filings had become a significant factor in the district and prompted the group to develop a separate case management track and plan for handling these cases. In 1991, the asbestos cases were transferred pursuant to an

[59] Source: Annual reports of the director of the Administrative Office, 1980 and 1990.

order of the Panel on Multi-District Litigation, a step that significantly lowered the civil caseload demands in the Northern District.[60]

Table 30
Cases Filed in the Northern District of Ohio, 1990-1995[61]

Statistical Year	Cases Filed				Filings Per Judgeship	
	Total	Civil	Criminal	Non-Asbestos Civil	Actual	Weighted
1990	7480	7032	448	2985	876	450
1991	4875	4439	436	3386	403	349
1992	4950	4464	486	3547	412	370
1993	8209	7659	550	3550	683	441
1994	7603	7140	463	3422	663	415
1995	8660	8184	476	3601	721	424

The remaining portion of the civil caseload has increased about 6% since 1991, the year the court designed its demonstration program, while the criminal caseload increased about 8% during that time. Compared to national growth in civil filings of about 3% since 1991, the Northern District's civil caseload growth has been above average, as has its criminal caseload growth, which increased while criminal filings nationally decreased.

A more telling measure of the demand of the court's caseload, however, is its weighted filings per judgeship, which takes into account the relative demand of different types of civil and criminal cases. The court's weighted filings rose initially during the demonstration period, then declined somewhat and remain, at 424 cases per judgeship in 1995, below the national average of 448 cases per judgeship. Because of vacancies in this district, however, the per judgeship figures understate the number of cases actually carried by each judge during much of the demonstration period.

Table 31, which identifies the principal non-asbestos case types filed in the district, shows that civil rights cases make up by far the single largest group (see next page). The Northern District is similar to most other district courts in its caseload composition, in that the first four case types listed in the table, along with habeas corpus cases, also represent the primary case type concentrations nationally. However, the Northern District has roughly twice the proportion of

[60] Asbestos cases continue to be filed in the district and place paperwork demands on the clerk's office, but the judges are not responsible for their pretrial management. Because the cases have been removed from the district, they are not included in our study.

[61] Sources: 1995 Federal Court Management Statistics; 1995 Report of the Director of the Administrative Office; records of the Northern District of Ohio. Total, civil, and criminal filings are reported for fiscal years, which end on September 30; asbestos filings are reported for calendar years. The measure for weighted filings includes asbestos cases, but the weight of these cases is very small. It is not clear what explains the drop in total and civil filings in 1991 and 1992, nor is it clear the numbers are correct. Statistics kept by the court and at the national level do not agree.

labor relations and administrative review (principally social security) cases and a noticeably smaller proportion of contract cases than do the district courts nationwide. During the demonstration period, its area of greatest non-asbestos civil caseload growth has been personal injury cases (up 39% since 1991) and its area of greatest decline has been in administrative review cases (down 25%).

Table 31
Principal Types of Non-Asbestos Cases Filed, FY95[62]
Northern District of Ohio

Case Type	Percent of Civil Filings
Civil Rights	29.0
Personal Injury	14.0
Labor Relations	11.0
Contract	9.0
Administrative Review	9.0

In this district, unlike some of the other demonstration districts, the program adopted under the CJRA applies to all case types. Thus, our examination of the district covers the full range of civil cases.

2. Designing the DCM System: How and Why

In 1991, when the court's advisory group analyzed the district's condition in preparation for making recommendations to the court, they noted the high asbestos filings in the district, the rise in the number of criminal trials (30% of all trials in the district), and the impact of the court's judicial vacancies. Given these conditions, the group was struck that despite what they considered enormous demands on the judges, the median disposition time placed the court at about the average for federal district courts. This fact, coupled with their finding that "the work ethic of District Judges is satisfactory and, in most instances, superior," prompted them to ask whether there was a need for change in the court's management of its cases.[63]

The group recognized that because the court was designated a demonstration district they were obligated to prepare a plan, but they also concluded that "any program which places all civil case filings into a single-track processing system as the present system does, inevitably creates delays

[62] Source: Records of the Northern District of Ohio. The court's figures are used instead of national data because national data include asbestos cases.

[63] Civil Justice Reform Act Advisory Group, Report and Recommendations: Differentiated Case Management Plan With Suggested Rules and Commentary. November 27, 1991: 19.

and, in some cases, the delay is considerable."[64] The group pointed out as well that the great variety of case management orders used by the judges made unnecessary demands on attorneys.[65] And they acknowledged the widespread perception that litigation costs are too high, though they noted that the actual costs of litigation had not been documented. They attributed the primary litigation costs, whether too high or not, to discovery, motions practice, and trial.[66]

Within this particular combination of caseload and resource conditions, the advisory group and court designed the court's differentiated case management system. The district's specific responsibility under the statute was to "experiment with systems of differentiated case management that provide specifically for the assignment of cases to appropriate processing tracks that operate under distinct and explicit rules, procedures, and time-frames for the completion of discovery and for trial."[67]

Issues Considered by the Advisory Group in Designing the DCM Program

The advisory group took the lead role in designing the DCM program, with substantial assistance from the court. Based on its analysis of the district, the group determined at the outset that "case-specific management plans which form the basis of DCM will help reduce unnecessary time spent between the events in litigation and the overall time to disposition."[68] An important tool for accomplishing this, they thought, would be a standard case management order, instead of the variety of orders used by the judges, that would provide attorneys and their clients dates for discovery cutoff, future conferences, motions cutoff, and trial.

Interviews with advisory group members in 1993 revealed several additional goals.[69] In one member's view, the basics of the DCM program already existed in the principles of judicial case management, so the issue was not what to adopt but how to make it work better in this court. Several said the group knew that some of the judges were not active case managers, and it was the group's hope that the new system would help them become better managers. Each noted their hope that the system would resolve the long-standing problem of delays in motions rulings.

The group began its planning by developing a flow chart of how a case moves through the court, which highlighted the issue of the timing for key events. Group members had varying perspectives on the appropriate timing for these events, but recommended that for several reasons the DCM system require an early case management conference, preferably within ninety days of filing the complaint, and that all pretrial dates be set at this conference. Although a small number of judges thought this would be too early for parties to know their discovery needs, thus making

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[64] *Id.*, p. 19.

[65] *Supra*, note 63, p. 11.

[66] *Supra*, note 63, p. 20.

[67] P.L. 101-650, Sec. 104.

[68] *Supra*, note 63, p. 19.

[69] For a description of our research and data collection process, see Appendix A.

planning impossible, others felt an early conference would make the judges and attorneys, as one said, "gear up for the case as soon as possible." Some hoped an early conference would also prompt plaintiffs to accomplish service more quickly.

To determine the number of tracks and their requirements, the advisory group looked at the court's caseload to see what kinds of cases were filed in the court and how these might be categorized. The group also looked at systems adopted by state courts and discussed these with two consultants hired by the court who had assisted state courts in establishing DCM systems.[70] Although some advisory group members wanted to push for a nine-month disposition for all cases, the group recommended several distinct tracks calibrated to case needs.

How to set and keep a firm trial date generated extended discussion by the advisory group. In the end, because the group wanted a firm date more than they wanted an early setting of the date, it recommended that the trial date be set at a midpoint status conference rather than at the case management conference. If it were set early, many feared, the chances of the trial being continued would be too great. The advisory group also recommended that the court establish a mechanism for referring a trial to another judge if the assigned judge wasn't available on the trial date.

The advisory group also vigorously debated whether to require parties to attend the initial case management conference. Because many parties are from out of town, some members thought it would be too costly. Others believed party attendance would make a substantial difference in case progress. Initially a strong rule requiring attendance was drafted, but in the end the rule was re-written to give the judges flexibility in deciding whether parties should attend.

One of the greatest concerns of the advisory group was the frequent delays in motions rulings. The group recommended that the judges hold regular motions days to expedite decisions, a recommendation the judges opposed. The court's final rule did include a provision for motions days, as well as deadlines for rulings on motions.

During its design stage, the advisory group met with the magistrate judges to hear their views about the court's case management practices and their role in it. The advisory group believed the magistrate judges' role should be expanded, particularly to include more trials on consent. To help reach this objective, the advisory group recommended that the attorneys be directed to discuss with each other when planning the case whether a magistrate judge could have jurisdiction over the case. The advisory group also recommended that this matter be included in the topics for discussion at the initial case management conference.

A committee of the bar had been working on ADR recommendations for some years prior to the CJRA, so this issue was not new or controversial to the group. They also knew the court had been moving toward expansion of ADR and thought it would be helpful to have all the forms incorporated into an overall program. Moving into more ADR "was not tough," said one member.

[70] Before the implementation of DCM in the Northern District of Ohio and the Western District of Michigan, formal DCM programs had been implemented only in state courts.

The only real task was to expand the group of neutrals, a task undertaken by a subcommittee of the advisory group, which screened the applicants and made recommendations to the court.

The advisory group members we interviewed were unequivocal in their praise of the CJRA process. While they felt they had developed a promising plan for the court, "one of the greatest benefits," said one, "is that for the first time there's an avenue for discussion between lawyers and the court. I can't emphasize enough how much this means." At the same time, these members hoped the plan would bring improvements, though their expectations were modest. "I don't think we'll see a drastic change in three years," one said. "Cases won't just be zipping along, but things will be working better." The biggest change, several said, would occur when the vacancies were filled.

The Court's Role and Goals in Designing the DCM System

The chief judge played a key role in designing and implementing the DCM program. One of his main tasks, apparently, was to convince the judges that DCM was not a mechanistic program and that judicial discretion would not be undermined. His enthusiasm and ability to communicate the program to the judges is said by many to have been a key element in gaining the court's agreement to try DCM. In addition to the chief judge, another judge served as liaison to the advisory group, and a third judge, who had already been working on a revision of the local rules, made additional changes to include the DCM system.

The court's clerk and chief deputy clerk were members of the advisory group and thus were able during the design phase of DCM to bring into the discussion the likely impact of the plan on court procedures. They worked closely with the advisory group, the consultants, and the judges in identifying changes—for example, in local rules and forms—that would be needed to put the plan into action. Staff were assisted in this task by the two consultants the court retained.

In designing its DCM program, the court had several purposes in mind. According to the local rules, the court adopted differentiated case management to "permit the Court to manage its civil dockets in the most effective and efficient manner, to reduce costs and to avoid unnecessary delay, without compromising the independence or the authority of either the judicial system or the individual Judge" (Rule 8.1.1).

Individual judges named the same primary purpose as is given in the rules, to reduce cost and delay. In addition, the judges identified a large number of other reasons for adopting the DCM system, each arguably a component of reducing cost and delay: to get a handle on the backlog; to get a handle on the flow of cases and make the flow more predictable; to establish accountability of the judges; to make everyone realize cases differ and that time and resources should be allocated accordingly; to make sure cases receive adequate attention from the court; to involve judges more actively in oversight of cases; to give judges and attorneys parameters for evaluating and planning the case; to focus attorneys on what really matters in the case; to identify appropriate cases for ADR; and to make an early identification of cases that can settle.

3. Description of the DCM System

The court formally adopted the *Differentiated Case Management Plan* on December 13, 1991.[71] The plan was incorporated into the local rules as Section 8 and became effective for cases filed on or after January 1, 1992. The core elements of the DCM program are as follows.

The System of Case Management Tracks

The DCM program requires that every civil case be assigned to a case management track. While some types of cases—those on the administrative track—are generally assigned by clerk's office staff, most civil cases are assigned to a track only after review by the judge and discussions with counsel. Each track has its own guidelines and time-frames for discovery, motions practice, and trial, which apply to cases assigned to that track. Although Rule 8:2.1 sets out specific requirements for each track, including a fixed number of interrogatories and depositions, commentary in the court's DCM plan notes that these requirements are guidelines, which may be modified by the judge at the case management conference. Table 32 (next page) lists the court's five case management tracks, their requirements, and the typical characteristics of cases suitable for each track.

Case Information Statement; Attorneys' Meeting and Joint Statement

When each party files their initial documents with the court—whether the initial claim or a responsive pleading or motion—the party must also submit a Case Information Statement, using a form provided by the court (Rule 8:3.1). The form provides the court some initial, though limited, information about the case, including the party's preferences regarding the track assignment and any special case characteristics the party considers relevant to the track decision.

The parties provide further information to the court when they submit their joint case management statement, which must be filed at least three days before the initial case management conference (initially called a "joint stipulation regarding conference agenda items"). As part of their preparation of this statement, counsel must meet to discuss their case. The order informing counsel of these requirements, which is sent to them within five calendar days after the last responsive pleading, identifies the matters counsel should discuss in their meeting and address in their joint statement, including whether Fed. R. Civ. P. 26(a)(1) disclosures have been made, whether ADR is suitable for the case, what track counsel recommend, what kind of discovery is needed, and how discovery should proceed. The order also may, depending on practice of the individual judge, notify the parties of the court's recommended track assignment.

Commentary to the DCM plan states that with advance notice of the track—and thus the procedural requirements contemplated by the court—and with advance discussions of the case's issues and the discovery needed, counsel are expected to be better able to discuss the case with the judge at the case management conference.

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[71] Pursuant to the Civil Justice Reform Act (28 U.S.C. § 474), the court's plan was reviewed and approved by the Judicial Conference and a committee of judges in the Sixth Circuit.

Table 32
Case Characteristics and Track Requirements for DCM Tracks
Northern District of Ohio

Track	Case Characteristics	Track Requirements
Expedited	Limited documentary evidence Few and clear legal issues Few parties and fact witnesses No expert witnesses Less than 5 days for trial	9 months from filing to termination Discovery completed within 100 days after case management plan filed Interrogatories limited to 15 single-part questions per party 1 fact witness deposition per party High probability of ADR
Standard	More than a few legal issues, some unsettled Up to 10 fact witnesses 2 or 3 expert witnesses 5-10 trial days	15 months from filing to termination Discovery completed within 200 days after case management plan filed Interrogatories limited to 35 single-part questions per party 3 fact witness depositions per party Moderate to high probability of ADR
Complex	Voluminous documentary evidence Numerous fact and expert witnesses Numerous procedural and legal issues, some possibly unique More than 10 trial days	24 months from filing to termination Pretrial schedule and scope of discovery established at case management conference Moderate probability of ADR
Administrative	Cases involving social security, prisoner pro se, recovery of government funds, etc.	No discovery without leave of court Normally determined on pleadings or by motion Assigned directly to magistrate judges for report and recommendation
Mass Tort	Asbestos cases	Treated in accord with a special management plan adopted by the court[72]

[72] As noted previously, asbestos cases, the primary case type on this track, have been transferred under an MDL order, and their management is not examined in this study.

Initial Case Management Conference and Case Management Order

Rule 8:1.2 directs that a case management conference be held within thirty calendar days after the date for filing last responsive pleadings and not later than ninety days after defendant has filed notice of appearance, whether or not responsive pleadings have been filed. The rule of thumb used by most judges is to hold the conference within ninety days after case filing. The local rules direct the parties to be present with counsel unless good cause is shown why they should be excused. Counsel may seek to participate by telephone rather than in person (8:4.2).

Rule 8:4.2 also establishes the agenda for the conference, which includes determining the type and extent of discovery, assigning the case to an appropriate track, setting discovery and motions cutoff dates, and setting the date for the status conference held approximately halfway between the case management conference and the discovery cutoff date. The judge and counsel are also expected to discuss the suitability of the case for ADR, whether consent to a magistrate judge would be appropriate, and disclosure of discovery information. Commentary in the DCM plan states that the case management conference should be used as well to encourage the parties to narrow the issues in the case, to establish priorities for completing key tasks in the litigation, and to review anticipated discovery problems.

The decisions made at the case management conference are recorded in a case management plan developed at the conference, which provides the scheduling order for the case.

Discovery Requirements

As Table 32 (above) shows, the DCM tracks provide guidance on the likely amount of discovery to be permitted for cases of different characteristics. These limits are set at the initial case management conference (Rule 8:4.2). Subsequent to the adoption of DCM, the court adopted additional requirements concerning discovery when it decided to opt into the 1993 amendments to Fed. R. Civ. P. 26. These requirements, which include initial disclosure and postponement of discovery until disclosures have been made, have been incorporated into Rule 8.

Also incorporated into the DCM rules is a court requirement that predated the DCM plan but has now been integrated into the DCM system: before seeking court assistance in resolving a discovery dispute, the parties must make every effort to resolve the dispute between themselves (Rule 8:7.4). When court assistance is sought, counsel must certify that they have tried to resolve the dispute but failed. The judge will then attempt to resolve it through a telephone conference, resorting to written motions only when all other efforts have failed.

Motions Requirements

To ensure that case progress will not be delayed by pending motions, Rule 8:8.1 provides for regularly scheduled motions days. In addition, Rule 8:8.2 requires that magistrate judges issue reports and recommendations on dispositive motions within thirty days of the reference date and that judges decide nondispositive motions within thirty days and dispositive motions within sixty days of hearing.

Midpoint Status Conference; Setting and Keeping Firm Trial Dates

According to Rule 8:5.1, a status conference should be held midway between the case management conference and the discovery cutoff date. At this time, counsel can discuss with the court any problems that have arisen in the case, including problems meeting the court's schedule. Parties with settlement authority must attend this conference so productive settlement discussions can be held. The rule also specifies that the trial date will be set at this conference and provides that if, for any reason, the assigned judge cannot start the trial within one week of the scheduled date, the case will be reassigned to another judge for prompt trial.

Table 33 provides a time line summarizing the scheduling of the principal DCM events.

Table 33
Time Line for DCM Pretrial Events
Northern District of Ohio

Event	Timing
Court issues order setting case management conference	Within 5 calendar days after date for filing last responsive pleadings - rule of thumb is about 60 days after case filing
Counsel file joint statement	At least 3 days before case management conference - about 85 days after filing
Court holds case management conference	Within 30 calendar days after date for filing last responsive pleadings or 90 days after defendant files an appearance - rule of thumb used by most judges is 90 days after case filing
Court holds status conference	Midway between case management conference and discovery cutoff date

Alternative Dispute Resolution (ADR)

Although ADR is not a component of DCM, the court has provided for the integration of ADR into case management by requiring each judge to discuss ADR with the parties at the case management conference (Rule 8:4.2) and by listing for each track the suitability of ADR for cases on that track (Rule 8:2.2). The local rules on ADR permit the judges to refer a case to ADR at any stage in the litigation, and it authorizes the judge to mandate, where appropriate, the use of ADR (Local Rule 7).

The court has established four principal ADR procedures: voluntary, nonbinding arbitration, early neutral evaluation (ENE), mediation, and summary jury or bench trial.[73] Local Rule 7 sets out

[73] Rule 7 also provides for referral to any other form of ADR considered appropriate by the judge. The court's voluntary arbitration program is one of ten authorized by 28 U.S.C. §§ 651-658.

comprehensive rules for the use of each of these types of ADR, including how cases are selected and referred, whether written materials must be submitted, who must attend ADR sessions, what fees must be paid, and what degree of confidentiality is required. The ADR programs are directed by an ADR administrator, who is responsible, among other duties, for maintaining the Federal Court Panel of arbitrators, evaluators, and mediators.

Pending Inventory Reduction Plan (PIRP)

At the time the court adopted the DCM program, it was concerned that the new program, which applied only to newly filed cases, not divert the court's attention from pending cases. Thus, the court adopted a special Pending Inventory Reduction Plan to make sure attention was given to non-DCM cases. This plan, the court hoped, would also help reduce the substantial docket of older cases.

Initially, the Pending Inventory Reduction Plan, by giving visibility to the pending caseload, prompted a major effort by the court to dispose of its older cases. Status conferences were scheduled before the magistrate judges in cases that had not been actively litigated, which prompted termination of many cases that had settled but not filed dismissal notices. Other cases were transferred from judges with substantial backlogs to judges who were current or were handled by visiting judges, which also terminated many cases. Although the concentrated effort of the initial inventory reduction plan has subsided, the court retains its goal of keeping the percentage of older cases to a minimum.

4. Implementing and Maintaining the DCM System

The Role of Court Staff and the Judges

During the winter and spring of 1991-92, the court—and its staff in particular—undertook the changes needed in court operations to translate DCM from a set of rules to a set of daily routines. Because the court's clerk and chief deputy clerk were members of the advisory group, they were able during the design phase of DCM to anticipate implementation problems and work with court staff to make plans for changes in court operations.

Overall coordination of changes in clerk's office procedures was the responsibility of the DCM coordinator, a law clerk to the chief judge who took on the DCM project as his clerkship was ending in early 1992. He served as liaison between the judges, consultants, advisory group, and rules advisory committee; helped develop consensus on implementation issues; prepared educational materials for training court staff and the bar; assisted clerk's office staff in applying the new rules; and worked with automation staff to develop new data fields and reports.

The program was included in the Federal Judicial Center's study of the voluntary arbitration courts. See D. Rauma and C. Krafka, Voluntary Arbitration in Eight Federal District Courts: An Evaluation. Federal Judicial Center, 1994.

The court found its automation staff especially critical for implementing DCM. The system required, for example, that new types of events, such as assignment of a case management track, be docketed and that new docketing screens be created for these events. Further, in adopting a rigorous case management approach the court wanted to be able to monitor whether case events—such as the scheduling of the case management conference and assignment of a track—occur on time. The automation staff tailored the court's docketing system to provide such reports. These changes were a significant challenge for the court, since it had not had the capability before DCM to generate computerized reports and had to customize its computer system very quickly.

Although not technically related to DCM tasks, two new staff positions were created during implementation of the DCM program. With the expansion to a full set of ADR options and maintenance of a panel of court-approved neutrals, the court determined that full-time staff was needed to manage ADR and hired an ADR administrator and ADR secretary. Their duties include recruitment and training of neutrals for the court's ADR panel, assignment of neutrals to cases, and monthly reporting on the number and status of cases in ADR.

Although DCM implementation was a period of intense planning for court staff, the roles of most were not substantially changed by the new system. The primary change for most staff has been the use of new forms, routing these forms correctly, and using new statistical reports for case monitoring. For example, intake clerks must now check whether plaintiffs file the required Case Information Statement with the initial pleadings and then must direct that form to the courtroom deputies. DCM has also imposed few new duties on chambers staff. A number of judges think, in fact, that the DCM system has made their staff, including their law clerks, more efficient. The system helps staff set priorities for their work by specifying which cases need attention. In addition, the monthly case status reports help staff make sure no case or event is overlooked.

To the extent DCM still needs specific coordination today, it continues to be provided by the DCM coordinator, who is now the chief deputy clerk. He describes the system, however, as so fully integrated into the court's practices that it has become the routine. His specific DCM duties today consist primarily of reviewing statistical reports. For the rest of the clerk's office and chambers staff, their principal responsibility under DCM is to maintain current and readily accessible information about each case for the judges' use and to promptly notify counsel when they must meet an obligation to the court, duties similar to those of clerk's staff in most courts.

To a great degree, the primary responsibility for maintaining the DCM system lies with the judges, through their enforcement of its requirements. The system is not self-executing, as one judge noted, but requires each judge's active and continuing commitment to establishing and meeting the deadlines set for each case—a responsibility that is, of course, supported in essential ways by the clerk's office, the chambers staff, and the court's computer-generated reports.

Although DCM has become the routine, one of the court's managers noted that "you can't just walk away from it when it's up and running. Automation in particular is an on-going process." The court is now creating new computer systems that will permit judges to access

information in chambers rather than having reports generated by the clerk's office, a step that will enable judges to call up only the information they find necessary.

In hindsight, said some of those who were involved in the implementation process, it would have been easier if the court had held a meeting of all the judges and staff at an early stage to introduce them to DCM and work out coordination of the various roles. Absent such a meeting—or set of meetings—when DCM began there were different interpretations among the judges about what the rules meant and varying levels of commitment to some of the rules. Some of the judges who had been on the bench for some time were in particular reluctant to change their practices. Over time, it was reported, these differences in practice have for the most part disappeared, especially with the appointment of new judges whose only experience in the court is under the new rules.

Forms Used by the DCM System

Although the court spent a fair amount of time developing forms during implementation of DCM, this does not indicate that a DCM system requires a great number of forms. In fact, there are only three key forms for this program (see Appendix C). The first is the Case Information Statement filed by counsel, on which counsel indicate what type of case they are filing, which case management track they think it should be on, and any issues they consider relevant to the track assignment.

The second key form is the Notice of Case Management Conference, which the judge sends within ninety days of case filing to inform counsel of the preparations they must make for the initial case management conference. With the notice, counsel receive a form—Report of Parties' Planning Meeting Under Fed. R. Civ. P. 26(f) and L.R. 8:4.2—for reporting to the court the outcome of these preparations. The sections of the form essentially cover the topics that will be discussed at the upcoming case management conference.

Upon completion of the case management conference, the judge issues a case management order. The court has not developed a special form for this order, but the attorneys' planning report to the court provides the judge substantial assistance in preparing the case management order.

When the DCM system was first implemented the court also used a notice signed by the chief judge and given to all plaintiffs at filing to inform them about the court's new case management system and to direct them to the relevant local rules. The court has found that most attorneys are now familiar with DCM and has suspended use of this notice.

Education of the Bar

As soon as the court approved the DCM rules, the advisory group and court began the task of educating the bar to this new case management system. The first step in some sense had already been taken, one judge noted, when the court appointed a diverse and highly respected advisory group whose lead others would follow.

The court and advisory group nonetheless put extensive resources into bar education. Continuing legal education sessions were held in each division, and attendees were given a binder containing the court's new rules, the DCM forms, and a chart showing the flow of cases through the court. Both the DCM and ADR programs were described in depth by members of the court and advisory group. They also held seminars at the district's largest law firms, spoke at many bar functions, and developed a brochure on DCM and ADR to give to plaintiffs at filing and to attorneys at bar meetings.

The Budget for DCM

The costs reported by the court for implementing and maintaining its DCM program are shown in Table 34.[74] As in the Western District of Michigan, the costs of starting the DCM program were greater than the subsequent costs to maintain it. Early costs included in particular the assistance of consultants to design the DCM system; supplies and equipment (much of the cost due to printing and postage associated with bar education); improvements in the court's automation system; and a CJRA staff attorney and secretary, whose time was used for both the DCM and ADR programs.

Table 34
CJRA Expenses, Fiscal Years 1991 to 1996
Northern District of Ohio

FY	Consultants	Travel	Supplies#	Automation	Training	Staff*	ADR+	Total
1991	$4,934	$0	$17,205	$5,829	$0	$0	$0	$27,968
1992	$28,644	$0	$47,754	$16,552	$7,856	$64,301	$19,292	$184,399
1993	$20,994	$324	$42,852	$2,540	$0	$111,585	$3,520	$181,815
1994	$2,336	$0	$9,825	$656	$0	$77,049	$2,570	$92,436
1995	$0	$0	$6,130	$1,758	$0	$67,228	$1,745	$76,861
1996	$0	$0	$9,231	$0	$0	$79,355	$3,021	$91,607
Total	$56,908	$324	$132,997	$27,335	$7,856	$399,518	$30,148	$655,086

\# Includes supplies, furniture, printing, postage, telephone, and office equipment.
* Includes salaries of both DCM and ADR staff. ADR accounts for the largest portion: an estimated $333,903 out of the total staff costs for '92-'96.
\+ Includes consultants, training, and fees paid to arbitrators.

Now that the program has been established, the court no longer uses the consultants and has not retained its CJRA staff attorney and secretary. Costs associated with automation, training, and providing materials to the bar have also decreased (in part because the bar bears the costs now by providing on-going education at regular bar conferences and CLE courses). The principal cost that remains is staff salaries, specifically the salaries of the ADR administrator and ADR secretary.

[74] Letter from G. Smith to D. Stienstra, December 4, 1996, on file at the Federal Judicial Center.

Most of the current costs, then, are attributable to the court's ADR programs and almost none to the DCM program.[75] As in the other demonstration districts, Ohio Northern was able to receive additional funding under the CJRA.

5. The Court's Application of the DCM Rules

Although the court's DCM rules provide a comprehensive set of practices, a major test of their viability is whether they are in fact used. In this section we discuss how the judges have applied the rules, using information acquired through interviews with the judges and court staff. We also show the pattern of track designations that result from the judges' application of the rules, which demonstrate the extent to which the track system has become integral to case management.

Application of Specific DCM Rules

Management of Cases on the Administrative Track

For one group of cases, adoption of the DCM system has not meant substantial change. Although cases involving agency review are assigned to a track, in reality the management of these tracks differs little from past practices. The track simply formalizes that practice, which is to refer the cases at filing to a magistrate judge for a report and recommendation or to a judge for dismissal if an answer is not filed. The purpose of assigning these cases to a specific track is more to permit monitoring of their progress than to provide new procedures.

Tracks, Case Management Conferences, and Firm Trial Dates

For the remaining—and largest —portion of the civil docket, almost every judge said s/he holds the initial case management conference in nearly every case, assigns all cases to tracks, issues a case management order in every case, and tries to maintain firm trial dates. There was no disagreement about the importance of these DCM elements.[76]

The judges who on occasion do not apply one of these DCM rules explained that they generally don't apply the rule for a very specific reason. For example, if, after reviewing the attorneys' joint statement and perhaps talking with them on the telephone, the judge believes a summary judgment motion is likely to resolve the case, s/he will ask for briefs and not hold the case management conference. If the motion is later denied, the judge then holds the conference, assigns an track, and sets dates. To some extent these instances do not fit very well within a tracking system, explained one judge—or at the very least they "mess up" statistical reporting

[75] *Id.*

[76] A search of the court's electronic docket (ICMS) revealed that a case management conference was held in at least 85% of the cases assigned to the court's three principal non-administrative tracks—expedited, standard, and complex. This may be a slight undercount. Below we look at the number of cases assigned to tracks.

about the system—because by the time the case management conference is held the case may be well outside the time-limit for the appropriate track, which is calculated from filing. In such situations, judges nonetheless assign the appropriate track in terms of the amount and timing of discovery, knowing that the total days the case will take may fall outside the track limit.

Although most judges said they hold a case management conference in nearly all eligible cases, some judges reported that other judges do not hold this conference themselves but have their law clerks or other staff conduct them—a practice not provided in the rules and highly disapproved by the judges who mentioned it. None of the judges acknowledged that staff conduct their case management conferences—perhaps because none do or perhaps because they know it is disapproved—but the judges who attributed this practice to others urged that it be discontinued.

Case Information Statements and Attorneys' Joint Planning Report

Other components of the DCM system are not as rigorously followed. For example, although 95% of plaintiffs' attorneys file the Case Information Statement (CIS), compliance by defense attorneys is, according to the judges, much lower. The judges have not tried to enforce this rule, however, because most of them give little attention to the CIS, finding the attorneys' joint planning statement and the initial claim sufficient for their preparation for the case management conference.

Even so, the judges reported that a fair number of attorneys do not file the joint statement. For some judges, this was not a significant problem. In their view, the planning meeting between the attorneys is the essential tool for getting them to prepare for the case management conference. Other judges, however, find the joint statement very helpful because it serves as a guide for the case management conference and saves time in that conference. While they acknowledge that the attorneys' meeting is probably the most important element in preparing them for the conference, they believe the meeting is held only because of the obligation to prepare a statement. Several judges urged continued vigilance on the part of the court in getting attorneys to file these statements. And all agreed that some method for getting the attorneys to discuss the case before the case management conference—whether a joint statement, disclosure, or some other device—is very beneficial.

Limits on the Amount of Discovery

The court learned early in the process of implementing DCM that rote application of the limits on interrogatories and depositions, caused, as one judge said, "flat-out resentment by the bar." Rote application also violated the principle of individual attention to each case's needs. Once the court made it clear to the bench and bar that the discovery limits listed for each track were guidelines, not rules, the problem disappeared. Using them as guidelines rather than rules does not, some judges pointed out, undermine the DCM system. The judge may, for example, place a case on the expedited track because s/he and the attorneys agree it can move quickly, but the judge may also permit more depositions or interrogatories than suggested by the track guidelines if a greater number are needed for that case.

Disclosure

Another area in which some judges' practices vary from the rules is in the implementation of initial disclosure. These are to some extent court-sanctioned departures, because the court permits the judges, in light of bar objections to disclosure, to apply the rule at their discretion. About half of the judges generally do so and require the parties to make disclosures before the case management conference. They find, as one judge said, that "it increases the sense of urgency and moves discovery along." These judges reported few or no disputes over disclosure. The judges who do not require disclosure generally did not object on any grounds other than practical ones. Because they hold the case management conference so early, said some judges, they are already moving the cases so quickly that disclosure is unnecessary. Others find that Rule 26's requirement that formal discovery be postponed undermines the case management conference by keeping important information out of the conference.

Status Conferences

While most judges said they agree in principle with the importance of monitoring case progress, several noted that they have abandoned Rule 8's requirement of a midpoint status conference, at least in some cases. Some judges described the status conference as "a waste of time" and said they hold it only for cases that need monitoring. In too many cases, one judge said, "the attorneys and I looked at each other and didn't know why we were there." Other judges find the midpoint conference helpful in most cases because, in the words of the judges, it "reminds attorneys to keep the case going," "brings problems to light," "helps eliminate unnecessary discovery," and "helps define issues." Judges' positions on this component of the rule generally were strongly held.

Setting Trial Dates

A number of judges also vary from Rule 8 in their trial-setting practices. Although the rule calls for the trial date to be set at the midpoint status conference, these judges set it at the initial case management conference. Others prefer to set it at a midpoint conference so they can be more certain it will be firm. One judge who sets it early, while agreeing in part with the judges who find it difficult to predict that far in advance, said, "It's unrealistic to think a trial date I set in May for November will really happen, but I set it. The attorneys and I know that because that date is there the case will be ready for trial by then, and it will be resolved. Certainly discovery and motions will be done." This judge and several others urged that the local rule be changed to require, for most cases, that the trial date be set at the initial case management conference.

Alternative Dispute Resolution

Nearly all of the judges refer cases to the court's ADR programs. Though the extent of their ADR use varies considerably and several think ENE and arbitration are of limited use, most of the judges consider ADR a valuable addition to the options available for resolving disputes.[77] The

[77] ENE, said one judge, is too similar to the case management conference. The ENE neutrals complained that they had no meaningful role. Arbitration is disliked by the attorneys, several said,

interviews revealed, nonetheless, some uncertainty about the differences between ADR types and how best to use ADR. Several judges, for example, had automatically sent large numbers of cases to ENE upon inheriting an old docket and expressed disappointment that most came back to them unsettled, apparently unaware that the purpose of the court's ENE procedure is not settlement but clarification of issues. Some judges also appear to send nearly every case routinely to ADR, without consideration of the track guidelines for its use.

Motions Days

Few, if any, of the judges hold motions days, which the DCM rules permit but do not require. In fact, this element has never really been implemented by any judge. One judge explained that motions that can be decided at a motions day can just as easily be decided on the papers, saving parties the necessity of coming to court. For more difficult motions, judges schedule hearings as needed.

Role of the Magistrate Judges

Although the DCM plan calls for enhancement of the magistrate judges' role, their workload continues to consist primarily of criminal pretrial matters and administrative review cases. Many judges prefer to handle their own pretrial matters, but in accord with the DCM plan some judges urge parties to consider consenting to a magistrate judge for full handling of the case through trial. Several of the magistrate judges believed the number of consents had not increased, however, and one of the judges expressed concern about "burn out" among the magistrate judges because of their heavy social security caseload. An examination of referrals during the past five years shows, in fact, that the number of cases consenting to the magistrate judges went up during the first two years of the DCM program, but this coincides with both the court's efforts to reduce its backlog of older cases and the period of greatest judicial vacancies.[78]

Computer Monitoring

Aside from the written rules, one final element of DCM plays an important role in the judges' use of the rules, and that is the automated system for routine monitoring of the status of each case. On a regular basis, judges see not only whether their cases are meeting deadlines but whether other judges' cases are. They also receive reports that provide them such measures as how many cases courtwide are assigned to tracks, how many cases close within the track guidelines, and how many cases settle in ADR. As discussed below, many judges consider this accountability one of the strengths of the DCM system.

In sum, while use of a number of specific components of DCM varies from judge to judge, several key components—the case management conference, track assignments, an order setting a schedule for the case—are regularly used by nearly all of them. The newer judges in particular,

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and one judge noted as well that the rules do not permit judges to order cases to arbitration, so s/he prefers to use mediation.

[78] Records maintained by the court show that in 1991, 9% of pending cases were under the jurisdiction of the magistrate judges, while in 1992 and 1993 the number increased to 13% and 14% respectively. Since then the number has returned to 9%.

who had no previous experience in this court (though several came from state court judgeships), have embraced DCM, but nearly all the judges said they subscribe to it in principle and in practice.

The Distribution of Cases Across Tracks

The track decisions the judges have made in the many individual cases that have come before them since 1992 are reflected in the composite picture presented in Table 35. To make the track assignments, the judges weigh a number of case characteristics, such as the number of parties, the number of witnesses, the subject matter of the case, and how much discovery will be needed. The key variable—and one around which the track categories themselves are built—is the amount of discovery needed.

Table 35
Track Assignments of Non-Asbestos Civil Cases Filed, 1/1/92-7/31/96
Northern District of Ohio[79]

Track	No. of Cases Assigned	As % of all cases assigned	As % of all cases assigned to non-administrative tracks
Total Cases Assigned	8368		
Expedited	1148	14.0	20.0
Standard	4216	50.0	73.0
Complex	351	4.0	6.0
Mass Tort	54	1.0	1.0
Administrative	2599	31.0	
Total Cases Unassigned	8088		
< 90 days	3988		
> 90 days	4100		
Total Cases Filed	16,456		

As reported by the judges and shown in Table 35 most of the non-administrative cases are assigned to the standard track. The second most frequent assignment—just over a fifth of the non-administrative cases—is to the expedited track. Several judges noted that they resist placing cases on the complex track and that attorneys resist having their cases placed on the expedited track. The attorneys' concern about the expedited track, judges say, is the limited number of depositions and interrogatories permitted by that track. Several judges have been able to overcome this obstacle by

[79] Based on information retrieved from the court's dockets.

using the time limits of the expedited track but permitting more discovery. It is for the same reason—limits on discovery—that some attorneys push to have their cases assigned to the complex track. The solution here, too, is usually assignment of the judge's preferred track—the standard track—with a slight increase in interrogatories and depositions.

One of the most striking figures in Table 35 is the number of cases not assigned to a track—nearly as many cases as are assigned to a track. At first glance it would seem that if DCM is to provide an effective system for managing litigation, at minimum all eligible cases should be assigned to a track. The failure to do so does not, however, necessarily indicate a problem. For half of the unassigned cases—those unassigned for less than ninety days—there is a ready explanation. Most terminated before they reached the ninety-day limit for holding the case management conference where the track assignment is made, and the remaining cases had not yet reached that conference.

The explanation for cases that remain unassigned beyond ninety days is also relatively straightforward. Examination of the distribution of track assignments shows that nearly half of the unassigned cases terminated before issue was joined and without court involvement.[80] A higher proportion of unassigned cases are, as well, on the dockets of judges who were on the bench well before DCM was adopted, which is consistent with comments made in interviews that some judges preferred to maintain their pre-DCM procedures. Even for most of these judges, however, at least 40% of their cases are assigned to tracks, which is not far below the court average of 50%.

On the whole, it appears that most eligible cases are assigned to a case management track and thus are subject to the requirements of the court's differentiated case management program.

C. The Impact of the Court's Demonstration Program

Interviews with advisory group members and the judges identified a number of goals for the DCM program:

To reduce disposition time
To reduce litigation costs
To prompt speedier rulings on motions
To focus attention on the case earlier
To make all judges active case managers
To make the case flow predictable
To create a system for judicial accountability and caseflow monitoring
To integrate ADR into case management
To prompt more consents to magistrate judge jurisdiction

[80] Data presented at Table 45, infra, show that the unassigned cases generally terminate quickly. The overall median age at termination is three months, with a two month median for those that remain unassigned under ninety days and a six month median for those that remain unassigned more than ninety days.

To what extent has the court's demonstration program succeeded in achieving the goals listed above? In the next four sections we attempt to answer that question, recognizing that we cannot readily measure progress toward many of the goals stated by the advisory group and court. We report first on the judges' views of the effects of the DCM system, turn next to the attorneys' evaluations of its effects, then look at the performance of cases on the DCM tracks, and finally examine the condition of the court's caseload since DCM was implemented.

Our findings can be summarized briefly as follows:

- Judges are very pleased with how the DCM program is working, and about half think it has achieved the goals of reducing cost and delay. Other benefits cited by judges include more individual attention to cases; active involvement of judges in case management; predictability for the flow of a case; greater accountability for judges; a system for monitoring case status; and a structure for judges' work.

- Elements of the program that judges say are most beneficial are attorney preparation for the initial case management conference and the conference itself; the assignment of case management tracks; a firm time frame for trial; use of telephone conferences to resolve discovery disputes; and the accountability that arises from computer monitoring of cases.

- The majority of attorneys do not think the DCM program overall affects time to disposition, but those who see an effect think it expedites the case rather than slowing it down. In addition, a majority of attorneys rate specific components as having moved their case along. Components viewed as helpful by two-thirds or more of the attorneys—several of which were noted by judges as well—include using telephone conferences to resolve discovery disputes; firm trial dates; an early case management conference with the judge; issuance of a scheduling order by the judge; and a final pretrial conference. Just over half of the attorneys also noted that disclosure under Rule 26(a)(1) and limits on discovery time move cases along.

- As with time to disposition, attorneys generally indicated that the program as a whole has no effect on litigation costs. Two program components, however—both of which were also cited as reducing time—were rated by a large majority of attorneys as reducing costs: use of telephone conferences for resolving discovery disputes and keeping firm trial dates. Two non-DCM case management components, referral to ADR and Rule 26(a)(1) disclosures, were also rated by over 40% of attorneys as reducing costs.

- In general, smaller numbers of attorneys thought the DCM program and its components reduced costs than thought they reduced time to disposition, with the only exception being the limits on numbers of interrogatories and depositions. A slightly larger proportion of attorneys thought costs were lowered by these limits than thought timeliness was improved by them—but only a third said so.

- Even though most attorneys do not think the DCM program as a whole reduces time and cost, the great majority (85%) think it is an effective case management system. In comments, several attorneys cited benefits other than reduction of cost and delay, including

helping them organize the case; allowing issues to be identified earlier; narrowing discovery; and providing an early opportunity for parties to meet.

- The DCM system appears most beneficial for attorneys in cases that are relatively standard and straightforward—i.e., those on the standard or expedited tracks, with little formal discovery, and with less-complex issues. On the other hand, attorneys in administrative track cases gave lower ratings to the program than did other attorneys.

- Most cases that survive beyond ninety days are assigned to a track. About half—and perhaps as many as two-thirds—of the non-administrative track cases terminate within track goals, but only a small percentage of administrative track cases do

- Caseload statistics show that disposition times for non-administrative cases were improving as the demonstration program and then stabilized. Consistent with the results from the attorney survey, caseload statistics show that administrative cases fared poorly during the demonstration period, although disposition time in these cases appeared to improve during the most recent year of the program. Given several other factors that very likely affected the condition of the court's caseload, such as the CJRA reporting requirements, the court's special program for reducing its backlog of older cases, and the large number of vacancies, it is impossible to determine what independent effect the DCM program may have had on caseload conditions.

1. The Judges' Evaluation of DCM's Effects

Interviews with twenty active, senior, and magistrate judges in 1996, well into the DCM experiment, revealed that most judges think the DCM system has been a success, with about half estimating that it has met its stated goal of reducing litigation costs and delay. Two judges noted, however, that the degree of success is affected by whether any given judge fully implements the procedures. At the beginning, these judges said, some judges chose not to follow the DCM rules, though most now do. Several judges also pointed out that it is difficult to discern the effects of DCM because during the time it has been in effect the court's many vacancies have been filled.

The discussion below reveals, however, that in the judges' view DCM has achieved many of the goals they set at the beginning of their project, including reductions in litigation time and cost; early, individualized attention to each case; active involvement by the judges in case management; predictability for the flow of each case; accountability for the judges; and a system for monitoring the status of cases.[81]

[81] As we saw earlier, DCM does not appear to have prompted more consents to magistrate judges. There is also not much evidence from the judges' comments that motions rulings occur earlier, although from records kept by the court, it is clear that the number of motions pending more than six months has dropped over the past four years. It is not clear whether this is due to DCM or to the CJRA requirement that each judges' motions pending for more than six months be publicly reported.

The Benefits of DCM

Early Attention to Cases

DCM has, most judges said, provided the court many benefits at minimal cost. First, it moves cases more quickly and efficiently because, as one said, "It engages everyone's attention very early and gets the attorneys and judges focused at the outset of the case." Less tangibly but equally as important, said one judge, DCM "sends a message to the bar and the court that there's a policy, a consensus that we have to work together." Another judge spoke of the "climate of getting cases moving" established by the DCM program.

Structured Approach to Management of Cases; Uniformity

Most of the judges also appreciate the effect DCM has had in structuring their work through the guidelines and rules established for each track. By providing a structured approach, said one judge, DCM "maximizes use of the judge's resources." DCM's structure has been particularly helpful to the court's many new judges, for whom it has provided a ready tool for quickly learning the basics of individualized case management. For some of the longer-tenured judges, adoption of DCM has formalized principles and practices they were already using. For others, it has changed their practice substantially. The net effect, most judges agreed, has been a greater degree of uniformity across the district.

While such uniformity is of obvious benefit to the bar, several judges have also found it is important for the court. "We all proceed now from the same understanding of how long a case should take," said one judge. This, said another, "promotes unity and camaraderie." As several judges said, the DCM system continues to provide for judicial discretion in the individual case, but it also draws the court together through a common approach—and a "common language," as one said—for handling cases.

Impact on Judge Time

In terms of DCM's impact on the time they spend on cases, nearly all of the judges said they have seen an increase in the time they spend on cases at the outset with a decrease at later stages. As one said, "I have to be prepared for the case management conference. I study the file so I can ask intelligent questions. But this lessens time later. Contentiousness is reduced and discovery is lessened." Whether the overall effect is to increase or decrease judge time is not clear. "It probably increases it slightly," said one judge, "because of the additional meetings with attorneys." "Ultimately it reduces time," said another, "because anytime you can settle a case before the pretrial motion stage, it saves time." The general view was that DCM probably reduces the overall time a judge spends on a case, but even if it doesn't, said one judge, it "maximizes use of judges' resources. We spend time where we need to spend it. Differentiation permits efficiency."

Impact on Attorneys

The judges said that on the whole they think the attorneys who practice before them have also reacted positively to DCM—once the court established that the limits on depositions and interrogatories were guidelines and not rigid requirements. A number of judges said attorneys like

the DCM system because, as one said, "They get into the judge's chambers early and they know from the outset where the case is going." The attorneys apparently have had little objection to the defining feature of DCM, assigning cases to tracks. "It provides a vehicle for planning the case," said one judge. Another advantage of the tracking system, said one judge, is that the attorneys "can also tell their clients reliably when the case will be complete." Several judges pointed out that the attorneys' reaction to DCM can depend to some extent on which segment of the bar is considered. "Attorneys with federal practice," said one, "find it helpful. Others find it intimidating." On the whole, however, the judges agreed that the bar has become very educated about the DCM rules and generally has reacted positively to them.

The judges said the attorneys have generally accepted ADR as well. Attorneys who are familiar with mediation in particular or who have experience with the court's panel of neutrals were described as being firm supporters of ADR. Other attorneys, especially those who think ADR means arbitration, can be lukewarm or even hostile. Although ADR is generally well received, said one judge, "attorneys still seem to feel that the case would settle if only a judge would get involved in settlement. They recognize that the judges don't have time to do this in all cases, so they accept ADR as a necessary evil because they can't get the judge's attention."

Accountability

Even as the judges pointed out DCM's many benefits, several noted that it is not "a panacea." While it provides a very helpful tool for keeping litigation on track, success still depends on the judge. In the words of one, "It isn't a miracle worker. You still have to be a hardworking judge, you still have to meet the deadlines. But it gives the hardworking judge an organizing principle." It also provides a standard for measuring the judges' and the court's performance. In fact, the word "accountability" was used by many of the judges, who embraced the idea that not only the lawyers but the judges as well need a system that holds them to deadlines and makes it visible when these are not met.

How, then, does DCM organize the judges' and attorneys' work? We asked the judges to identify the elements of DCM that have led to the benefits they described. Most of these elements are inter-related and work together in support of one especially critical feature of the DCM system: setting a schedule for each case and keeping the judges and attorneys on that schedule.[82]

The Critical Elements in DCM's Success

The judges named a number of DCM's components as critical in bringing about the benefits they have realized, but those discussed below clearly stand out in the judges' minds.

Attorney Preparation for the Initial Case Management Conference

The first important elements for establishing and maintaining the case schedule, judges said, are the attorneys' planning meeting and their joint statement. Because of these requirements, the

[82] The schedule generally includes deadlines for discovery, for adding parties and amending pleadings, for filing dispositive motions, and for the next conference with the judge. An ADR date may also be set.

attorneys come to the case management conference more knowledgeable about their case, better prepared to discuss its strengths and weaknesses, more likely to know what evidence they will need at trial, and more cooperative with each other. Although some of the judges said they do not find the joint statement especially helpful in their own preparation for the conference, they believe it is an essential tool for making the attorneys discuss the case. A number of judges also require the attorneys to make Rule 26(a)(1) disclosures before the case management conference, which they say also enhances the attorneys' familiarity with the case. Taken altogether, the judges say, these requirements make the case management conference more productive, result in a realistic schedule that the attorneys "buy into," and reduce the need for later schedule changes.

The Initial Case Management Conference

The case management conference itself is the second important element for setting and maintaining a schedule, not only because the dates are determined at this meeting but also because the meeting occurs early in the case. The judges try to hold this conference within thirty days after responsive pleadings are filed, and no later than ninety days after the complaint has been filed, which gets the case off to a fast start and "makes it clear to the bar," as one judge said, "that cases won't languish, that judges will stick to a schedule."

The case management conference is also important, several judges said, because it helps the judge and attorneys get a measure of each other. One judge spoke of the importance of understanding the "psychology of the case"—whether the attorneys dislike each other, how firmly they are in control of their clients, how much "game playing" may be expected. Another judge emphasized the importance of setting a "tone" for the case, which includes not only letting the attorneys see that the judge is in control but also letting them know the judge is accessible and that many matters can and should be handled informally. The attorneys, this judge said, are much more likely to approach the judge when something is getting out of control if a relationship has been established at the case management conference. Several judges pointed as well to the benefit gained from having the clients present. Most judges do not enforce this requirement when it would create hardship for the clients, but when clients are present the judges use it as an opportunity to explain DCM, highlight opportunities for settlement such as ADR, and raise the cost of litigating the case.

With more knowledgeable and cooperative attorneys, most judges noted, they are also able to use the conference to streamline the case and to forestall later problems. Instead of simply setting dates, as in the past, most judges now use the conference to discuss the strength of the issues, to explore what evidence the attorneys will use to support their claims, to dispose of insupportable claims, and to identify cases likely to be resolved by an early summary judgment motion. The judges believe these thorough discussions early in the case permit a tighter schedule and reduce the number of problems likely to occur later, such as disputes over discovery or requests for extensions. Several judges also think the in-depth conference has reduced the number of motions generally but may have increased the number of summary judgment motions by forcing attorneys to confront the strength of their case earlier. An increase in these motions may also be due to changes in circuit and national law, the judges noted.

The Case Management Tracks

In addition to the attorneys' initial preparation and the case management conference, the judges identified the system of case management tracks as a third important feature of DCM. Although most of the judges agreed that a tracking system is in essence individualized case management with a new label, most of them pointed to one distinctive feature: the track characteristics and time-frames set out in the local rules give attorneys important information about the court's expectations and help them make reasonable plans for the schedule of the case and the scope of discovery.

The tracks also provide guidance to the judges, both in determining an initial schedule and subsequently in aiming to complete each step, particularly the trial, within the target dates. With both the attorneys and judges using the track guidelines, a shared framework is already established by the time they meet in the initial case management conference. As one judge said, "Tracks are the tool we use to structure litigation for the attorneys and the judges."

A Target Time Frame For Trial

A number of judges identified DCM's emphasis on a firm trial date as another central element of the system. Although some feel they cannot set an actual date until midway through the case, they noted that from the outset of the case there is an expectation that the trial will occur within the time frame given by the track to which the case has been assigned—as one said, it "focuses the schedule from the outset on an expected trial date." To ensure that a trial date is firm, judges have stepped in to try cases for others who could not be available when a scheduled trial came up.

Telephone Conferences for Discovery Disputes

Once a schedule has been determined, one additional feature is essential for maintaining it, many judges said: telephone conferences for resolution of discovery disputes. This practice, which predated DCM, "greatly adds to efficiency," as one judge said, because it promptly resolves the dispute, permits discovery to proceed immediately, and reduces the amount of paper prepared by the attorneys and reviewed by the judges.

Automated Tracking; A Willingness to Experiment

Several judges identified two other aspects of DCM that have assisted the court. These are less directly linked to setting case schedules, but both have been important in achieving success with DCM. The first is the court's automated tracking system and regular case reports, which not only provide information about cases needing attention but also create a system of accountability. As one judge said, "Professional pride inspires judges." The second feature is less tangible but no less important. "DCM," said one judge, echoing others, "has raised consciousness and increased our willingness to innovate."

Reservations About DCM

Although nearly all of the judges are committed to the court's DCM program, several raised cautionary notes. One wondered whether "there's a danger we'll over-manage and that we'll place too much emphasis on deadlines." Another asked, "Do we focus too much on settlement and fail to give an opportunity for trial before a jury?" And a third had concerns about "building a bureaucratic system." Along these same lines, one judge noted that the paperwork can be overwhelming for judges because of the reports that have to be submitted to the clerk's office and the reports from the clerk's office that have to be reviewed in chambers. These judges did not suggest that their concerns—except for the paperwork burden—had materialized, only that the court be watchful.

Recommendations and Suggestions for Other Courts

A measure of the judges' commitment to DCM is their universal recommendation that other courts consider implementing a DCM system. Among the reasons given by the judges were that DCM "provides guidelines for judges," "provides a framework for developing a reasonable approach to the case," "forces judges who have a tendency to slack off to be more on the ball," "brings control over the civil docket," and "cuts costs by making attorneys evaluate the case up front and decide what resources to put into it."

The judges had a number of suggestions for courts that might be interested in adopting a DCM program. Several underscored the importance of involving the bar from the outset in designing the system. Through the attorneys' participation—especially if they are highly respected in the community— the court will very likely come up with a system that takes local practices and concerns into account and therefore will be more quickly accepted by the bar. The Northern District of Ohio, for example, found bar participation critical in deciding how many tracks the DCM system should have and what each track's requirements should be. Bar participation is also a valuable tool for disseminating information.

Several judges also recommended that any court considering DCM design a system that allows room for individual judicial discretion. Track requirements should be viewed as guidelines, not rigid requirements. Within those guidelines, the judge should take control of the case through the initial case management conference. Courts considering DCM should also make sure their judges understand what will be required of them. As one judge said, "The judges must commit to sitting down with the parties."

One judge pointed out that a DCM system requires good staff and good computer capabilities for monitoring cases. In this area, as well as all other aspects of DCM, several judges recommended that courts who are interested in DCM talk to those who have already successfully used it. And, once the plan is in place, said one judge, be willing to re-evaluate it and make changes if necessary.

On the whole, then, the judges in the Northern District of Ohio believe they have experienced a number of benefits from their DCM system. Components they point to as most helpful include the requirements that attorneys meet to prepare for the case management conference; the case management conference itself; the case management tracks and the guidelines, including a target date for trial, that the tracks provide both judges and attorneys; the use of the telephone for discovery disputes; and the caseload monitoring provided by the court's automation system.

2. The Attorneys' Evaluation of DCM's Effects

In this section, we examine the attorneys' assessment of the DCM system as they experienced it in a particular case they litigated in the court. To determine whether DCM is more effective for some types of cases or attorneys than for others, we also explore whether the attorneys' assessment of the DCM system is related to any of a large number of party and case characteristics such as the number of cases the attorney has litigated in this court, the degree of complexity of the case they litigated, its nature of suit, and the amount of discovery in that case.

Our discussion proceeds first to an examination of the attorneys' assessments of program effects on time and then its effects on cost. We next discuss the attorneys' satisfaction with the court's management of their cases and whether they have found DCM as a whole to be an effective case management system. We conclude with a summary of our findings from the attorney survey, which can be found at page 126. As before, the findings reflect attorneys' experiences with DCM and not necessarily its actual impact.

DCM's Effects on Time to Disposition

As indicated in Table 36 (next page), in response to a general question asking for a rating of the amount of time it took for the case to move from filing to disposition, the vast majority of attorneys who had litigated a case in the Northern District reported that their case was moved along at an appropriate pace. Attorney perceptions of timeliness differed significantly, however, by the track to which the case had been assigned. Forty-one percent of attorneys whose cases were assigned to the administrative track believed that their case was moved along too slowly, while at least 80% of attorneys with cases on other tracks thought the case had proceeded at an appropriate pace.[83]

This general rating of timeliness does not, of course, reveal whether the attorneys believe DCM has been helpful in maintaining an appropriate litigation pace or whether, perhaps, DCM is responsible for the 12% of attorneys who felt their case moved too slowly. This issue is addressed more directly in two other analyses.

[83] Unless otherwise noted, all relationships mentioned in this section are statistically significant in a Chi-square analysis at the $p<.05$ level or better.

Table 36
Attorney Ratings of the Timeliness of Their Case
Northern District of Ohio

Rating of Time From Filing to Disposition	% of Respondents Who Selected Response (N=609)
Case was moved along too slowly	12.0
Case was moved along at appropriate pace	80.0
Case was moved along too fast	3.0
No opinion	6.0

Attorney Estimates of DCM's Overall Effect on Time

Table 37 presents the attorneys' ratings of DCM's overall effect on the timeliness of their case. Well over half of the attorneys in this district said that DCM program as a whole had no effect on the time it took to litigate their case. Only a very small fraction, on the other hand, believed it hindered their case, leaving a substantial proportion who believed that DCM expedited their case.

Table 37
Attorney Ratings of Overall Effect of the Differentiated Case Management Program on Litigation Timeliness
Northern District of Ohio

Rating of Overall Effectiveness of DCM on Time	% of Respondents Who Selected Response (N=581)
Expedited the case	39.0
Hindered the case	3.0
Had no effect on the time it took to litigate the case	58.0

Do the attorneys who found DCM helpful differ from the attorneys who reported it had no effect? Further analyses showed that the attorneys' responses did not differ by type of case, by type of party (plaintiff/defendant), or by attorney characteristics (such as years in practice or experience in this court). Their responses were, however, related to several case characteristics.[84]

[84] Attorneys were asked to rate a number of case characteristics on a scale from "very high" to none."

Discovery/Disclosure. When attorneys reported lower amounts of formal discovery, they generally also felt that DCM expedited the case: 50% of those reporting low amounts of formal discovery felt DCM's overall effect was to expedite the case, compared to 44% of those reporting medium amounts and 37% of those reporting high amounts of such discovery.

Attorney ratings of DCM's impact on timeliness were also associated with the amount of informal discovery reported but, interestingly, with the opposite trend: higher reported levels of informal discovery were associated with reports that DCM expedited the case, and lower amounts of informal discovery were associated with reports that DCM had no effect on timeliness.[85] More than half (53%) of the attorneys reporting high or very high amounts of informal discovery thought that DCM expedited the case, compared to 48% of those reporting medium amounts, and 40% of those with low or very low amounts.

Track Assignment. Further analyses indicated that ratings of DCM's overall effect on timeliness also differed by case tracks, with a larger proportion (54%) of attorneys handling expedited cases reporting that DCM expedited the case, followed by attorneys handling standard cases (48%), complex cases (37%), and administrative cases (24%). These results are particularly interesting regarding the expedited track cases. Although, as shown later in section C.3, fewer of these cases terminate within the track guidelines than do cases on the other non-administrative tracks, attorneys on this track—the court's fastest track—reported that it moved their cases along. For administrative cases, the results indicate that only a quarter of the attorneys believe DCM has a positive effect on disposition time, suggesting that this system has not been especially effective for these cases.

Referral to ADR. We also found significant differences in attorney perceptions of DCM's impact on timeliness by whether cases were referred to ADR, with 51% of attorneys whose cases were referred to an ADR procedure reporting that DCM expedited the case, while only 37% of those not referred to ADR reported this effect.

Taken together, these analyses suggest that DCM is most effective as a case expediter in the court's more routine civil cases and in cases where the parties cooperate with each other during the pretrial process—i.e., where there is little formal discovery, high informal discovery, and the parties participate in ADR.

Attorney Assessments of the Effect Specific Case Management Components Had on Case Time

To further assess DCM's impact on litigation time, we asked the attorneys to rate the effects of specific DCM components. Table 38 (next page) shows how attorneys rated the impact of the principal elements of the DCM system—as well as several other case management practices—on the time it took to litigate their case. Program components are listed in descending order according to the percentage of respondents who said the component moved the case along. The analysis includes only the responses of those who said the component was used in their case.

[85] The item attorneys were asked to rate was "amount of informal discovery exchange or disclosure."

Table 38
Attorney Ratings of Effects of Differentiated Case Management Components on Litigation Time (in Percents)
Northern District of Ohio

Components of DCM Program	N	Moved this case along	Slowed this case down	No effect
Use of telephone, rather than in-person meeting to resolve discovery disputes	201	81.0	2.0	17.0
Scheduling order issued by judge	417	77.0	1.0	22.0
Trial held on date it was scheduled to be held	125	76.0	2.0	22.0
Early case management conference with judge	370	74.0	2.0	23.0
Final pretrial conference with judge	189	66.0	1.0	33.0
Time limits on discovery	328	55.0	1.0	44.0
Attorneys' joint planning report	324	50.0	4.0	46.0
Deadlines by which judges must rule on motions	182	50.0	6.0	45.0
Assignment of case to one of the court's case management tracks	437	48.0	1.0	51.0
Limits on number of interrogatories	262	29.0	4.0	68.0
Certification of good faith effort to resolve discovery dispute	199	24.0	7.0	69.0
Filing of case information statement with initial pleadings	416	23.0	2.0	76.0
Limits on number of depositions	230	20.0	4.0	75.0
Other Case Management Components				
Parties made initial disclosure in accord with FRCP 26(a)(1)	225	57.0	4.0	39.0
Court or judge referred case to an ADR procedure	108	47.0	18.0	35.0
Parties filed experts' reports in accord with FRCP 26(a)(2)	105	38.0	5.0	57.0
Paperwork required by the court or judge	222	32.0	11.0	57.0

Components Reported to Move the Case Along. A substantial number of attorneys—from nearly half to over three-quarters—cited the following specific DCM components or other case management practices as moving their case along:

- use of the telephone rather than in-person meetings to resolve discovery disputes (81%),
- a scheduling order issued by a judge (77%),
- holding a trial on its scheduled date (76%),
- an early case management conference with the judge (74%),
- a final pretrial conference with a judge (66%),
- initial disclosure in accord with Fed. R. Civ. P 26(a)(1) (57%),
- time limits on discovery (55%),
- the attorneys' joint planning report (50%),
- deadlines by which judges must rule on motions (50%), and
- assignment of the case to a case management track (48%).

It is clear that many attorneys found many of the DCM components useful in expediting their case. Where they did not find a component useful, they generally reported that it had little effect and seldom that it had an adverse effect. On a number of the components they found helpful their assessment coincides with the judges', including the value of using the telephone for discovery disputes, holding a case management conference, preparing a joint case management statement, and assigning the case to a track. And on a procedure that may be surprising to the court, given bar resistance when the court considered adopting it, more than half of the attorneys said Rule 26(a)(1) disclosure helped move the case along.

Components Reported to Have Little Effect on Time. Table 38 shows that for a number of the DCM and other case management components where attorneys did not report a positive effect on litigation time they felt it simply had no effect. These included:

- filing of a case information statement with initial pleadings (76%),
- limits on the number of depositions (75%),
- certification of good faith effort to resolve discovery disputes (69%), and
- limits on the number of interrogatories (67%).

Perhaps most noteworthy among these responses is the attorneys' assessment of the impact of limits on interrogatories and depositions. These key elements of the DCM plan, elements that caused controversy when adopted, are seen by the great majority of attorneys as having no effect on litigation timeliness. In terms of discovery, the greater benefit appears to come from time limits on discovery.

Components Reported to Slow the Case Down. Very few of the court's practices were identified by the attorneys as slowing the case down. In fact, no DCM component was cited by more than 10% of the attorneys as slowing their case down—and for most components fewer than 5% said so. Two non-DCM case management practices were, however, perceived by a higher proportion of attorneys as slowing cases down. Eighteen percent of the attorneys thought that having the court or judge refer the case to an ADR procedure slowed the case down, and 11% said that paperwork requirements of the court or judge did. There was little relationship between attorney or case characteristics and attorney ratings of the effects of these components on time, except that attorneys on the complex track were more likely than others to say paperwork requirements slowed the case down.[86]

Components Viewed with Differences of Opinion as to Effect on Time. For several DCM components there was a decided split of attorney opinion as to whether the component moved the case along or had no effect on timeliness. These include the attorneys' joint planning report, assignment of the case to a case management track, and deadlines by which judges must rule on motions. For the first two of these components, there were no significant differences by attorney or case characteristics, track assignment, or whether the case was referred to ADR.

Further analyses did indicate, however, that attorneys who handled more cases in this court prior to DCM were more likely than attorneys handling small numbers of cases to believe that deadlines for rulings on motions had no effect on case timeliness. A majority of attorneys with fewer than twenty pre-DCM cases thought those deadlines moved the case along. This suggests that attorneys with extensive prior experience in the district do not perceive a major difference in how quickly rulings on motions are made under the new system.

Program Effects on Litigation Cost

Table 39 (next page) shows that, as with the pace of litigation, most attorneys rated the cost of their case as about right—although the 65% who say so is substantially less than the 80% who said the pace was appropriate. Likewise, the 17% of attorneys who said the cost was too high is substantially higher than the 12% who said it moved too slowly.

Attorneys handling complex cases were much more likely to report that litigation costs were higher than they should have been (59% of attorneys on the complex track, compared to less than 20% of attorneys on any other track). At least two-thirds of attorneys handling other types of cases thought the cost was about right. One possible explanation for this finding is that DCM may not be particularly effective in controlling the time or cost of the court's most demanding cases. On the other hand, because the question did not ask specifically about the DCM program, it is possible that these responses reflect not so much DCM's failure but the attorneys' perception that complex litigation is costly. To address that issue, we looked to two other sets of analyses.

[86] The wording of the question does not identify specific paperwork requirements, nor do the attorneys' written comments shed light on which requirements they find burdensome.

Table 39
Attorney Ratings of Cost of Case from Filing to Disposition
Northern District of Ohio

Rating of the Cost From Filing to Disposition	% of Respondents Who Selected Response (N=607)
Cost was higher than it should have been	17.0
Cost was about right	65.0
Cost was lower than it should have been	6.0
No opinion	11.0

Overall Estimates of DCM's Effect on Cost

Although most attorneys found the cost of litigating their case about right, most did not report DCM as having an impact on litigation costs. As Table 40 shows, to a large extent attorneys' overall perceptions of DCM's effect on litigation cost parallel their evaluations of its impact on litigation time—the majority of attorneys reported little effect. More attorneys, however, reported that DCM increased cost than reported that it increased time—8% versus 3%—but in either instance the percentage is very low.

Table 40
Attorney Ratings of Overall Effect of Differentiated
Case Management Program on Cost of Their Case
Northern District of Ohio

Rating of the Overall Effect of DCM on Cost	% of Respondents Who Selected Response (N=569)
Decreased the cost	25.0
Increased the cost	8.0
Had no effect on the cost of the case	67.0

Additional analyses revealed that a number of case characteristics were significantly related to perceptions of DCM's overall effect on cost, including the attorneys' rankings of the legal and procedural complexity of the case, the amount of formal discovery in the case, the monetary stakes in the case, the extent to which the parties agreed on the monetary value of the case, and the likelihood the case would go to trial. Where case complexity and formal discovery were less and where the case was less likely to go to trial, the attorneys more often perceived a beneficial effect on

litigation cost. Where attorneys reported that the monetary stakes were high, they were more likely to see DCM as increasing cost. And where attorneys agreed on the value of the case, they were more likely to say DCM had no effect on cost.

Differences were found by track as well. Although the majority of attorneys on all tracks reported no DCM effect on cost, more attorneys on the expedited and standard tracks (29% and 33% respectively) reported that DCM reduced litigation costs, while many fewer attorneys on the complex (5%) and administrative (19%) tracks were of this view. Twenty-one percent of attorneys handling complex cases thought DCM increased cost, by far the largest proportion.

These findings parallel those that emerged for litigation timeliness, suggesting again that DCM is more effective in reducing costs in more straightforward and standard cases marked by little formal discovery and low complexity.

Attorney Assessments of the Effect Specific Case Management Components Had on Case Cost

To determine whether individual DCM components are more effective in reducing costs than the system as a whole, we examined attorneys' ratings of each components' impact on cost. One goal of this analysis was to determine whether the relatively high number of those reporting cost as too high attribute it to particular DCM components. Table 41 (next page) shows the attorneys' rating of the effect each DCM component—and several other case management components—had on litigation costs in their case.

Components Reported to Lower Case Cost. While most attorneys did not find DCM as a whole effective in reducing litigation costs, over half of the attorneys perceived cost reductions from two specific DCM components. A large minority also reported savings from two non-DCM practices. The cost-saving devices are:

- use of the telephone to resolve discovery disputes (80%),
- holding trial on the date it was scheduled (58%),
- making initial disclosures under Rule 26(a)(1) (43%), and
- referral to ADR (42%).

For each of these components except ADR most other attorneys reported the component as having no effect.

In exploring whether different types of cases or attorneys rated these components' effects differently, we found that a majority of the attorneys who said the amount of informal discovery in their case was high reported that disclosure lowered costs, while a majority of those who said informal discovery was low said disclosure had no effect. The two findings together suggest that where discovery exchange is informal, whether prompted by disclosure under Rule 26(a)(1) or some other method, case costs are lower. (We discuss differences related to ADR below; see Components Thought to Increase Cost.)

Table 41
Attorney Ratings of Effects of Differentiated Case Management Components on Litigation Cost (in Percents)
Northern District of Ohio

Components of DCM Program	N	Lowered cost of this case	Increased cost of this case	No effect
Use of telephone, rather than in-person meeting, to resolve discovery disputes	167	80.0	3.0	17.0
Trial held on date it was scheduled to be held	100	58.0	6.0	36.0
Early case management conference with judge	318	43.0	13.0	45.0
Final pretrial conference with judge	159	40.0	12.0	48.0
Scheduling order issued by judge	349	36.0	5.0	59.0
Deadlines by which judges must rule on motions	149	34.0	5.0	61.0
Time limits on discovery	277	30.0	7.0	63.0
Limits on number of interrogatories	223	30.0	6.0	65.0
Assignment of case to one of the court's case management tracks	363	28.0	3.0	69.0
Attorneys' joint planning report	282	26.0	15.0	59.0
Limits on number of depositions	190	22.0	5.0	73.0
Certification of good faith effort to resolve discovery dispute	167	19.0	10.0	72.0
Filing of case information statement with initial pleadings	348	11.0	12.0	77.0
Other Case Management Components				
Parties made initial disclosure in accord with FRCP 26(a)(1)	184	43.0	13.0	44.0
Court or judge referred case to an ADR procedure	83	42.0	30.0	28.0
Parties filed experts' reports in accord with FRCP 26(a)(2)	85	21.0	20.0	59.0
Paperwork required by the court or judge	186	20.0	25.0	55.0

Components Reported to Have Little Effect on Case Cost. As Table 41 clearly shows, a high proportion of attorneys reported that most DCM components had no effect on litigation cost. Fifty percent or more of the attorneys reported this to be the case for the following DCM components:

- filing the case information statement with initial pleadings (77%),
- limits on the number of depositions (73%),
- certification of good faith effort to resolve discovery disputes (72%),
- assignment of the case to one of the case management tracks (69%),
- limits on the number of interrogatories (64%),
- time limits on discovery (63%),
- deadlines by which judges must rule on motions (61%),
- the joint planning report (59%), and
- scheduling orders issued by a judge (59%).

Components Reported to Increase Case Cost. For only a small number of DCM components did more than 10% of the attorneys find that the component increased cost:

- attorneys' joint planning report (15%),
- early case management conference (13%),
- filing of case information statements with initial pleadings (12%), and
- final pretrial conference (12%).

We found few distinguishing features among attorneys who reported that these components of the DCM program increased costs. Defense attorneys were more likely than plaintiffs' attorneys to report that the joint planning report and the early case management conference reduced litigation costs (plaintiffs' attorneys were more likely to say they had no effect)—relationships for which we have no ready explanation. And attorneys whose cases were on the complex track were more likely to think the case information statement filed at case outset increased cost, which is in line with earlier analyses showing that attorneys on this track were also more likely to find that paperwork slowed down their case.

The case management practices most likely to be seen as increasing litigation costs were not DCM components but other court practices:

- referral of the case to ADR (30%),
- requiring parties to file a Rule 26(a)(2) expert's report (20%), and
- paperwork requirements (25%).

Only for ADR was the attorneys' negative assessment of the component outweighed by a greater percentage of attorneys (42%) who said the component reduced litigation costs. For the

other two components, the number saying the it increased costs was equivalent to or higher than the number who said it reduced costs.

The attorneys most likely to find that paperwork requirements increased case cost were those in solo practice, those on the expedited and standard tracks, and those reporting low to medium amounts of formal discovery. Thus, it seems that attorneys from the smallest practice settings and those handling the smaller and less complex cases are finding paperwork requirements burdensome, whereas those practicing in larger firms and handling more complex cases perhaps are better able to anticipate and garner the resources needed to handle them.

Further analysis of cases in which the ADR referral was reported as increasing costs revealed that parties who had taken more depositions were more likely to say the ADR referral increased costs, indicating perhaps that parties who seek more discovery find ADR less helpful in reducing costs. We explored whether it is the sheer volume of discovery that matters or whether a larger amount of discovery indicates either a complex or contentious case and found that attorneys who reported increased costs from ADR generally reported that higher monetary stakes were involved and that there was more conflict in their cases, including higher degrees of contentiousness between parties and between attorneys and lower agreement on case value.

We also found that attorneys reporting both high or low levels of agreement on the issues involved in the case more often said that ADR referral increased costs—that is, those reporting a medium amount of agreement on the issues found ADR's effect on cost either helpful or benign, suggesting perhaps that a moderate amount of agreement on the issues makes for the most appropriate case referrals to ADR. Cases with too low an agreement on the issues may not be resolved through ADR procedures, and the referral may simply serve to prolong the cases and thus increase their overall cost. On the other hand, cases with very high agreement on the issues may also be inappropriate candidates for ADR since they may be settled more quickly and with less cost without ADR.

Satisfaction with the Case Outcome and the Court's Case Management

While it is often appropriate to seek new procedures for reducing litigation time and costs, it is important to consider as well whether such procedures deliver outcomes the parties are satisfied with and consider fair. Keeping in mind that not all attorneys will be satisfied with their case outcome since some will have clearly lost, Table 42 (next page) shows that altogether three-quarters of attorneys were satisfied with the outcome, with half reporting themselves as very satisfied.[87] Nearly 80% reported the outcome as fair, with over half reporting it as very fair.

[87] Satisfaction with the case outcome and attorney reports of winning or losing were highly intercorrelated. This has commonsense validity but should be interpreted cautiously because nearly 20% of the sample did not answer the question about case outcome. Margin comments indicate the item choices were not exhaustive of all possible outcomes.

Table 42
Attorney Satisfaction With Case Outcome
Northern District of Ohio

Satisfaction With Outcome	Percent Selecting the Response (N=595)	Fairness of Outcome	Percent Selecting the Response (N=593)
Very satisfied	50.0	Very fair	52.0
Somewhat satisfied	26.0	Somewhat fair	27.0
Somewhat dissatisfied	12.0	Somewhat unfair	12.0
Very dissatisfied	11.0	Very unfair	9.0

Examination of attorney responses to this question by years of practice and pre-DCM experience in the district revealed no differences of opinion based on amount of experience. Defense attorneys, however, were significantly more satisfied with the outcome and its fairness than attorneys for the plaintiff. Further, a majority of attorneys whose cases were not referred to ADR reported being very satisfied and finding the outcome very fair, whereas attorneys in cases referred to ADR were as likely to report that they were somewhat satisfied and the outcome was somewhat fair as they were to give the highest ratings.

Track assignment was also associated with attorneys' satisfaction with case outcome and perceptions of fairness. While over 75% of attorneys handling expedited and standard track cases reported being satisfied with the outcome and believed it was fair, only 57% of attorneys with administrative track cases said it was fair, and only 47% of those with complex track cases said they were satisfied.

Table 43 (next page) shows that attorneys were even more satisfied with the court's management of their cases than they were with case outcomes, with nearly 90% reporting that they were satisfied with the court's management and found it fair. Attorneys with more experience and who had practiced in the court before DCM was adopted did not differ in their responses from attorneys who had less experience in practice and more recent experience in this court. As with outcome, however, assessments of the court's management varied by party type, with defense attorneys again more satisfied with the court's procedures and more likely to see them as fair than plaintiffs' attorneys.

As with attorney assessments of outcome, attorney perceptions of the court's management of the case also differed by DCM track. Once again, attorneys handling expedited and standard cases reported higher levels of satisfaction with the court's management of the case and higher perceptions of fairness than did attorneys handling complex and administrative cases. Over 60% of attorneys with expedited or standard track cases reported being very satisfied with the court's

management and thought it was very fair, compared to fewer than 46% of attorneys with complex and administrative track cases.

Table 43
Attorney Satisfaction With Court's Management of Their Case
Northern District of Ohio

Satisfaction With Management	Percent Selecting the Response (N=589)	Fairness of Management	Percent Selecting the Response (N=589)
Very satisfied	58.0	Very fair	64.0
Somewhat satisfied	28.0	Somewhat fair	24.0
Somewhat dissatisfied	9.0	Somewhat unfair	8.0
Very dissatisfied	5.0	Very unfair	4.0

The pattern identified earlier seems to hold once again with regard to attorney satisfaction with case outcome and the court's management of their case—satisfaction is greatest for the court's more straightforward cases. We did uncover one odd relationship, however, and that is the lower satisfaction and sense of fairness reported by attorneys whose cases were referred to ADR. This may reflect that there are no clear winners in ADR as there are in cases where trial or a dispositive motion ends the case, but the finding goes against the argument that ADR provides litigants a more satisfying outcome. We should note, however, that despite each of the variations by party, track, and ADR, it is evident that the vast majority of attorneys were satisfied with the court's handling of their case and believed the court's management of their case had been fair.

Overall Effectiveness of Differentiated Case Management Program

The analyses above showed that most attorneys rated several specific DCM components as effective, but only 39% reported that the system as a whole expedited their case and only 25% said it decreased the cost of their case. Unlike these mixed ratings, when asked whether DCM is an effective system for managing cases, the great majority of the attorneys—85%—said it is (see Table 44).

Table 44
Attorney Ratings of DCM's Effectiveness as a Case Management System
Northern District of Ohio

Rating of the Effectiveness of DCM as a Case Management System	% of Respondents Who Selected Response (N=537)
It is an effective system of case management	85.0
It is not an effective system of case management	15.0

These findings appear to contradict the findings regarding DCM's overall effect on time and cost but might also suggest that the questions about DCM's effect on time and cost did not tap into what attorneys find beneficial about the system. Comments provided in the questionnaire reveal what some of these other benefits might be—that DCM helps attorneys organize the case and identify issues earlier, that it narrows discovery, and that it provides an earlier opportunity for parties to meet.[88] Interestingly, many of the attorneys also mentioned reductions in litigation time. Others noted that because DCM prompts earlier contact and earlier issue identification it leads to a shorter schedule, less discovery, or a higher likelihood of settlement. Example comments are listed below:

> "I think DCM provides an organizing framework for case development."
>
> "On the whole, it cuts down on discovery and requires the parties to identify their claims and defenses more clearly in the early stages of the litigation."
>
> "It focuses *all* judges on deadlines that move cases along."
>
> "Effectively resolves the initial breaking of the ice between parties - provides a DMZ to begin earlier resolution of the case."
>
> "It enables counsel to project costs, which often leads to a realistic settlement position sooner."

Of the 15% of attorneys who said it is not an effective case management system, many also offered comments. The comments tended to cluster around several problems, two of them already identified in the preceding analyses: the ineffectiveness of the system for social security cases, which make up the bulk of the administrative track; excessive paperwork; additional burdensome requirements; and rigid application of the system. Several respondents also suggested the system would be more effective if all judges followed the rules, while several others said a tracking system is irrelevant because the most important factor in litigating a case efficiently is the effectiveness of the judge. Example comments are presented below:

> "The differentiated case management program has no role in effectively disposing of social security disability cases - by definition they are on the administrative track and magistrate judges set their own briefing schedule. There's great variation among the judges in how long it takes to get a decision."
>
> "Overall, it's effective, but when the system overlaps with Federal Civil Rules on disclosure, the paperwork becomes too burdensome, at least sometimes."
>
> "There needs to be greater willingness to *vary* the system to suit the individual case - i.e., more flexibility."

[88] Following the question asking whether DCM was an effective case management system, we asked the attorneys to elaborate on their yes/no answer; 209 provided additional comment.

> "Adds layers of procedure which are not necessary and cause unnecessary time to be spent on non-meaningful tasks."
>
> "DCM will never be a substitute for a good, yeoman trial judge who is willing to pretry and try cases."

Further examination of the attorneys' rating of whether DCM is an effective system confirmed what earlier analyses have shown: attorneys handling cases in the administrative track were the least likely to say DCM was effective, with only two-thirds rating the system that way, compared to 97% of attorneys with expedited cases, 84% with standard cases, and 95% with complex cases. It is not surprising that fewer of those on the administrative track rated the system as effective, given the dissatisfaction already discussed above. More surprising is that, despite similar reported dissatisfactions, 95% of attorneys handling complex cases still viewed the system as a whole to be effective. Keep in mind also that although fewer administrative track attorneys found it effective, two-thirds did find it effective.

A slightly larger proportion of attorneys with no pre-DCM experience in the district rated the system as effective, compared to attorneys who had experience litigating in the district. We examined how attorneys with pre-DCM experience rated the degree of change brought by DCM and found that those who saw a change were more likely to rate DCM as effective, while those perceiving no change from past practices were more likely to say DCM was not effective. However, even with these variations, 83% of attorneys with pre-DCM experience rated the new system as effective, compared to 93% of those without such experience, indicating general positive views of the case management program.

An open-ended question asked for additional comments or suggestions. Two types of comments stood out from the 269 received. Many attorneys mentioned frustration at delays in rulings on motions and particularly dispositive motions. And many also said the system of rules and procedures matters much less than the judge who handles the case. The comments below are illustrative of these points:

> "Motions need to be resolved on a timely basis. A case management system is worthless unless decisions are rendered on a timely basis. It is not unusual to wait over one year for a ruling on a summary judgment motion."
>
> "As with anything else, the trial judge is the most important factor in case management. A good, fair, hardworking judge, who promptly resolves discovery and dispositive motions and sticks to pre-agreed deadlines and court dates is far more important than the procedures themselves."
>
> "The system is not a substitute for the interest and involvement of the judge."

Summary of Attorney Evaluations

Some overall themes are evident from the analysis of the attorney surveys. The comments above notwithstanding, on the whole the attorneys' responses echo the judges' positive comments, with 85% of the attorneys rating DCM an effective case management system.

- The majority of attorneys reported that DCM as a system had no effect on case time or cost (most of the rest reporting that its effect was to lower both). However, they identified several specific DCM and case management components as particularly helpful for moving cases along, reducing their costs, or both.

- The specific case management practices identified as most likely to reduce litigation time or cost were use of the telephone to resolve discovery disputes, the early case management conference, the scheduling order, holding trial on the scheduled date, the final pretrial conference, Rule 26(a)(1) disclosures, time limits on discovery, the joint planning report, and deadlines for motions rulings. A notable minority of attorneys did, however, find that the joint planning report and case management conference increased costs.

- Attorneys reported that very few of the court's practices slowed cases down. The one most likely to do so was referral of the case to ADR (18% of attorneys). ADR was also reported as one of the three practices most likely to increase litigation costs (30%). Attorneys reporting increased costs from ADR were those in cases marked by greater contentiousness, higher monetary stakes, and higher amounts of formal discovery. ADR appeared to be most helpful in reducing costs for cases in which there was a moderate amount of agreement, in contrast to high or low agreement, on the issues in the case.

- A noticeable minority of attorneys also reported that paperwork requirements slowed down their case and increased costs (11% and 25%, respectively). Attorneys most likely to report these effects were those in solo practice and those in cases with less discovery. In addition, attorneys with cases on the expedited and standard tracks reported a detrimental effect of paperwork on costs, while those on the complex track reported a detrimental effect on time, suggesting—along with the written comments above—that paperwork can be a burdensome factor in all types of litigation.

- While most attorneys did not say the court's deadlines for ruling on motions slowed down the case or increased its cost, few attorneys reported that these deadlines helped move a case along or reduced costs. Attorneys with substantial experience in the district were most likely to say the court's rule setting such deadlines has had little effect, suggesting the court may not be following this rule. This point is corroborated by the attorneys' written comments, many of which suggested the court rule more promptly on motions.

- Fewer than a third of the attorneys reported that limits on depositions or interrogatories reduced litigation time or cost. Most said they had no effect. Attorneys with pre-DCM experience were particularly likely to see these limits as having no effect. The discovery methods that have been most helpful, according to the attorneys, are Rule 26(a)(1)

disclosure and discovery time limits, both rated by over half of the attorneys as moving their case along.

- Attorneys' assessments of DCM and other practices often differed by the track to which the case was assigned. Generally attorneys handling complex and administrative track cases tended to be less satisfied with the timeliness and cost of their case, the case outcome, and the court's management of the case. Despite these differences, however, attorneys handling cases on the complex track still overwhelmingly rated DCM as an effective system. In contrast, attorneys handling administrative cases did not share that positive belief, suggesting that perhaps DCM is not serving these case as well as other types of cases. Written comments by attorneys who have handled these cases support this point.

Finally, a good number of attorneys echoed a concern expressed by some of the judges. One attorney, who wrote "DCM will never be a replacement for a good, yeoman trial judge," sounded very much like the judge who said, in explaining that DCM is not a panacea, "you still have to be a hardworking judge." A substantial number of comments noted that a case management system, no matter how finely designed and executed, cannot be realized without an effective judge. The questionnaire responses—e.g., the high percentage of attorneys finding DCM's key components helpful, the high percentage rating DCM overall an effective system—suggest that most judges have proven to be effective users of the system.

3. Performance of Cases on the DCM Tracks

We turn now to a different kind of assessment of DCM's effectiveness and examine whether the cases assigned to the DCM tracks are resolved within the time frames set for each track. Large numbers of cases terminating beyond track goals may signify that the judges are not maintaining the deadlines set for each case, that the track structure is irrelevant, or that the track guidelines are unrealistic. On the other hand, large numbers of cases terminating within track goals may indicate that judges and attorneys are adhering to track guidelines in most cases. Table 45 (next page) shows the levels of adherence to track goals.

Considering first the numbers in column 3, we see the median age of cases terminated on each track. Except for the administrative track cases, the median age of cases terminated on each track is generally well within the guidelines for the track. For example, the median age of cases on the standard track is twelve months, compared to the track goal of fifteen months. However, the median disposition time can be very misleading because it is based on terminated cases. Among cases still pending are likely to be the court's longest cases, which, if they were included in the analysis, would very likely raise the median disposition time.

To get a better picture of the disposition of cases on each track, consider columns 4-6 in Table 45, which are based on all cases assigned to each track, both pending and terminated cases. Column 4 shows the percentage of cases on each track that have terminated within the track goal. Overall, 41% of cases assigned to tracks have terminated within track goals. For each of the court's

non-administrative tracks, slightly more than half of the cases have terminated within the track goals, but only 15% of the administrative cases have.

Table 45
Age of Terminated Civil Cases Filed 1/1/92-7/31/96
and Percent Terminated Within and Beyond Track Goals
Northern District of Ohio

Track Name and Goal	1 No. of Cases Assigned	2 % Terminated	3 Median Age at Termination (Months)	4 % Terminated Within Track Goal[89]	5 % Pending But Within Track Goal	6 % Terminated or Pending Beyond Track Goal
Total Cases Assigned	8368	77.0	12.0	41.0	14.0	45.0
Expedited (<9 mos.)	1148	83.0	8.0	53.0	9.0	38.0
Standard (15 mos.)	4216	73.0	12.0	52.0	18.0	30.0
Complex (24 mos.)	351	64.0	14.0	51.0	23.0	27.0
Mass Tort (case-specific)	54	100.0	13.0			
Administrative (6 mos.)[90]	2599	81.0	15.0	15.0	8.0	77.0
Unassigned	8088	84.0	3.0			
< 90 days	3988	85.0	2.0			
≥ 90 days	4100	83.0	6.0			
Total Cases Filed	16,456	80.0	7.0			

Column 4 probably understates the proportion of cases terminated within track goals because some portion of the cases pending on each track will be terminated within that goal. Column 5 shows the percentage of pending cases that are still within the age guideline for each track. If all were terminated within the track goal, the percentage of cases meeting the track guidelines would increase to 55%, slightly over a majority of the cases.

[89] The denominator for this column and the two to the right is the total number of cases, pending and terminated, assigned to each track. If, for this column, we used instead only the number of cases terminated on each track, the percent terminated within track goal would be higher: Exp., 65%; Std., 72%; Comp., 80%; and Adm., 19%.

[90] Local Rule 8 sets no specific time frame for disposition of administrative track cases, but the advisory group recommended that these cases be completed within six months.

As this number suggests, and as shown in column 6, a substantial portion of the court's cases are terminating beyond the time frame set for each track—45% of cases overall, with by far the poorest performance on the administrative track, where 77% of the cases terminate or remain pending beyond the track goal.[91] Further, an analysis not shown here reveals that an additional six to eight months beyond the track goal is needed to terminate 90% of the cases on the non-administrative tracks and an additional nineteen months is needed to terminate 90% of the administrative track cases.

The findings in Table 45 parallel the results from the attorney survey, where attorneys on the administrative track were less likely to report time and cost savings from DCM. Most of the cases on this track are social security cases, which are handled much as they were before DCM, with automatic assignment at filing to a magistrate judge for a report and recommendation. We asked the judges whether the delayed termination of these cases indicates a failure of the tracking system. In their view, it does not. The problem, most noted, is that the court has a high volume of these cases, and the magistrate judges have been unable to keep up with them. In December 1995, the court declared any social security case pending for more than fifteen months a part of the "social security backlog" and instructed the magistrate judges to make a concerted effort to reduce the backlog as quickly as possible. The court's use of fifteen months as a benchmark for this effort suggests that the six month track goal recommended by the advisory group—and used in our analysis—is an unrealistic goal for this track.

The activity on the administrative track illustrates the judges' statements that DCM is not a "panacea." Tracks provide guidelines only and, while judges' and attorneys' case planning may benefit from them, the guidelines can readily be overcome by large caseloads or judicial inattention to deadlines. Tracks do not, in and of themselves, make cases terminate on time.

Aside from the administrative track cases, it is difficult, absent a standard for how many cases *should* be resolved, to say whether the court has successfully adhered to the track goals. Table 45 shows that just over a majority of non-administrative cases are resolved within track guidelines and that as many as two-thirds of them might be if all pending cases were terminated within track goals. Whether a larger proportion should meet the track goals is a policy matter for the court.

4. Caseload Indicators of DCM's Effect

In this section we turn to several measures of the condition of the caseload for a final assessment of DCM's effects. Although our interest is in DCM's effects on caseload trends, it has not been the only device available to the court for reducing disposition time. In 1992, for example, the court began to give special attention to older cases through its Pending Inventory Reduction Plan. The court has also transferred most of its asbestos cases, which constituted a large caseload, to another district under an MDL order. Further, in the early years of the demonstration program the

[91] Note that we are using as our track goal the six month time frame recommended by the advisory group. The DCM plan itself specifies no goal for this track.

court experienced a severe shortage of judicial resources but over the last two years has received its full complement of judges. Each of these has had its own effect on the court's caseload.

Because of the differences in management of the administrative and non-administrative cases, these two caseloads are examined separately in this analysis. Looking at the non-administrative—or general civil—cases first, Figure 3 shows several caseload trends for these cases for fiscal years 1988 to 1995. The vertical line marks the beginning of the demonstration program. At the close of FY95, the court's median disposition time for its civil caseload was about nine months, and 70% of the civil cases were disposed of in about fifteen months.

The most notable feature in the graph is the fact that more cases were terminated than were filed during FY88-92. Consequently, the number of pending cases and the age of the pending caseload both fell. The rise of the mean age at disposition during FY88-91 suggests that the cases being terminated were the court's older cases. Subsequently, both the median and mean ages at disposition began to go down, as many of the older cases moved out of the system and filings began to rise, leaving a pool of younger cases available for decision. Today the mean age of the pending caseload is about 420 days, compared to about 650 days six years ago.[92]

In FY93, Figure 3 shows, terminations began to fall, the number of pending cases began to rise, filings began to go up, and subsequently the age of pending and terminated cases also began to rise. These trends probably reflect the shortage of judges in 1993 and 1994.

Overall, the graph for the court's general civil caseload shows a notable improvement in the condition of the caseload. While it might be tempting to attribute this improvement to the demonstration program, the graph shows clearly that the improving trend began well before the demonstration program was implemented and, in fact, seems to have ended in FY93—probably because of the vacancies. The disposition of the court's older cases in FY89-92 is the key factor in the improved caseload measures seen in Figure 3, dispositions that may be due to the CJRA's reporting requirements, the transfer of asbestos cases, or some other factor.

As might be expected from the earlier examination of the performance of cases on each track, the condition of the court's administrative caseload is not faring as well is its non-administrative caseload. Figure 4 shows that during the same time period when the court was disposing of its older non-administrative cases, it also disposed of older administrative cases, resulting in a rise of median disposition time and a fall in the mean age of the pending cases. However, in 1993 terminations dropped off while filings continued to go up, resulting in a rise in the number and age of pending cases (perhaps due to the magistrate judges shifting attention to non-administrative cases to pick up the slack left by the large number of vacancies). In the past year terminations have again caught up with filings; if this trend continues, improvements in the administrative caseload may again be seen.

[92] The number of cases pending for more than three years has also fallen substantially, from 6-8% in the 1980s to 2% in FY95.

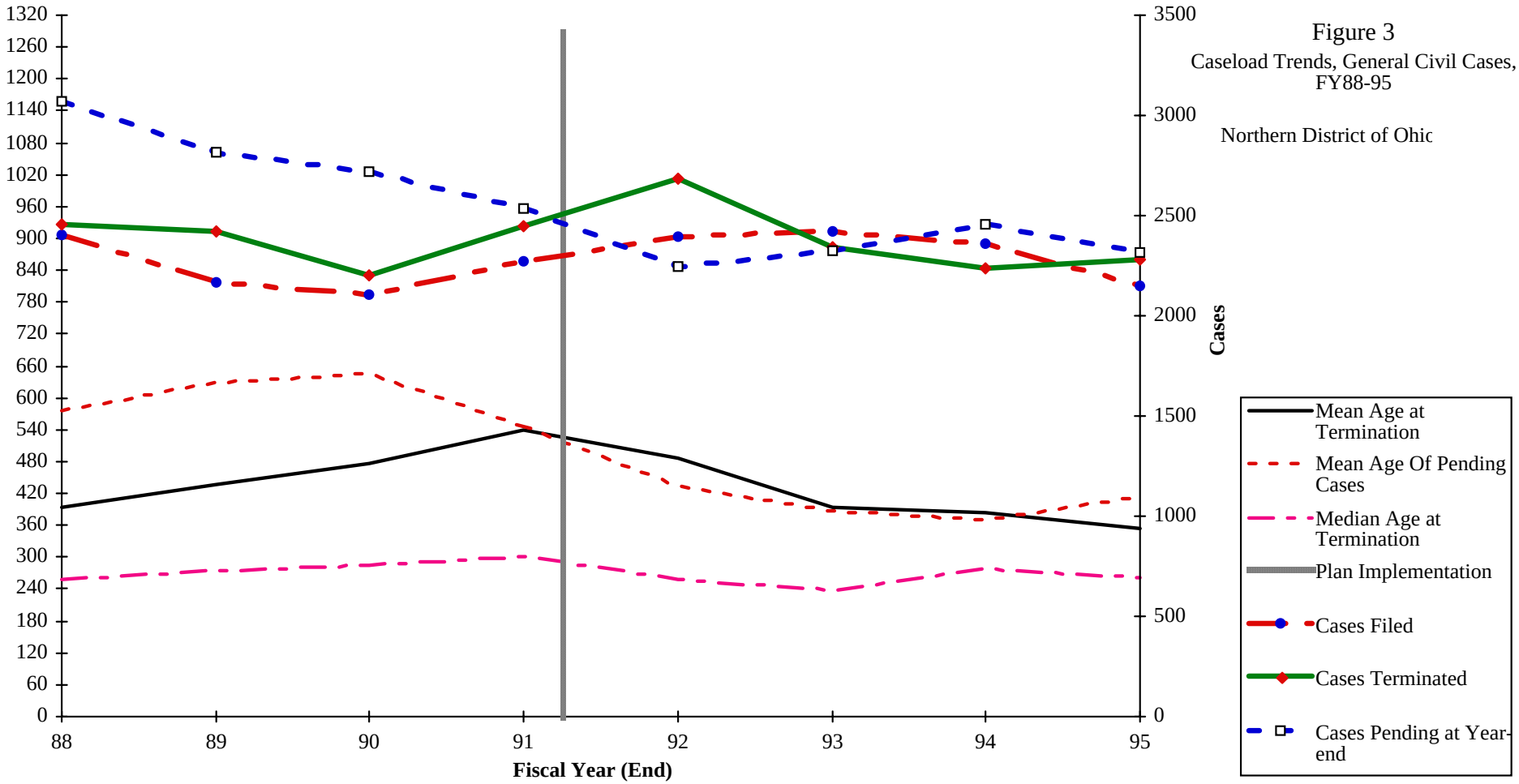


Figure 3

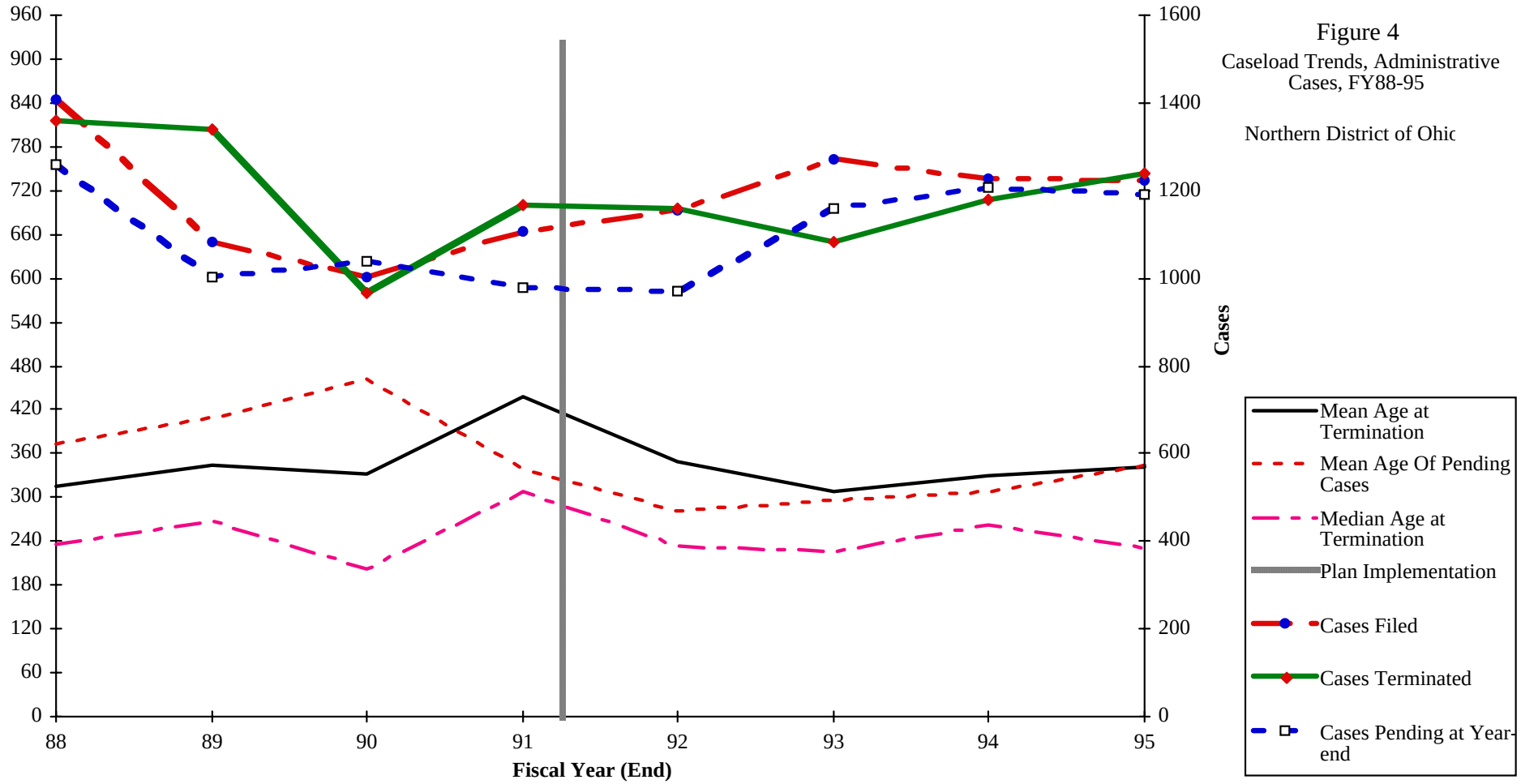
Caseload Trends, General Civil Cases, FY88-95

Northern District of Ohic

Figure 4

Caseload Trends, Administrative Cases, FY88-95

Northern District of Ohic



Because overall disposition trends may obscure shifts in the underlying distribution of case dispositions, Table 46 examines whether there has been a change in the proportion of pre-DCM and post-DCM cases terminated in certain time intervals.[93] The table shows that there has been some change, but it appears to be primarily a shift of dispositions from the seven-to-twelve month intervals into the thirteen-to-eighteen month intervals—in other words, a shift to slightly longer disposition times after implementation of DCM. Again, we must take care in attributing any causal effect to DCM, since vacancies may have played a role in slowing down dispositions.

Table 46
Percent of Cases Terminated by Time Intervals, Pre-DCM and Post-DCM
Northern District of Ohio

Months to Disposition	Pre-DCM	Post-DCM
0-3	32.0	33.0
4-6	20.0	19.0
7-9	14.0	12.0
10-12	12.0	10.0
13-15	8.0	10.0
16-18	5.0	6.0
19-24	6.0	6.0
25-36	4.0	4.0
37+	1.0	0.3
No. of Cases	10,022	10,657

This analysis of the caseload data reveals that the court realized substantial improvements in key caseload measures before and in the early years of the demonstration program, improvements that can be attributed to disposition of older cases. Subsequently, the court was able for the most part to maintain its improved condition, despite numerous vacancies. The initial improvements very likely were due to the CJRA reporting requirements, to the court's effort, through its Pending Inventory Reduction Plan, to reduce the number of older cases, and to the greater amount of time available to judges after the MDL transfer of thousands of asbestos cases. To what extent the DCM program has permitted the court to maintain its improved condition, we cannot say, since other factors, such as the continuing CJRA reporting requirements, may also have played a role.

[93] The analysis includes all civil cases, both general civil and administrative cases. The pre-DCM period includes cases filed between 1/1/88 and 12/31/91 and terminated before 12/31/91. The post-DCM period includes cases filed between 1/1/92 and 12/31/95 and terminated before 12/31/95.

If DCM has had a positive effect, it is clearly limited to the general civil caseload. As revealed by the attorney questionnaire responses, the analysis of adherence to track time frames, and the analysis of caseload data, DCM has not so far proven to be an effective case management approach for the administrative cases. As noted earlier, the court has called for additional effort from the magistrate judges to decide these cases. Whatever the court did for the non-administrative cases in 1989-1991 seems called for today for the administrative cases.

Chapter III

The Northern District of California's Case Management Pilot Program

This chapter discusses one of the programs implemented by the Northern District of California in fulfillment of its responsibilities as a demonstration district under the Civil Justice Reform Act of 1990. The court adopted two programs, one for case management in 1992 and one for ADR in 1993. The ADR program is discussed in Chapter IV.

In addition to an examination of the case management program's effect on litigation time and cost, we also attempt to assess its success in achieving other goals the court had in mind when it adopted the program, in particular its goal of streamlining litigation through adoption of mandatory disclosure.

Following the format of previous chapters, section A presents our conclusions about the court's implementation of its case management program and the impact of that program. Sections B and C provide the detailed documentation that supports the conclusions: section B gives a short profile of the district and its caseload, describes the court's case management program, discusses the process by which the court designed and set up that program, and examines how the court has applied the case management rules; section C summarizes our findings about the program's effects, looking first at the judges' experience with the program, then at its impact on attorneys, and finally at its effect on the court's caseload.

A. Conclusions About the Case Management Program in This District

Set out below are several questions related to the goals set out by the Civil Justice Reform Act and the judges and attorneys in the Northern District of California, along with answers based on findings from our study. Many of the findings summarized below are based on interviews with judges and surveys of attorneys and reflect their subjective views of the program's effects. The same caution applies as in previous chapters: While important, the judges' and attorneys' views should not be taken as conclusive evidence of the program's actual impact.

How great a change from previous practices was the case management program?

The Northern District of California has long been known as a court willing to experiment with innovative case management and ADR practices. A number of judges said their case management practices had not changed much with adoption of the program. Attorneys who had pre-program experience in the court generally did think practices had changed to at least some extent, and a sizable proportion thought practices had changed substantially. This difference in perceptions is consistent with the observation of some judges that the program has greater effects on attorneys (e.g., through the meet-and-confer and initial disclosure requirements) than on judges.

Has the case management program reduced disposition time in civil cases?

Caseload data do not reveal a clear lowering of disposition times during the demonstration period, although it does appear that the longest cases are being terminated more quickly and that a portion of the caseload is now being disposed of at a very early age. The lack of an effect on disposition time is not unexpected given that the district began the demonstration period with a below-average median disposition time compared to national figures. In fact, the district's disposition time has been very stable over the past decade, and caseload data reveal that the court has essentially kept up with its workload throughout that period.

Attorneys generally perceived that the program as a whole either reduced or had no effect on disposition time. In rating individual components of the case management program, about two-thirds of attorneys (59%-66%) indicated that the meet-and-confer session, case management statement, case management conference, case management order, and initial disclosures helped to move the case along. Around half of the attorneys also identified the judge's handling of motions and the court's ADR requirements as helpful in moving their case along. Attorneys in cases of medium complexity and attorneys whose cases were referred to ADR most frequently believed that the program reduced disposition time.

Has the case management program reduced litigation costs?

As with the program's effect on disposition time, attorneys generally believed that the case management program as a whole either reduced or had no effect on litigation costs in specific cases, though a sizable minority (20%) said it increased costs. Individual case management components most likely to help reduce costs (40-43% of the attorneys saying so) were initial disclosure, the attorneys' meet and confer session, the initial case management conference, the judges' handling of motions, the attorneys' joint case management statement, postponing discovery until disclosures are made, and the court's ADR requirements. There was some suggestion from the judge interviews and the attorney survey results that the program might increase costs in smaller, less complex cases or in cases that terminate very early. Attorneys in cases of medium complexity and attorneys whose cases were referred to ADR most frequently reported that the program reduced litigation costs.

What was the court's experience with disclosure?

Because the Northern District was one of the first federal courts to require disclosure of information in the absence of discovery requests—adopting this requirement before the federal rule was adopted—the court's experiences with this procedure are noteworthy. According to a number of judges, attorneys had been quite concerned about the disclosure requirements at the time the program was implemented, but their fears about disclosure generally have not been borne out. The attorney survey results revealed that attorneys whose cases involved high levels of disclosure were more likely to think the case management program reduced time and costs and to think the program was an effective case management system than attorneys whose cases had little or no disclosure. Although there appear to be some problems in implementing disclosure, the court's overall experience with disclosure—from both judge and attorney viewpoints—appears to be favorable.

The problems mentioned are of two types. In some cases, according to the attorney surveys, attorneys do not trust each other to produce the required information and are not forthcoming. Because the judges generally do not closely monitor compliance, they are unaware of the problems some attorneys are having. In such instances, closer monitoring would help, these attorneys said.

Second, some cases find postponement of discovery problematic. It appears that a mechanism is needed—in particular, access to a judge—to expedite discovery in cases where necessary information is not being obtained through disclosure or where little discovery information is needed and a party wants to move ahead before the initial case management conference.

Are some case management practices more effective than others?

There appears to be a constellation of case management procedures that are thought helpful in moving cases along and in reducing their cost. Both judges and attorneys identified as particularly helpful the early case management conference; the attorneys' meet and confer session and joint case management statement; and initial disclosure. Also helpful in many cases, according to the attorneys, were the case management order, the judges' handling of motions, and ADR.

At the same time, several of the practices identified as reducing time and cost were seen by substantial minorities of attorneys as increasing costs: the attorney meet and confer session and joint statement; the judges' handling of motions; and the court's ADR requirements. There is some indication that the first two of these requirements unduly increase costs for small cases or those that are likely to terminate early. The split rating on ADR suggests the importance of identifying the appropriate cases for these procedures.

The judges' handling of motions was also reported by a substantial minority of attorneys as slowing their case down. Considering both its positive and negative effects on cost, it is clear that the court's practices regarding motions are an important factor in the progress of a case. The practice perceived as most likely to cause delay was postponement of discovery until after disclosures have been made, but this did not have a similar effect on cost. Most likely to increase costs, according to the attorneys, are the court's paperwork requirements.

Does the case management program work better for some types of cases than for others?

Attorneys in cases that were "medium" in complexity evaluated the program more favorably than did attorneys in low- or high-complexity cases, and written comments from attorneys supported the assertion that the program is most effective in standard cases. Attorneys whose cases were referred to ADR were also more likely to report that the case management program moved the case along and reduced costs than were attorneys in cases not referred to ADR and were less likely to say the program had no effect on cost and time. This lends support to the point made by some of the judges that ADR and case management are most effective in combination with each other.

B. Description of the Court and Its Demonstration Program

Section B describes the demonstration program adopted by the Northern District of California in July 1992. An initial brief profile of the court's judicial resources and caseload provides context

for the discussion that follows, which describes in detail the steps taken by the court to design, implement, and apply its case management program.

1. Profile of the Court

Several features of this district are noteworthy for our understanding of the implementation and effects of the court's demonstration program: the existence of at least one vacant judgeship throughout the demonstration period; the relatively low number of criminal cases filed in the district; the relatively low time to disposition in civil cases even before the demonstration program was implemented; and the low trial rate in the court compared to the national average.

Location and Judicial Resources

The Northern District of California is a large, urban court, headquartered in San Francisco and with divisional offices in San Jose and Oakland. The court has fourteen judgeships and eight full-time magistrate judge positions, one of which was created in November 1995. Two of the district judgeships were added in 1991, and throughout the demonstration period there has always been at least one vacant judgeship. In addition, one of the court's active judges did not carry a full caseload. The contribution from senior judges during the demonstration period totaled approximately one-and-a-half to two active judge caseloads per year.

Size and Nature of the Caseload

Table 47 (next page) shows the trend in filings during the years just before and during the court's demonstration program. After an increase in case filings in FY92, which was accounted for completely by an increase in civil case filings, the total number of both overall filings and civil case filings has decreased during the demonstration period, while still remaining above earlier levels. The measure of weighted filings per judgeship, which was below the national average in 1991 and 1992, climbed above the national average in 1993 and 1994. In 1995, the court was ranked 40th out of 94 judicial districts in the number of weighted filings per judgeship.

Relative to other federal district courts, California Northern does not have a high rate of criminal filings per judgeship. The advisory group concluded in its 1991 report that "the criminal docket in the Northern District does not appear to pose, at present, a significant problem with respect to the efficient litigation of civil actions."[94] In 1995, the district ranked 78th out of 94 districts for the number of criminal felony filings per judgeship.

[94] 1991 Report of the Advisory Group of the United States District Court for the Northern District of California , p. 16.

Table 47
Cases Filed in the Northern District of California, FY91-95[95]

Fiscal Year	Cases Filed			Filings Per Judgeship	
	Total	Civil	Criminal	Actual	Weighted
1991	5563	5166	397	397	352
1992	6457	6062	395	461	368
1993	6100	5656	444	436	431
1994	5913	5516	397	422	438
1995	5666	5223	443	405	424

As Table 48 shows, the Northern District of California has had an extremely low rate of trials per judgeship throughout the demonstration period. For 1995, the most recent year for which statistics are available, the district ranks 90th out of 94 districts on this measure. Throughout the time period covered by the table, the Northern District has had an active alternative dispute resolution program; the available statistics, however, do not permit evaluation of whether there is a causal relationship between the low number of trials and the existence of ADR in the court.[96]

Table 48
Trials Completed per Judgeship, FY91-95[97]

Fiscal Year	California Northern	National
1991	12	31
1992	16	32
1993	16	30
1994	14	27
1995	14	27

[95] Source: 1995 Federal Court Management Statistics. The statistical year ends on September 30.

[96] The advisory group noted in its report that anecdotal evidence suggested that the relatively low number of trials per active judgeship may be due in part to the success of the court's ADR programs (*supra*, note 94, p. 15). It, too, however, did not have data available to test this hypothesis. Court statistics do show that the number of trials as a percentage of the national average has gone down since the Early Neutral Evaluation (ENE) program was implemented on a permanent basis in 1988: from 1980 through 1987, the number of trials per judgeship per year in California Northern ranged from 53-79% of the national average number of trials, whereas between 1988 and 1995 the annual number of trials per judgeship ranged from 39-53% of the national average. Source: Federal Court Management Statistics.

[97] Source: 1995 Federal Court Management Statistics.

Within the Northern District of California there is one federal prison and three California state prisons.[98] When the CJRA advisory group prepared its report to the court in 1991, it noted that prisoner petitions had increased by over 40% between 1986 and 1990.[99] Prisoner petitions now make up the single largest case type filed in the district (24.0 % of civil cases filed in 1995, similar to the proportion nationally). In 1995, the principal civil case type categories in the Northern District were as follows:

Table 49
Principal Types of Civil Cases Filed, FY95[100]
Northern District of California

Case Type	Percent of Civil Filings
Prisoner Petitions	24.0
Civil Rights	17.0
Contracts	13.0
All Other Civil	12.0
Labor Suits	10.0

The percentages of the court's cases that are civil rights and contracts cases are slightly higher than the national figures. The court has a substantially smaller proportion of tort cases than the national average and a higher proportion of labor suits.

Time to Disposition in Civil Cases

The advisory group noted in its report that in FY91 the median time from filing to disposition for civil cases in the district was eight months, as it had been since 1988.[101] The national figure for civil time to disposition in FY91 was ten months.[102] In 1993-1995, the median disposition time for civil cases in California Northern dropped to seven months, compared to a national figure of eight months. In 1995, the district ranked twelfth out of 94 districts for time to disposition in civil cases.[103]

In the following discussions of the design and impact of the court's demonstration program, keep in mind the principal features of the court outlined above. For example, because the court

[98] *Supra* note 94, p. 54-55.

[99] *Id*, p. 53.

[100] Source: Federal Court Management Statistics, 1995.

[101] *Supra* note 94, p. 16.

[102] Source: Federal Court Management Statistics, 1995.

[103] *Id.*

began the demonstration period with an already low median time to disposition for civil cases, any beneficial effects of the court's case management innovations may have a less drastic impact on disposition time than they might in a court with a higher disposition time.

2. Designing the Case Management Program: Purpose and Issues

According to General Order 34, by which the Case Management Pilot Program was implemented originally, the program was designed to "enable parties to civil litigation who are proceeding in good faith to resolve their disputes sooner and less expensively" by addressing three problems: 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.

Our interviews revealed wide agreement among advisory group members and judicial officers about the main purpose of the case management pilot program.[104] It was designed, most respondents said, to encourage earlier attention to cases by judges and attorneys so core issues are identified at the outset and future events rationally planned, leading to earlier and more cost-effective case resolution. Early identification of issues and problems would, as one judge said, either "clear the path to settlement" or, if settlement was not likely, permit planning for discovery. Thus, several respondents also identified as program goals eliminating unnecessary discovery and reducing discovery disputes. Another purpose, according to several respondents, is to demonstrate to other courts the effects of these case management methods, in accordance with the court's responsibilities under the CJRA. A number of judges and advisory group members said they recognized, however, that because so many changes occurred at one time in the court, it would be difficult to determine the effects of the pilot programs.

The court wanted the initial design of the demonstration program to come from the attorneys and chose not to be directly involved in the development of the advisory group's plan. The judges did, however, provide input to the advisory group through interviews and surveys.

Two key components of the court's demonstration program—disclosure and a uniform case management program—arose from advisory group deliberations. The group was prompted by concerns about the cost of discovery, a trend toward less professional behavior by attorneys, and an awareness of the pending national changes involving disclosure. They were eager to experiment with disclosure and also believed that benefits could be realized by a greater emphasis on early judge and attorney involvement in each case. Several advisory group members and judges said that many of the ideas proposed and discussed by the group originated with Judge William Schwarzer, Judge Robert Peckham, and Magistrate Judge Wayne Brazil—all of whom are nationally known for their innovative ideas about ADR and case management. In addition, the advisory group recognized that the court's culture provides a receptive environment for experimentation, since the court has a long history of active case management and of bar cooperation with the court. These considerations came together in the case management program recommended by the advisory group.

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[104] For a description of our research and data collection process, see Appendix A.

The program recommended by the advisory group was more far-reaching than the one ultimately adopted by the court and included such features as disclosure of adverse as well as supporting information, party attendance at the case management conference, a number of provisions regarding motion practice, and a more detailed case management conference. When the proposal was considered by the court, some judges found it too complicated and flawed by internal inconsistencies in the relationship between discovery and case management. Although there were questions about both the disclosure and case management provisions of the plan, disclosure—and in particular disclosure of adverse material—prompted the greatest concern.

To address the issues raised, the court appointed a committee of judges and advisory group members to revise the advisory group's proposed plan. As one court staff member said, this committee "provided a reality check on what judges would accept." Judge Brazil led the revision efforts, and the court ultimately adopted a case management program that, while not including all of the provisions proposed by the advisory group, did include forms of both disclosure and early judge and attorney involvement in case planning.

3. Description of the Case Management Pilot Program

The case management program, which became effective July 1, 1992 for cases filed on or after that date, was adopted originally through General Order 34 and was designated a "pilot" program.[105] Subsequently, the provisions of General Order 34 were incorporated, with modifications, in new local rules that became effective September 1, 1995.[106] The case management program applies to most categories of civil cases, although some of its requirements, including disclosure, do not extend to bankruptcy appeals; review of administrative cases; prisoner civil rights and habeas corpus cases; student loan and other debt collection cases; actions filed by a pro se plaintiff; actions to enforce or register judgments; cases reinstated, reopened, or remanded from appellate courts; actions for forfeiture or statutory penalty; condemnation actions; federal tax suits; actions to enforce or quash a summons or subpoena; and bankruptcy actions in which the reference to the bankruptcy court has been withdrawn.

At the time an eligible civil case is filed, the clerk issues a case management schedule setting deadlines for various events, including service, a meet-and-confer session, initial disclosures, filing of ADR certification, filing of case management statement, and the case management conference. Plaintiff is required to serve a copy of this schedule on each defendant (L.R. 16-2).

Early Service Dates

General Order 34 required service on each defendant within forty days after the complaint was filed. In addition to the summons and complaint, plaintiff was required to serve a copy of General Order 34, the Order Re Court Procedures, and a booklet describing alternative dispute resolution

[105] Pursuant to the Civil Justice Reform Act (28 U.S.C. § 474), the court's plan was reviewed and approved by the Judicial Conference and a committee of judges in the Ninth Circuit.

[106] During the period of this study, the requirements of General Order 34 applied.

processes in the district. Local Rule 4-2 now provides that within forty-five days of filing the complaint, the plaintiff must either file a waiver of service or a certification of service of process on at least one named defendant.

Attorneys' Meet and Confer Session and Joint Case Management Statement

General Order 34 required that, within 100 days after the complaint was filed, lead counsel meet in person (unless separated by more than 100 miles, in which case they could meet by telephone) to discuss a number of matters, including: 1) identification of the principal factual and legal issues; 2) whether the case is appropriate for settlement or alternative dispute resolution; 3) whether the parties consent to trial by a magistrate judge; 4) whether additional disclosures beyond those required by the program should be made and when; 5) identification of motions whose resolution will have a significant effect on the litigation; 6) a plan for discovery, including limitations on discovery tools; and 7) scheduling of other aspects of the case.

When General Order 34 was incorporated into the local rules, the timing of the meet and confer was changed. Under Local Rule 16-4, lead trial counsel are now required to meet and confer within ninety days after the initial filing unless otherwise ordered, and are to discuss a plan for discovery (Fed. R. Civ. P. 26(f)); initial disclosure (L.R. 16-5); ADR Certification (L.R. 16-6); and the case management statement and proposed order (L.R. 16-7 and 16-8). Based on agreements reached in this meeting, counsel are to prepare and file a joint case management statement and proposed order setting forth their agreements and suggestions for management and scheduling of the case. This statement is to be filed no later than the date specified in the case management schedule issued by the clerk. If preparation of a joint statement will cause "undue hardship," parties may serve and file separate statements, along with a statement describing the undue hardship (L.R. 16-7).

Disclosure

Under General Order 34, within ninety days after a complaint was filed in a case subject to the program, each party was required to disclose to every other party who had been served in the action: 1) names and addresses of people known to have discoverable information about the facts of the case; 2) unprivileged documents in the party's custody that supported the position the disclosing party would take in the case; 3) copies of relevant insurance agreements; 4) claimant's computation of any damages likely to be sought; and 5) unprivileged documents and other evidence in a party's custody that related to damages (except punitive damages). Parties had a continuing duty to supplement these disclosures.

In September 1995 the Northern District adopted the provisions of amended Fed. R. Civ. P. 26(a)(1) regarding initial disclosure, which require a party to provide to other parties 1) names, addresses, and telephone numbers of people likely to have discoverable information about disputed facts in the case; 2) a copy or description of documents and other tangible items in the party's possession or control that are relevant to disputed facts; 3) a computation of any damages sought; and 4) relevant insurance agreements. In addition to satisfying Rule 26(a)(1), parties must, within ten days after the meet-and-confer session "actually produce to all other parties all of the unprivileged documents which are then reasonably available and which tend to support the positions

that the disclosing party has taken or is reasonably likely to take in the case" (L.R. 16-5(b)). Under the new rule, parties must disclose both adverse and favorable material and must produce actual documents, not just a list of documents.

Stay of Formal Discovery

When General Order 34 was implemented in July 1992, it provided that formal discovery be stayed, absent a stipulation of all parties or on written order of the court, until after the initial case management conference. When General Order 34 was revised in December 1993, this provision was amended to provide that discovery be suspended (absent stipulation or court order) until after initial disclosures had been made and the meet-and-confer session had taken place. The local rules now provide that discovery be suspended (absent stipulation or court order) only until after the meet and confer session has taken place (Local Rule 16-3), thus apparently allowing some discovery before initial disclosures have been made.

Initial Case Management Conference

The initial Case Management Conference, which is to be attended by lead trial counsel for each party, is conducted within 120 days of the filing of the complaint or on the first available date on the judge's calendar after that time. The district judge assigned to the case may delegate this conference and other pretrial proceedings to a magistrate judge. At the conference, counsel and the judge discuss the issues addressed in the case management statement and schedule the remainder of the case. Under General Order 34, the judge was required to enter a case management order no more than ten calendar days after the initial case management conference; in contrast, Local Rule 16-8 states that the judge "may enter a case management order or sign the joint case management statement and proposed order submitted by the parties" and specifies no time limit.

Under General Order 34, parties were prohibited from modifying the case management schedule except upon "written order of a judge ... following a timely showing that the interests of justice clearly would be harmed if the provisions in question were not modified or vacated."

This prohibition has been softened somewhat in the new local rules. Under Local Rule 16-2(e), a party may seek relief from the case management schedule by filing an expedited motion with the assigned judge that 1) describes the circumstances supporting the request; 2) indicates whether other parties join or object to the request for relief; 3) is accompanied by a proposed revised case management schedule; and 4) if applicable, indicates any changes required in the ADR program or schedule in the case. Parties may not stipulate to a schedule that varies the date of hearings or conferences with the judge unless such stipulation is approved by the judge (Local Rule 16-2(f)).

Coordination of Case Management and ADR Schedules

Local Rule 16-2(d) provides that "Unless otherwise ordered by the assigned judge, parties shall simultaneously proceed according to the initial case management schedule issued by the clerk and any schedule set by the court concerning ADR. All requirements set by the ADR Local Rules for such a case shall apply unless relief is otherwise granted pursuant to those local rules."

Table 50 summarizes the schedule under Local Rule 16 for major case management events.

Table 50
Time Line for Case Management Events
Northern District of California

Event	To be scheduled on or before the following number of days after initial filing in the court.
Service on at least one named defendant	Day 45
Lead trial counsel meet and confer	Day 90
Parties make initial disclosures	Day 100
Parties file ADR certification	Day 110
Parties file case management statement	Day 110
Case management conference	Day 120

4. Implementation of the Case Management Pilot Program

After the scope and content of the case management program were agreed upon, the advisory group assisted the court in drafting the General Order to implement the program and the accompanying forms. Several new forms were designed, including a new Joint Case Management Statement and Proposed Order (see Appendix D).

To provide administrative support for implementation of the Case Management Pilot Program, the court hired a Case Management Pilot Coordinator who worked with the court to familiarize judges, the bar, and parties with the new case management techniques. She also monitored the early experience with cases under the program, including the application in individual cases of the deadlines specified by General Order 34, and provided a report to the court evaluating early experience with the case management program.[107] Finally, she answered many questions about the program that arose from attorneys shortly after the program was implemented.

In the clerk's office, implementation of the case management program meant training the intake and docketing staff about the new forms and procedures, including new docket entries in the automated docketing system (ICMS).

Although some changes in procedures were required of staff and judges, the majority of judges said the change had not been very difficult, with several pointing out that the program was, as one judge said, "not much different from what most judges were already doing with standing orders."

[107] Preliminary Study of the Case Management Pilot Program in the District Court for the Northern District of California, October 1993.

Several judges also noted that the response among judges varied, with some, especially senior judges, more resistant to changing over to the new program. One judge also indicated that the court's adoption of disclosure was vigorously debated and that the court came "very close to not doing it." However, as one judge pointed out, "a large number of judges wanted to make [the new case management program] work" and therefore the court had the "critical mass of participants" it needed to make the transition to the program successful.

Budget

According to the clerk of court, the portion of the court's budget that has been used to support the case management program is somewhat difficult to quantify. The major expense at the beginning of the program was the salary for the Case Management Pilot Coordinator, who was employed from July 1992 through December 1993 at an annual salary of $63,196.00. The court also retained a consultant, for a total cost of $22,950.00, to design a monitoring and evaluation system for the case management program. In addition, the court has spent approximately $2,740 per year over the last several years to make copies of the general orders and local rules implementing the case management and ADR programs, the CJRA Plan, CJRA Annual Assessments, and ADR training materials. Finally, the four staff members in the ADR Office—whose positions were created as a result of the CJRA—provide case management support as well as ADR support for judges and counsel, so some portion of their salaries, equipment, and work space is used to support the case management program.[108] The funds for these expenditures were obtained under the CJRA.

5. Application of the Case Management Rules

Judges report that attorneys generally comply with case management requirements, with compliance greater in some areas than in others. Judges also adhere closely to the rules, although, as discussed below, they do not always send out case management orders after the initial case management conference.

Most of the judges said that attorneys comply with the meet-and-confer requirement the vast majority of the time, while two judges acknowledged they did not know if this requirement was being met routinely. One judge indicated that "I really crack down when they don't comply" and said the court as a whole had agreed when the program started to enforce its requirements because "if we didn't take it seriously, the bar wouldn't."

[108] The positions include the Director of ADR Programs (CL 32; $75,516-$98,191); the Deputy Director of ADR Programs (CL 30; $64,200-$83,461); the Administrative Assistant to the ADR Programs (CL 25; $31,505-$40,960); and an ADR Case Systems Administrator (CL 25; $31,505-$40,960). Each of these staff members has a computer, and the court purchased a fax machine for the ADR Office, with the cost of all of this equipment totaling approximately $7,000. Existing space has been used to accommodate the ADR staff. Letter from R. Wieking to D. Stienstra, September 30, 1996, on file at the Federal Judicial Center.

According to the judges, attorneys routinely submit the case management statements required by program. Three judges noted that attorneys will occasionally submit separate statements rather than a joint case management statement or, as one judge said, "a skimpy joint one and voluminous separate ones." Another judge pointed out that when the attorneys file separate statements, "You know you have to roll up your sleeves."

All of the judges said they hold case management conferences in all eligible civil cases, with minor exceptions. Exceptions cited were: cases excluded under the program; *pro se* or prisoner cases (although a number of judges do hold these conferences in *pro se* cases); and the rare situations where parties have stipulated to or asked for a continuance of the conference. Most judges hold the conferences in person rather than over the telephone, and their practices vary as to whether the conference is held on the record. Finally, most judges do not require clients to attend the case management conference.

Most, but not all, judges said they send out a case management order in all cases after the case management conference. Some judges ask the attorneys to prepare a draft order based on the discussion at the conference, and some work from the case management statement to prepare the order. One judge said s/he tells attorneys during the conference how they should modify the case management statement to reflect decisions made at the conference and does not send out a separate order after the conference. Virtually all judges said they do not monitor compliance with the order proactively; instead, they assume that parties will police the order themselves and will report to the judge if another party is not complying. As one judge said, "I presume someone wants to keep the case moving." In addition, some cases have further status conferences at which judges can determine if deadlines have been met.

Virtually all the judges said that parties are generally complying with the initial disclosure requirements of the case management program; as one judge said, there are "very few instances of failure to disclose." A few judges expressed surprise at the level of compliance. One judge said s/he thinks the reason disclosure appears to be working well is because "we've brought them in in stages—under General Order 34, they only had to disclose *supportive* information; then, we opted into Federal Rule 26(a)(1). Three years of getting them used to it was a smart way to do it."

Judges were less certain about the degree of compliance with the requirements for expert disclosures and expert reports. Although they generally report that parties are complying with the requirement to make expert disclosures and to file expert reports, several judges mentioned that parties sometimes stipulate not to do expert reports because these reports are expensive to prepare. One judge said, "In a low-budget case, I'll get the parties to stipulate to less than what Rule 26(a)(2) requires; I give them an escape valve, because it can be costly." A couple of judges mentioned that it is risky for parties not to file the report because nonfiling can preclude the expert from testifying at trial.

Referral of Matters to Magistrate Judges

Most of the judges handle the pretrial procedures specified by the case management system themselves and do not refer these matters, other than discovery disputes, to the magistrate judges.

Magistrate judges do, however, perform pretrial case management functions in cases that are assigned to them upon consent of the parties. On March 1, 1996, the court added San Francisco magistrate judges to the civil case draw, with presumptive handling of a proportion of civil cases by magistrate judges unless parties affirmatively request to have a case assigned to a district judge. Most of the judges said this change would have a far more profound effect on magistrate judges' role in civil cases than did the case management program.

C. The Impact of the Court's Case Management Program

In the following discussion of the case management program's impact, we first discuss the judges' experience with the program and their assessment of its effects, then turn to the views of attorneys who have litigated cases in this court, and finally discuss its impact on the condition of the court's caseload.

Our findings can be summarized briefly as follows:

- Most judges are generally positive about the case management program, although for several of them the program did not mean a great change in their case management practices. Features of the program that judges cited as critical were early attorney preparation; the case management conference; and initial disclosures.
- Attorneys generally think the case management program is effective and that it either reduces or has no effect on litigation time and costs. They were generally less likely to think the program had a beneficial effect on costs than on litigation time. Case management components rated as most beneficial include the attorneys' meet-and-confer session, initial disclosures, the attorneys' case management statement, the case management conference, and the case management order. Two of these same requirements, however—the meet-and-confer session and the case management statement—were rated as increasing costs by a substantial minority of attorneys.
- Attorneys who provided the most favorable ratings of the program include those who did not have experience in the court prior to the case management program; whose cases had a high amount of disclosure; whose cases were of medium complexity; and whose cases were referred to ADR.
- Caseload data do not show a significant drop in disposition time for civil cases, although this is not surprising in a court that began the program with below-average median time to disposition. It does appear that older cases are being terminated more quickly, but it is not clear whether this is attributable to the program. There is no indication that the program increases time to disposition in cases subject to it.

The remainder of Section C discusses these and related findings in more detail, including subtleties that cannot be captured in a brief summary of results.

1. Judges' Evaluation of the Case Management Program

Benefits of the Case Management Program

As discussed earlier, the purposes of the case management program include encouraging earlier attention to cases by judges and attorneys, thereby reducing cost and time to disposition; eliminating unnecessary discovery and reducing discovery disputes; and demonstrating these case management principles to other courts.

In the spring of 1996, when asked whether the program was achieving its goals, almost all judges said it was, although many of them qualified their responses in one way or another—for example, by saying the program was successful "in some ways" or that it was "probably" working. Two judges said they did not know whether the program had achieved its goals, with one asserting that "it will take years to figure this out."

Benefits for Cases

Discovery. The majority of judges said they thought there had been a decline in discovery disputes since the case management program began, though several acknowledged that they couldn't be sure this was attributable to the case management program as a whole or to particular aspects of the program (e.g., disclosure). Estimates of the extent to which discovery disputes had declined varied—from "maybe a few less early discovery disputes" to "the program has substantially cut down on discovery disputes." Several other judges, however, said they had seen no change in the frequency or nature of discovery disputes (as one judge said, "the cases that fight will always fight"), and the remaining judges said they could not tell if there was a difference.

Motion Practice. Over half of the judges said they had seen some positive change in motion practice since the beginning of the case management pilot program, but most did not think there was a major difference. Two judges mentioned that motions are more scheduled now, rather than just occurring when attorneys decide to file them. Several judges said that any change was in the timing of motions, rather than their nature or frequency, although they expressed different opinions about how the timing had changed. For example, one said "the initial conference can help forestall motions," while others thought the program prompted earlier motions. Some judges thought the early requirements of the case management program ultimately resulted in fewer "reflexive" 12(b)(6) and summary judgment motions. Finally, two judges said they thought the case management program was harmful to motion practice, noting that "parties file dispositive motions in every case—I think the [program] rules have hurt it."

Setting of Trial Dates. About half of the judges said the case management program had no effect on the setting of trial dates, while others said it did. Most of those who did see an effect said they are able to set realistic trial dates earlier in a case because they and the attorneys have more information at an earlier stage. On the other hand, one judge said the program has made him/her more reluctant to set a trial date at the outset of a case, because the discussions with lawyers often make it clear that dispositive motions must be addressed before a trial date is set.

Response of the Attorneys

Most judges said attorney response to the case management program has been quite positive, and several judges acknowledged that this positive response was contrary to their expectations. About half of the judges indicated that bar response to the program had improved over time and said that attorneys had been concerned about the program, particularly the disclosure aspect, when it was first implemented. Now, however, disclosure and other aspects of the case management program have "become part of the culture," said two judges. Two judges emphasized that the court had gotten attorneys involved while the program was being designed and spent time educating attorneys about the program, which they saw as partially responsible for the bar's overall acceptance of the program.

One of the concerns attorneys reportedly had at the outset was that the program would be beneficial for large cases but not small ones or would favor one type of party over another. One judge said, however, that experience has shown that the program "hasn't favored anyone, which was what attorneys warned would happen. It is good for both plaintiff and defendant." Other judges were less sure that the program was equally beneficial for different types of parties and attorneys. For example, one judge said that "attorneys who mostly practice in state court find it a real pain and may be discouraged from practicing in federal court. Others like it, especially attorneys who are regularly in federal court and attorneys with large cases." A second judge said s/he thought the program "may be more expensive for the smaller case."

Another feature that concerned attorneys at the beginning, according to two judges, was the proliferation of rules governing case management in the court. Now that the attorneys have become accustomed to the rules, the court is hearing far fewer complaints, they said.

Benefits for Judges

Virtually all of the judges said they are satisfied with the case management program, with one judge referring to it as "a raging success." Other judges, while still positive, were more reserved in their evaluations, with a few saying the case management program fit with the way they handled cases anyway and therefore was not a great change for them. Some of the types of benefits judges said they experienced are captured in the comments below:

> "You have to take charge of the case; this is a system where the judge can be in charge when it's needed."
>
> "I'm generally satisfied. It gives me a preview of the case; I know when I have something that's going to present big problems. For deciding later motions, I have a better understanding of the case, and the conference and early disclosure of evidence provide bases for early settlement."
>
> "The program provides a framework for exercising discretion—a good framework—good for judges and attorneys for planning a case schedule."

Most of the judges did not think the case management program had changed the relationship among judges in the court, but a substantial minority pointed out that case management practices had become more uniform across judges. As one judge said, "We (judges) speak a different language [than we did before] when we talk now."

About a third of the judges said they saw no effect of the program on judge time or that they could not tell if there was an effect. As one judge said, "the program clearly reduces elapsed time, but it's not clear whether it reduces my time." Of those who did think there was an effect of the program on judge time spent in a case, most thought the program increased judge time, but most were also quick to acknowledge that they did not think this was a bad outcome. For example, one said, "It increases the amount of time a judge spends on a case, but leads to easier and cheaper resolutions—this is what the goal should be." A number of judges also believed that additional time invested by the judge early in a case often saved time in the later stages of a case, and two thought this tradeoff resulted in a net time savings for judges.

Key Features of the Case Management Program

The judges identified a number of program components that they believe are key elements in achieving the program's goals.

Attorney Preparation Before the Case Management Conference

The majority of judges cited as a key feature the fact that the program requires lawyers to take action at an early point in a case. Some judges spoke in general about the fact that the program requires a number of actions by the attorneys. For example, one judge said that "lawyers don't do things unless they're required" and that the case management program "gives them an early decision point where they're required to do something." Similarly, another judge pointed out that "whenever you have an event, it forces attorneys to think about the case—they have to take stock, make decisions, think about it." Finally, a third judge said a key element of the program is "the mere fact that the parties are encouraged to do something other than send out interrogatories and deposition notices; they have to pause and think."

Several judges cited the "meet and confer" requirement more specifically as a key feature in the success of the case management program. This session, which must occur within ninety days after filing (previously 100 days), is the first event in the case management schedule. As one judge explained, "the sooner the attorneys talk to each other the sooner they understand their case—and when they do, it can move forward." Judges generally agreed that these meetings are beneficial, especially, as one judge said, "if there are good lawyers on both sides." Several judges noted the general salutary effect of a face-to-face meeting between the attorneys: the meeting "brings them together to start being civil" at a time when they "haven't been met with obnoxious discovery requests." Other judges noted that the meeting was a good opportunity to move the case toward settlement discussions, because it "gives them a way to discuss settlement without appearing weak." Another effect cited by a number of judges was getting the attorneys to focus on the case and identify what the real issues are, prompting them to prepare a good case management statement and come to the case management conference much more informed about

the case. One judge noted that the meet-and-confer session "enables me to find out at the Rule 16 conference if I've got a problem case," because if the attorneys had a problem at their meet-and-confer "then I'm probably going to have a problem with them."

After the meet and confer session, attorneys must file a joint case management statement. Most judges said they find the statements helpful, although the extent to which they reported finding the statements helpful varied quite a bit. For example, a few judges referred to the statements as "very" or "extremely" helpful, while about a third of the judges said they were "sometimes" helpful or "helpful in part." One judge said s/he did not see the statements as "terribly different from statements they filed before." A judge who said s/he did not find the statements helpful pointed out that attorneys "mechanistically fill it in" and said the statement does not provide adequate information about significant legal issues in the case. When asked what they used the case management statement for, judges most frequently cited getting an overall sense of the case; setting dates, including the trial date; identifying any problems; and setting appropriate discovery limits.

Case Management Conference

The judges also find the case management conference important and generally use it to set a schedule for the case, including discovery limitations and deadlines, dates for motions, and, in many instances, a trial date. Several judges indicated that they try to determine at the conference if the case is likely to be disposed of by motion and, if it is, they will set a schedule for hearing the motion. A number of judges also discuss ADR with the parties and, if appropriate, refer the case to an ADR procedure after the meeting. Judges were generally enthusiastic about the usefulness of these conferences. As one judge said, "We resolve so many matters at the conference; I have fewer disputes and motions later."

Disclosure

A number of judges cited the disclosure requirements of the case management program as an important feature. Judges named several effects they have observed from disclosure, including making both the attorneys and the court more informed about the case early in the pretrial process. As one judge said, in the absence of disclosure, "attorneys might only hear a warped perspective from their clients"; disclosure allows them to "be much better informed at an early stage." Other effects cited were speeding up the pretrial process; getting the case ready for settlement; and eliminating the need for some formal discovery or "easing the way" for discovery.

Reservations About the Case Management Program and Suggested Improvements

About a third of the judges said they did not think the program had detrimental features. As one judge said, "The dire predictions haven't come to pass." Those who did identify downsides generally noted that the case management program might constitute "overkill" or "over-management" for some cases—particularly small cases—with one judge pointing out that this problem could be addressed by tailoring case management to the individual case. Another judge

mentioned that even if the program does not fit a particular case, "parties have gotten together to talk and reach this conclusion," which might be beneficial in itself. Two judges cautioned that the program might make litigation more expensive. Finally, one judge said a potential detriment of the program was that it "may cause us as judges to jump to conclusions prematurely. You try to spot the issue the case will turn on, and you may be wrong, which could sidetrack the case on collateral issues."

The majority of judges did not have suggestions for improving the program. One judge cautioned that s/he "would be wary of going too far" because the court "needs to maintain the appearance of neutrality, and active case management can go against this." Three specific suggestions for improvement made by judges were: 1) "tightening up" Fed. R. Civ. P. 4, which allows 120 days for service of process; 2) "streamlining" the case management system somewhat in smaller cases, where the system "puts a lot of demands on small parties"; and 3) adding a requirement that parties must talk with the assigned judge before filing any discovery motions.

About half of the judges said they could not think of other ways to achieve the same effects the case management program had—or at least not better ways. Two judges noted that the same effects could be achieved only by greatly increasing the number of judges in the court. Another judge said that any court that had both case management conferences and ADR could basically achieve the same effects as the case management program. Finally, one judge pointed out that the new federal rules cover a lot of what the court's program requires, such as initial disclosures.

Recommendations and Advice to Other Courts

All of the judges said they would recommend the case management system to other courts, with one judge cautioning that there are "undoubtedly local factors." Several judges mentioned the importance of involving the bar in the design of such a program at an early stage, rather than forcing the program on the bar. Two judges said they would recommend court-wide implementation so that case management would have uniformity and predictability. Judges also mentioned several features that they think should be included in a case management program, such as a face-to-face meeting of the attorneys (one judge said s/he "would insist" on this); early disclosure; a standardized form for the case management statement; a case management conference; and an effective ADR program in the court. One judge who mentioned ADR emphasized that "case management and ADR should be spoken together in the same breath—you can't do one without the other." Finally, two judges said they would advise other courts to just try a program like this and not resist innovation.

2. Attorneys' Evaluation of the Case Management Program

As in the two districts discussed in previous chapters, questionnaires to attorneys in California Northern focused on the demonstration program's impact on time and cost in a particular case and also asked the attorneys a number of more general questions about their satisfaction with the court and the degree of change the case management program had brought to litigation in the district. Their assessment of the case management program is discussed below, beginning with their assessment of program effects on litigation time and cost. We then discuss the attorneys'

satisfaction with the court's management of their cases and the degree of change they have experienced under the new rules and conclude with their suggestions for further change.

Those who are not interested in the technical discussion of the questionnaire results should turn to page 168 for a summary of the attorneys' evaluation of the case management program. As in the previous analyses of the attorney data, the findings reported below are based on attorneys' judgments about the effects of the case management program.

Program Effects on Time to Disposition

To understand how attorneys generally rate the timeliness of litigation in this district, we first examined their assessment of time it took for their case to move from filing to disposition. As Table 51 shows, the great majority of responding attorneys—83%—said the case was moved along at an appropriate pace, with only 10% saying it was moved along too slowly.

Table 51
Attorney Ratings of Timeliness of Their Case
Northern District of California

Rating of Time From Filing to Disposition	% of Respondents Selecting Each Response (N = 455)
Case was moved along too slowly	10.0
Case was moved along at an appropriate pace	83.0
Case was moved along too fast	3.0
No opinion	5.0

Although these responses reveal attorneys' views of how long it took their cases to move from filing to disposition, they do not indicate whether attorneys thought the case management program, or components of it, had any effect on disposition time. This issue is addressed more specifically in two additional analyses.

Attorney Impressions of the Case Management Program's Overall Effect on Time

First, respondents were asked whether the case management program as a whole expedited the case, hindered the case, or had no effect on the time it took to litigate the case. As Table 52 (next page) shows, 46% of attorneys thought the program expedited the resolution of the case, 42% thought it had no effect, and 12% thought the program hindered the case's timeliness.

Table 52
Attorney Views of the Overall Effect of the Case Management Program on the Timeliness of Their Case
Northern District of California

Rating of Overall Effect of the Case Management Program on Time	Percent of Respondents Selecting Each Response (N=438)
Expedited the case	46.0
Hindered the case	12.0
Had no effect on the time it took to litigate the case	42.0

Further analysis revealed that responses to this question did not differ according to the type of party represented (plaintiff or defendant), but did differ by whether the attorney had experience in the Northern District before the case management program was implemented.[109] In particular, 42% of experienced attorneys said the program expedited the resolution of the case, while 55% of attorneys without prior experience in the court thought it expedited the case.[110]

In addition to looking at differences in responses based on party represented and attorney experience, we examined whether a number of case characteristics were related to attorneys' views of whether the case management program expedited litigation.[111]

Case Complexity. Attorneys' ratings of the program's effect on timeliness varied by the level of complexity of legal and factual issues in a case and the level of procedural complexity, with a higher percentage of attorneys who rated their case as "medium" in complexity reporting that the program expedited the case compared to attorneys from low or high-complexity cases.[112] At least as far as attorneys are concerned, then, the program may be most useful in standard civil cases and

[109] Only relationships that are statistically significant in the Chi-square analysis at the $p<.05$ level or better are discussed, except as otherwise noted. These comparisons and others reported here using Chi-square analyses were confirmed with correlational analyses between the specific variables mentioned.

[110] We used other questionnaire data to explore possible explanations for this pattern of response but were not able to confirm any of our hypotheses.

[111] Attorneys were asked to rate a number of case characteristics on a scale from "very high" to none."

[112] Fifty-two percent of attorneys who rated their case as medium in complexity of *legal* issues said the program expedited the case, compared to 45% of attorneys from cases with high complexity and 44% of attorneys from cases with low complexity. Fifty-nine percent of attorneys who rated their case as medium in complexity of *factual* issues thought the program expedited the case, compared to 42% of attorneys from both high- and low-complexity cases. Fifty-one percent of attorneys who rated their cases as medium in *procedural* complexity said the program expedited the case, compared to 33% of attorneys from high-complexity cases and 50% of attorneys from low complexity cases.

less beneficial in cases that are either very simple or highly complex. This finding, at least with regard to simpler cases, coincides with the observations of some of the judges.

Disclosure. Attorneys who reported a higher incidence of informal discovery or disclosure in their cases more frequently said the program expedited the case and less frequently said it had no effect on the case than attorneys who reported a lower amount of informal discovery.[113] Ratings of the effect of disclosure on litigation time were associated with how much disclosure occurred in the case (as reported by attorneys): over three-quarters (78%) of attorneys who reported their cases had a high level of informal discovery or disclosure said that disclosure requirements moved the case along, compared to 65% of attorneys in cases with medium levels of disclosure, 48% of attorneys in cases with low levels of disclosure, and 27% of attorneys in cases with no disclosure.[114] This analysis may indicate that in cases in which the need for information exchange is substantial, attorneys find that the disclosure requirement expedites the case.

Referral to ADR. Whether a case was referred to an ADR option was also significantly associated with attorney ratings of the program's effect on time to disposition: 55% of attorneys whose cases were referred to ADR thought the program expedited the case, compared to 38% of attorneys whose cases were not referred to ADR.

Attorney Assessments of the Effect Specific Case Management Components Had on Time

Table 53 (next page) presents attorney ratings of the effect specific elements of the case management program had on litigation time, as well as the effect of several case management practices not specifically included in the program—such as the court or judge's ADR requirements—or that were unique to the assigned judge. Program components are listed in descending order according to the percentage of respondents who said the component moved the case along. The analysis includes only the responses of those who said the component was used in their case.

Case Management Components that Move Litigation Along. As Table 53 shows, the vast majority of attorneys rated all components of the case management program as either moving the case along or having no effect on the time to disposition. Five program elements—initial disclosure, the meet and confer session, the case management statement, the initial case management conference, and the initial case management order—were rated by over half of the responding attorneys as having moved the case along. This is consistent with interview responses from judges, who indicated that all of these elements, with the exception of the case management order, were critical features of the case management program.

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[113] The item attorneys were asked to rate was "amount of informal discovery exchange or disclosure."

[114] It is not immediately apparent why some attorneys from cases in which no disclosure occurred would say the disclosure requirements expedited the case. One possibility, which was mentioned in an attorney response to another question, is that in some cases the prospect of disclosure led to settlement.

Table 53
Attorney Ratings of Effects of Case Management Components on Litigation Time
Northern District of California

		Effect on Litigation Time (in Percents)		
Component of General Order 34	N	Moved this case along	Slowed this case down	No effect
Initial case management conference	247	66.0	7.0	28.0
Meet and confer session	267	63.0	11.0	26.0
Attorneys' case management statement	260	62.0	13.0	25.0
Initial case management order	238	60.0	8.0	32.0
Initial disclosures	272	59.0	6.0	36.0
Service of process within 40 days of filing of complaint	275	44.0	2.0	55.0
No formal discovery until after the initial disclosures have been made	277	31.0	28.0	40.0
Continuing duty to supplement disclosures	217	29.0	3.0	68.0
No stipulations to modify case management schedule	195	18.0	24.0	59.0
Requests to postpone trial signed by lead attorney and client	108	6.0	4.0	91.0
Other Case Management Components				
Judge's handling of motions	191	52.0	23.0	26.0
Judge's trial scheduling practices	189	48.0	12.0	40.0
Court or judge's ADR requirements	194	46.0	17.0	37.0
Paperwork required by the court or judge	193	30.0	19.0	51.0

Case Management Components that Delay Litigation. For the most part, a small percentage of responding attorneys said the court's case management procedures slowed down the progress of their cases. Two program components stand out, however, as a source of delay in a significant minority of cases. One is the requirement that formal discovery be stayed until initial disclosures have been made, absent a stipulation between the parties to begin discovery earlier. Over 28% of attorneys thought this requirement slowed the case down. In our initial interviews, judges had expressed some concern about this requirement as well, and several judges speculated that attorneys did not always realize they could stipulate out of this requirement.

It is possible, then, that some attorneys who reported that this requirement slowed the case down had less experience with the program and therefore were not aware they could stipulate to begin formal discovery at an earlier stage in the case. Further analysis, however, suggests this is unlikely: Although ratings of the effect of this requirement varied significantly depending on how many cases the attorney had litigated in the court, about 15% of attorneys with more than fifty cases in the court thought the requirement moved the case along, while more than a third (37%) of attorneys with the least experience (fewer than five litigated cases in this court) thought the requirement moved the case along.

Interestingly, there was a relationship between the amount of informal discovery or disclosure in a case as reported by the attorney and attorney ratings of the effect on litigation time of postponing discovery. Of attorneys who reported high levels of informal discovery or disclosure in their cases, almost half (49%) thought postponing discovery moved the case along, compared to 39% of attorneys from cases with medium levels of informal discovery, 25% of attorneys from cases with low levels of informal discovery, and 17% of attorneys from cases with no informal discovery. It may be that in some cases the delay of formal discovery causes parties to engage in more cooperative, less adversarial exchange of information, thereby expediting the case. On the other hand, in cases where little disclosure takes place, the delay of discovery may prevent parties from obtaining information they need to evaluate their case and move it along. Alternatively, these cases may need little in the way of either disclosure or discovery and simply need to move along.

A second element cited by a substantial minority of attorneys (24%) as slowing down the case was the inability of attorneys to modify the case management schedule, other than the time of commencement of discovery, by stipulation. Additional analysis indicated that attorney responses to this question were associated with whether the case had been referred to ADR.[115] About a third of attorneys whose cases had been referred to ADR (33%) indicated that inability to modify the case management schedule slowed the case down, while only 9% of attorneys in cases not referred to ADR responded in this way. One possible explanation for this result is that attorneys in cases that went to ADR might have wished to modify the case management schedule pending completion of the ADR process but were unable to do so. The more-recent version of the case management program that has been incorporated into the local rules has softened the no-stipulation requirement somewhat.

[115] Whether the case had been referred to ADR was determined by a specific question to that effect. The case management component listed in Table 53, "Court or judge's ADR requirements," is not the source for the referral information.

Program Effects on Cost of Litigation

Table 54 shows the respondents' general rating of the cost to their clients of litigating the case from filing to disposition in the court. In contrast to the timeliness question, for which 83% of attorneys said the time to disposition was appropriate, just under two-thirds of responding attorneys (62%) said the cost of litigating the case was "about right," while 21% said the cost was "higher than it should have been.

Table 54
Attorney Ratings of Costs
Northern District of California

Rating of the Cost from Filing to Disposition	% of Respondents Who Selected Response (N=449)
Cost was higher than it should have been	21.0
Cost was about right	62.0
Cost was lower than it should have been	10.0
No opinion	7.0

Because this is a general rating of the costs of litigating the case and does not focus on the effects of the case management program, it is difficult to tell whether the relatively high rate of responses indicating the cost was too high reflects a general dissatisfaction with litigation costs or a reaction more specific to the court or its case management program. This issue is addressed more specifically below by looking at the attorneys' rating of the overall effect of the case management program on the costs of their cases.

Attorney Impressions of Overall Effect of Case Management Program on Costs

As shown in Table 55 (next page), about a third of attorneys (34%) indicated that the program decreased the cost of their case, 20% said it increased the cost, and 46% said it had no effect on the cost of the case. As with the timeliness question, the answers did not differ by whether the attorney represented a plaintiff or defendant but did differ depending on whether the attorneys had pre-program experience: 30% of attorneys who had experience in the court prior to the program thought the program reduced litigation costs and 22% thought it increased costs, while 43% of attorneys with no pre-program experience thought the program reduced costs and 14% thought costs were increased. This finding parallels that for timeliness: Attorneys with less experience in the court find the case management procedures more effective than attorneys with more experience in the court.

To further understand the impact of the case management program on litigation costs, we examined a number of case characteristics and their relationship to attorney views of the program's effects on costs.

Table 55
Attorney Ratings of the Overall Effect of the Case Management Program on the Cost of Their Case
Northern District of California

Rating of the Overall Effect of the Case Management Program on Cost	% of Respondents Who Selected Response (N=431)
Decreased the cost	34.0
Increased the cost	20.0
Had no effect on the cost of the case	46.0

Complexity of Case. Findings regarding associations between the legal and factual complexity of a case and attorneys' views of the effect of the program on costs parallel findings on time to disposition. In each instance, the general pattern is that a higher percentage of attorneys who reported their cases were of medium complexity thought the case management program decreased costs compared to attorneys who reported low or high complexity.[116]

Other findings bolster the idea that the program is less appropriate for small, simple cases. For example, some judges had speculated, during our interviews, that the program may increase litigation costs for smaller cases or might be "overkill" in some cases. In addition, several attorney responses to a later, open-ended question indicated that the program requirements did have different effects depending on the type of case, as illustrated below:

> "[The program is] far too cumbersome, paper- and time-intensive. Geared for corporate type litigation and big firms. Works to significant detriment of small client in a personal injury case, who is brought into the federal system."
>
> "In simple cases it requires excessive paperwork and court appearances."
>
> "For easy cases like this one, it is a waste."

These comments are not representative of all attorneys who responded—in fact, some attorneys thought the program was more suitable for simple cases than for complex ones—but in combination with the quantitative information and judge interview responses, they suggest that for

[116] Forty-one percent of attorneys who rated their case as medium in complexity of *legal* issues said the program decreased costs of the case, compared to 33% of attorneys from cases with high complexity and 30% of attorneys from cases with low complexity. Forty-four percent of attorneys who rated their case as medium in complexity of *factual* issues thought the program decreased costs of the case, compared to 36% of attorneys from high-complexity cases and 28% of attorneys from low-complexity cases.

some smaller cases or for parties with fewer resources compliance with all requirements of the case management schedule can be burdensome.[117]

Disclosure. Again, associations noted above between disclosure and attorney ratings of the program's effect on time to disposition held true for ratings of its effects on costs. Specifically, the higher the level of disclosure, the more likely the attorneys were to say the program overall reduced cost.[118] We found a similar pattern regarding the specific program requirement that disclosures be made: The higher the level of disclosure, the more likely the attorneys were to say the disclosure requirements reduced costs.[119] Thus, when disclosures were made, attorneys generally reported that disclosure reduced costs and reported that the program as a whole reduced costs.

ADR. As with timeliness, there was an association between whether a case was referred to ADR and the attorneys' ratings of litigation costs: 43% of attorneys whose cases had been referred to ADR thought the case management program decreased the cost of the case, compared to 26% of attorneys whose cases were not referred to ADR.

Attorney Assessments of the Effect of Specific Case Management Components on Case Cost

As with the timeliness question, attorneys were asked about the effect on litigation cost of a number of specific components of the case management program. Table 56 (next page) shows, for various components of the program and for four non-program case management components, the percentage of attorneys who said that component had lowered the cost of the case, increased the cost of the case, or had no effect on litigation cost. The components are listed in descending order based on the percentage of attorneys who thought they lowered the costs of the case. The analysis includes only the responses of those who said the component was used in their case.

A comparison of the responses in Table 56 with the responses in Table 53 on timeliness shows that in general a smaller proportion of attorneys said the case management components saved costs than said these components moved the case toward disposition. The only exception to this pattern concerns the requirement that formal discovery be postponed until after initial disclosures are made: While only 31% of attorneys thought this moved the case along and a similar

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[117] The Case Management Pilot Program Coordinator reached a similar conclusion in her report to the court after the first year of the pilot program: i.e., that "the Pilot Program appears to be most beneficial for the middle range of cases filed in this court." Preliminary Study of the Case Management Pilot Program in the District Court for the Northern District of California, October 1993, p. ii. Her conclusion was based largely on interviews with attorneys in cases subject to the pilot program.

[118] Fifty-six percent of attorneys in cases with high levels of disclosure said the program reduced costs, compared to 43% of attorneys from cases with medium levels of disclosure, 29% of attorneys from cases with low levels of disclosure, and 15% of attorneys from cases with no disclosure.

[119] Sixty-one percent of attorneys who reported high amounts of disclosure in their cases thought the disclosure requirements reduced costs, compared to 47% of attorneys from cases with a medium amount of disclosure, 37% of attorneys from cases with a low amount of disclosure, and 22% of attorneys from cases with no disclosure.

Table 56
Attorney Ratings of Effects of Case Management Components on Litigation Cost
Northern District of California

		Effect on Litigation Cost (in Percents)		
Component of General Order 34	N	Lowered cost of this case	Increased cost of this case	No effect
Initial disclosures	272	43.0	15.0	42.0
Meet and confer session	267	43.0	27.0	30.0
Initial case management conference	247	41.0	19.0	40.0
Attorneys' case management statement	260	40.0	31.0	29.0
No formal discovery until after the initial disclosures have been made	277	40.0	12.0	47.0
Initial case management order	238	37.0	13.0	49.0
Continuing duty to supplement disclosures	217	24.0	10.0	65.0
No stipulations to modify case management schedule	195	14.0	22.0	64.0
Service of process within 40 days of filing complaint	275	14.0	5.0	82.0
Requests to postpone trial signed by lead attorney and client	108	5.0	7.0	89.0
Other Case Management Components				
Judge's handling of motions	191	41.0	25.0	34.0
Court or judge's ADR requirements	194	40.0	24.0	36.0
Judge's trial scheduling practices	189	27.0	13.0	60.0
Paperwork required by the court or judge	193	17.0	32.0	51.0

proportion (28%) thought it slowed the case down, 40% of attorneys rated the requirement as lowering the costs of the case and only 12% thought it increased costs.

Case Management Components that Lower Costs. Case management components receiving the highest ratings for lowering costs were generally the same as those that received high ratings for lowering disposition time: initial disclosure, the meet and confer session, the case management statement, case management conference, and case management order. In every instance, however, fewer than half of the responding attorneys said the component saved costs.

Case Management Components that Increase Costs. Two of the same elements rated as saving costs —the meet and confer session and the case management statement—were rated by more than 25% of attorneys as increasing litigation costs. Because these are the two earliest requirements of the case management program, it may be that they increase costs in cases that settle or are determined on a motion very early for reasons unrelated to the case management program; that is, cases are required to participate in these case management events (and incur related costs) even if they are on the verge of settlement or decision. To test this hypothesis, we examined the relationship between attorneys' ratings of these case management components and docket information about when and how cases terminated, but did not find a statistically significant relationship. We did find, however, that attorneys who reported that the case management statement increased costs were more likely to have devoted a substantial portion of their practice to federal litigation over the past five years. Attorneys with less federal experience were more likely to report that the case management statement lowered costs. These findings suggest that preparation of this statement is helpful to attorneys with less federal experience whereas those with more experience were more likely to find it an unnecessary burden.[120]

Is the Case Management Program an Effective System?

Recognizing that the case management program may have benefits apart from its effects on cost and time, we asked attorneys whether overall they thought the requirements of General Order 34 provided an effective case management system. As Table 57 (next page) shows, over three-quarters of responding attorneys (77%) said yes, while about a quarter (23%) said no.

Again, attorney responses to this question were associated with whether they had experience in the court prior to the case management program, with a smaller percentage of experienced attorneys (73%) saying the program was effective than attorneys without pre-program experience (87%). Responses did not differ according to whether the attorney represented plaintiff or defendant: 76% of plaintiff's attorneys and 77% of defense attorneys said the program was effective.

[120] Twenty-eight percent of attorneys who had devoted 10% or less of their time to federal civil litigation over the past five years reported that the case management statement increased costs, whereas 37% of those devoting 11-25% of their time and 42% of those devoting 25-50% of their time reported this effect. Those devoting more than 50% of their time do not fit this pattern, with only 26% saying the case management statement increased costs.

Table 57
Attorney Ratings of the Overall Effectiveness of the Case Management Program
Northern District of California

Rating of the Effectiveness of the Case Management Program	% of Respondents Who Selected Response (N=376)
It is an effective system of case management	77.0
It is not an effective system of case management	23.0

Regardless of the answer they gave, attorneys were asked to explain their responses; 192 of them did. Their comments revealed several recurring themes. Attorneys who said the system is effective generally noted that the program makes attorneys and parties focus on the case at an early stage, thus moving cases along toward earlier resolution, as the examples below illustrate:

> "Early court conference to monitor spurs lawyers to assess and exchange information and views."
>
> "I have handled many federal cases in the Northern District, as well as all the other California districts. I have found G.O. 34 to be a much more efficient means of moving the cases along than FRCP."
>
> "All of the requirements combine to force an early resolution."
>
> "I do most of my litigation in state court. I found this system much more effective in getting the parties focused on the real issues."

Attorneys who said the case management system is not effective identified three primary problems: 1) that delay of discovery hampers the case; 2) that disclosure requirements are vague and do not result in all relevant documents being produced; and 3) that parties sometimes fail to comply with requirements of the program, and there is no mechanism for enforcing compliance.

Comments about the delay of formal discovery until after the case management conference were the most frequent. As one attorney noted, echoing the comments of a number of others, "The pace at the beginning is far too slow. The bar on discovery before initial disclosure slows down cases unnecessarily." Another mentioned specifically the effect of this requirement on simpler cases: "Limits on discovery prior to the conference just delay things in relatively simple cases where documents would be requested at the time of complaint being served."

These comments are consistent with the earlier finding that 28% of attorneys believe the postponement of formal discovery slows down the case. None of the comments mentioned that

parties could stipulate out of this requirement, so it is unclear whether attorneys who said postponement was a problem were unaware of this provision or were aware of it but unable to enter such a stipulation with the opposing party.

The next most frequent set of comments about the ineffectiveness of the case management program had to do with disclosure requirements. The main problems identified by attorneys were parties' manipulation of the disclosure requirements and duplication of efforts when parties send discovery requests for information identical to that required to be disclosed. "There seems to be as much gamesmanship with initial disclosures as with formal discovery," one attorney wrote, reflecting the views of several others. "After initial disclosures," said another, "parties send out the same interrogatories, requests to produce, etc. that they would initially in any event."

Both of these problems relate to *implementation* of disclosure, rather than the general idea of exchanging information in the absence of discovery requests—that is, it would appear that parties' good faith compliance with the disclosure requirements would obviate the need for duplicative discovery, but attorneys believe that others are not forthcoming with their disclosures and instead engage in "gamesmanship."

This point is similar to a more general problem noted in a number of attorney comments—that parties often do not comply with the requirements of the case management program (including disclosure) and there is no effective mechanism for addressing the problem. Reflecting the views of a number of respondents, one attorney wrote: "[Disclosure] would be more effective if the courts *enforced* it—in this *pro se* case, it is not applicable but we tried to follow it anyway because of overall effectiveness. In other cases, we disgorge everything, the other side does nothing, and the judges don't seem to care about noncompliance."

These comments about lack of compliance with the case management program are notable in light of the high proportion of judges who acknowledged in interviews that they do not monitor compliance with the case management order. Most of these judges explained that they expect parties to "police" the case management schedule themselves and bring non-compliance to the judge's attention. Attorney comments suggest that in some cases either the non-compliance is not pointed out to the judge, or, if it is, the judge does not take action against the offending party.

It is important to keep in mind that, although there were a number of negative attorney comments about the effectiveness of the case management program, attorneys who did not think the program was effective constituted fewer than 25% of respondents.

Finally, as in their comments on program effects on time and cost, several attorney comments noted that the overall effectiveness of the case management system varies depending on characteristics of the case or parties. Cases for which the program was seen as particularly effective include cases with experienced, competent counsel; cases that are highly fact-intensive; cases with simple factual and legal issues; cases with a good relationship between the attorneys; and complex, high value cases. Cases for which the program was seen as not effective include

simple or easy cases; complicated or complex cases; employment cases; cases with recalcitrant opposing counsel; and maritime claims. It is interesting to note that the program was viewed as both effective and ineffective in both simple and complex cases, depending on the responding attorney. This is consistent with the pattern of results reported above that attorneys in cases of medium complexity tended to find the program more beneficial than attorneys in high- or low-complexity cases.

Satisfaction with Case Outcome and the Court's Management of Cases

Within the goals of lowering litigation costs and time, to what extent has the court been able to preserve the fairness of its management procedures? To address that question, we examined the respondents' satisfaction with the court's management of their case and how fair the court's procedures were. Because it is reasonable to assume that attorneys' ratings of these measures might be affected by the case outcome, we also examined their satisfaction with and fairness of the case outcome. As Table 58 shows, over three-quarters of responding attorneys were either somewhat or very satisfied with the outcome of their case and a similar proportion thought the outcome was somewhat or very fair.

Table 58
Attorney Satisfaction With Case Outcome
Northern District of California

Satisfaction With Outcome	Percent Selecting the Response (N=448)	Fairness of Outcome	Percent Selecting the Response (N=447)
Very satisfied	53.0	Very fair	55.0
Somewhat satisfied	26.0	Somewhat fair	25.0
Somewhat dissatisfied	9.0	Somewhat unfair	11.0
Very dissatisfied	12.0	Very unfair	9.0

Both the fairness and satisfaction ratings varied according to the type of party represented (plaintiff or defendant), with defense attorneys generally giving more favorable ratings, as shown in Table 59 (next page). Ratings did not vary according to the number of years of practice experience attorneys had, the percentage of the attorney's practice devoted to federal court litigation, or by whether the case had been referred to ADR.

Table 59
Attorney Ratings of Outcome Satisfaction and Outcome Fairness
by Type of Party Represented (in Percents)
Northern District of California

Satisfaction With Outcome	Plaintiff Attorneys (N=244)	Defense Attorneys (N=204)	Fairness of Outcome	Plaintiff Attorneys (N=242)	Defense Attorneys (N=205)
Very satisfied	45.0	61.0	Very fair	46.0	65.0
Somewhat satisfied	30.0	22.0	Somewhat fair	30.0	19.0
Somewhat dissatisfied	11.0	7.0	Somewhat unfair	12.0	9.0
Very dissatisfied	14.0	9.0	Very unfair	12.0	7.0

As Table 60 shows, attorneys also report high levels of satisfaction with the court's management of their case and generally believe that management was fair. The satisfaction and fairness ratings were more favorable overall for the case management questions than for the outcome questions.

Table 60
Attorney Satisfaction with Court's Management of Their Case
Northern District of California

Satisfaction With Management	Percent Selecting the Response (N=448)	Fairness of Management	Percent Selecting the Response (N=447)
Very satisfied	63.0	Very fair	67.0
Somewhat satisfied	26.0	Somewhat fair	22.0
Some dissatisfied	7.0	Somewhat unfair	7.0
Very dissatisfied	5.0	Very unfair	4.0

Attorney ratings of the court's management of their case did not vary significantly by the type of party represented (contrary to the ratings of outcome satisfaction and fairness); by whether the attorney had practiced in the Northern District prior to the case management program; by the number of years of practice experience the attorney had; by the percentage of the attorney's practice devoted to federal civil litigation; or by whether the case had been referred to ADR. In addition, none of the case characteristics we considered (complexity; amount of informal discovery, and amount of formal discovery) were consistently related to attorney ratings on the question about

satisfaction with the court's management of their case. Thus, attorneys' favorable ratings of the court's case management were quite universal.

Comparison to Past Practices

In interviews, several judges had indicated that they did not change their case management practices greatly when the court adopted the case management program because they already used many of the program components in their management of cases. To determine the extent to which attorneys believed the case management program had generally changed case management practices across the court, we asked those who had litigated in the court both before and after adoption of the program whether, under the court's prior case management procedures, there would have been differences in the attorney time spent, in the total cost of litigating the case, and in the time from filing to disposition. Table 61 reproduces this three-part question and shows the percentage of attorneys selecting each response.

Table 61
Responses of Attorneys with Pre-Program Experience to Questions Comparing Current and Prior Practices (in Percents)
Northern District of California

Under the court's prior case management procedures:	Much higher	Higher	About the same	Lower	Much lower	I can't say
attorney time in this case would have been (N=324)	6.0	19.0	42.0	19.0	3.0	11.0
costs of litigating this case would have been (N=324)	4.0	21.0	44.0	16.0	3.0	11.0
time from filing to disposition in this case would have been (N=325)	6.0	30.0	44.0	6.0	1.0	13.0

As far as total attorney time, the largest proportion of responding attorneys (42%) thought it would have been the same under the prior procedures, and similar proportions thought it would have been higher (25%) or lower (22%) under the prior procedures (11% indicated they couldn't say). With respect to the costs of litigation, again over 40% of attorneys (44%) thought they would have been about the same under the court's prior procedures, while a quarter (25%) thought the costs would have been higher previously, and 19% thought the costs would have been lower under the former system (11% did not express an opinion).

Finally, while 44% of attorneys again said the time from filing to disposition would have been about the same under prior practices, over a third (36%) reported that the time from filing to disposition would have been higher previously, and only 7% said the time to disposition would have been lower (13% did not express an opinion). Thus, a substantial percentage (42-44%) of attorneys who expressed an opinion did not think any of these measures would have been

substantially different under the court's prior case management procedures, but the largest percentage of those who did thought that costs and time to disposition would have been higher under the court's previous procedures.

Attorneys with pre-program experience in the court were also asked how different the court's case management practices are under the case management program compared to practices prior to implementation of the program. Fewer than two percent reported that there is no difference at all, while 36% said there is "some" difference, 44% said there is a "substantial" difference, and 7% reported a "very great" difference (11% couldn't say whether there was a difference). Clearly, the great majority of attorneys have perceived differences in the court's case management practices under the program.

Several judges noted that case management practices had become more uniform across judges since the implementation of the case management program. If this is true, then the differences in practice noted by attorneys could be due in part to judges who had previously managed cases minimally or differently bringing their practices more in line with their colleagues who had always been more active case managers. We asked attorneys about the extent to which they thought the court's case management practices are uniform under the case management program. About one-quarter of the attorneys said they couldn't answer this question—perhaps because they had had experience with only a limited number of judges on the court. Of those who did express an opinion, two-thirds (66%) said there is "some" variation from judge to judge, 19% said there is "substantial" variation from judge to judge, and 11% said there is "little" variation among judges' practices. On the whole, then, judges' practices do not appear to be greatly different from each other, although they differ from previous practices to at least some extent.

Attorney Suggestions for Program Improvement

Many of the survey respondents—112 attorneys—provided additional comments and suggestions. A number of attorneys suggested the court allow exemptions or opt-outs from all or some of the case management requirements for certain cases. One attorney suggested allowing opt-out from the program in cases where questions of law predominate. Another noted that some cases, such as those in which a defendant defaults, should be exempted from the case management conference requirement. A third attorney suggested that certain cases should be exempted from the disclosure requirements. The example s/he gave was housing discrimination cases under the Fair Housing Act, for which s/he noted that "the requirement to disclose specific information which demonstrates plaintiff's contention that discrimination has occurred permits the defendant apartment manager to fabricate reasons for the discriminatory treatment based on the document exchange." Yet another attorney suggested that in cases where a 12(b)(6) motion has been filed the disclosure and ADR requirements should be suspended until the motion is resolved, with procedural penalties for motions that do not raise a substantial possibility of success. Finally, one attorney made a more general point that the program should allow more flexibility by case, pointing out that "not every case can fit into the same envelope."

Other suggestions made by attorneys for improving the program include the following: (1) Judges should set early, firm trial dates. (2) The court should enforce the case management

requirements. (3) Judges should handle case management conferences by telephone. (4) The court should do away with the stay on discovery. (5) There should be no more rule changes. (6) There should be greater consistency across judges. (7) There could be greater care by the clerk's office at filing regarding cases that should be excluded from the program. (8) ADR dates should not be assigned until after the case management conference. (9) Case management forms should be made available on computer diskette.

Summary of Attorney Evaluations

Several overall themes emerge from analysis of the attorney survey responses.

- First, attorneys are generally quite favorable in their opinions of the case management program. About three-quarters of responding attorneys think it is an effective case management system, and the great majority were somewhat or very satisfied with how their case was managed in the court. Almost half of the attorneys think the program reduces time to disposition, and about a third think it decreases costs. Most of the remaining attorneys think it has little effect on time and cost, but a sizable minority—20%—think it increases costs.

- In general, a higher proportion of attorneys said the program or specific elements of it reduced time to disposition than said it or its components reduced costs. This is consistent with interview responses from judges who noted that the program requires a good deal of work from attorneys and the court at the outset of a case but said this initial investment may pay off in a shorter disposition time for the case.

- The case management elements attorneys found most beneficial were the meet and confer, the case management statement, initial disclosures, the case management conference, and the case management order. This coincides with the case management elements the judges said are most beneficial.

- Attorneys in cases that were "medium" in complexity evaluated the program more favorably than did attorneys in low- or high-complexity cases, and written comments from attorneys supported the assertion that the program is most effective in standard cases.

- The greater the amount of informal discovery or disclosure in a case the more favorable were attorneys' overall ratings of the program's effects on cost and time to disposition. In addition, attorneys in cases with higher levels of disclosure more frequently reported that the disclosure requirements reduced costs and time. In contrast to these attorneys, attorneys in cases where little disclosure occurred thought the program's delay of discovery was a problem, perhaps because they did not have the information they needed at an early point in the case to evaluate their opponent's position. Written comments from attorneys indicate that in some cases parties do not comply fully with the disclosure requirements and that compliance frequently is not enforced by the court. Thus, it would appear that when the disclosure requirements are complied with by cooperating attorneys

they have beneficial effects, but the requirements are not always fully honored or enforced.

- As the preceding paragraph suggests, the component of the case management program receiving the most negative evaluations from attorneys was the stay on formal discovery until after initial disclosures had occurred, unless parties stipulate otherwise. Attorneys who had a high degree of informal discovery or disclosure in their cases were less likely to think this was a problem than were attorneys with little or no informal discovery.

- Attorneys whose cases were referred to ADR generally were more likely to indicate that the case management program moved the case along and reduced costs than were attorneys in cases not referred to ADR, and were less likely to say the program had no effect on these measures. This supports the assertion of some of the judges that ADR and case management are most effective in combination with each other.

3. Caseload Indicators of the Program's Effect

Analysis of the court's caseload trends will be deferred until the end of the next chapter, after we have considered the court's ADR programs and can examine the caseload trends in the light of both the case management and ADR programs.

Part II

The ADR Demonstration Programs

Chapter IV

The Northern District of California's ADR and Multi-Option Programs

In this chapter we discuss the ADR programs implemented by the Northern District of California. In addition to examining the program's impact on litigation time and cost, we also give attention to other goals the court had in mind when it adopted these programs, including providing parties with a range of ADR options, enhancing party satisfaction, and enhancing the quality of the court's ADR programs through full-time professional management.

In section A, we present our conclusions about the court's implementation of its ADR and multi-option programs and the impact of these programs. Sections B and C provide the detailed documentation that supports the conclusions: section B gives a short profile of the district and its caseload, describes the court's ADR programs, discusses the process by which the court designed and set up the programs, and examines how the court has applied the ADR rules; section C summarizes our findings about the program's effects, looking first at the judges' experience with the ADR programs, then at their impact on attorneys, and finally at their effect on the court's caseload.

A. Conclusions About the ADR and Multi-Option Programs

Set out below are several key questions about the demonstration program in the Northern District of California, along with answers based on the research findings discussed in sections A and B. As in preceding chapters, many of the findings presented below are based on interviews with judges and surveys of attorneys and reflect their subjective evaluations of the program. While these views are important for understanding the impact of the ADR programs, they should not be taken as evidence of actual program impact.

Do the court's ADR processes reduce time to disposition?

In a court with many different programs being implemented within a short period of time, it is difficult to discern the effects of any particular program on trends in the court's overall caseload. Those who participated in the court's ADR procedures, however, estimated that these procedures reduced disposition time, with more than 60% of attorneys believing this was the effect in the cases they were involved in.

The attorneys' rating of ADR's effects on disposition time did not differ by nature of suit, the type of ADR used, the method of referral to ADR, or whether the case was in the multi-option program, suggesting a rather robust beneficial effect of ADR on litigation time. Attorneys' ratings of ADR's effect on disposition time did vary, however, by whether the case settled. If it did, attorneys were more likely to report that the ADR process reduced disposition time.

Does the ADR program reduce litigation costs?

Attorneys generally reported that their clients did not pay a fee to the neutral for ADR, and more than a third (35%) reported that the cost of preparing for and attending the ADR session was less than $500, with the median cost of preparation and attendance being $1500.

As with ratings of time to disposition, more than 60% of attorneys said they believed that the ADR process decreased litigation costs in the surveyed case. The attorneys' ratings did not differ by type of party or type of ADR. Attorneys' ratings did differ, however, by whether the case settled through ADR and by the method of referral to ADR. When the case settled and when the parties had selected their own ADR process, the attorneys were more likely to report that ADR saved litigation costs.

The cost savings reported by attorneys were substantial, ranging up to $500,000, with a median savings of $25,000 and a mean of $43,000.

Does the ADR program produce settlements in cases?

The attorney survey revealed that parties expect ADR to effect settlement, and they give more favorable ratings along a number of measures (cost, time, satisfaction) when it does so. A high proportion of attorneys (65%) reported that all or part of their case had settled as a direct result of the ADR process. These ratings did not vary significantly according to the type of ADR in which the case had participated but were higher when the parties selected their own ADR procedure.

Effect of the Neutral

On nearly every measure we examined, attorneys' responses varied by the perceived ability of the neutral who conducted their ADR session. Attorneys who ranked the neutral near or at the excellent end of the scale were significantly more likely to report that the ADR process reduced litigation cost and time, that their case settled through the ADR process, that the outcome was satisfactory and the process fair, and that the benefits of using ADR outweighed the costs.

Are certain types of ADR better for certain purposes?

Neither our data nor the court's program design permit us to test whether certain kinds of ADR are better for some types of cases, but our analysis found that the type of ADR in which the attorneys had participated seldom made a difference in how they rated the effects of ADR. Whether their case had been referred to early neutral evaluation (ENE), mediation, or arbitration, they were equally likely, for example, to report that ADR saved litigation costs and time.

At the same time, attorney responses revealed that they do distinguish between the court's various forms of ADR. When explaining why they selected a particular ADR process, attorneys from all processes said they chose the process because they wanted to reduce litigation time, lower costs, and facilitate settlement. Beyond these three principal reasons, however, attorneys selected different ADR processes for different reasons. For example, those who selected ENE were more

likely to say they wanted an expert opinion of the likely outcome of the case, while those who selected a magistrate judge settlement conference were more likely to say they wanted a judge's opinion before proceeding to trial.

Attorney responses also indicated that they derived different kinds of benefits from each ADR process. While each process was reported as helpful in moving the case toward settlement, for example, this was more likely to be the case in mediation than in arbitration or ENE, while in the latter two forms of ADR attorneys were more likely to receive a neutral evaluation of the case and help in clarifying liability.

What are the effects of giving parties a choice of ADR options?

The benefits of ADR, as reported by the attorneys, were greater in almost every instance when the attorneys had selected their own ADR process. Attorneys who had selected their process were more likely to report that it lowered litigation costs, that it reduced the amount of discovery and the number of motions, that it was a fair process, that their case settled because of the process, and that the benefits of the process outweighed its costs. Attorneys who had selected their own ADR process were also more likely to have actually participated in an ADR session.

When given a choice of ADR processes, few attorneys selected arbitration. Most selected ENE, suggesting that in this district attorneys want an expert evaluation when they use ADR.

In the court's multi-option program, which presumes that ADR will be used but leaves the choice of process to the parties, a higher proportion of cases are selecting an ADR process than are referred to ADR from the non-multi-option caseload, suggesting the court has successfully created a presumption that ADR will be used in each civil case.

Has the ADR office been a useful addition to the court?

The existence of the ADR office has clearly given judges confidence in the court's ADR programs. This confidence, as well as the role of the staff in making sure attorneys are familiar with the court's ADR options, may help explain why a high proportion of multi-option cases go to ADR. The majority of attorneys who have participated in ADR conference calls have not, however, found these calls especially beneficial, although around 40% found the conference calls helpful in providing information about the ADR process, assisting attorneys in selecting a process, and prompting them to stipulate to a process. To the extent the ADR office is a factor in the number of cases using ADR, in participants' subsequent positive ratings of ADR's effects, and in the judges' confidence in ADR, it appears to be a net benefit to the court. The cost of the program is about $480 per case served by the program, compared to an estimated median savings of $25,000 per party.

What is the preferred future for the court's ADR programs?

Almost two-thirds of attorneys and neutrals said they would prefer a system with a presumption of ADR use in every case. The highest proportion of attorneys and neutrals (38% and

51%, respectively) said they would prefer a system in which there is a presumption of ADR use in all cases, with parties allowed to opt out only with consent of the assigned judge. Attorneys and neutrals appear to want some degree of compulsion to use ADR. At the same time, other responses suggest that within that framework the opportunity to choose the particular form of ADR results in greater perceived benefits from ADR.

B. Description of the Court and Its Demonstration Program

Section B describes the ADR programs adopted by the Northern District of California and in particular the new multi-option program adopted in July 1993. A context for this discussion was provided in Chapter III, where we described the court's caseload and judicial resources (see Chapter III, section B.1).

1. Designing the ADR Programs: Purpose and Issues

The Northern District of California has a history of experimentation with alternative dispute resolution (ADR) programs. It was one of three courts to establish pilot programs in mandatory arbitration in the late 1970s, a program that became one of the ten mandatory arbitration courts authorized by statute in 1988.[121] The court also created the concept and first experimental program of early neutral evaluation, which was adopted in 1985. The local state courts also offer ADR options, and private ADR is widely available in the area. Thus, the local bar is accustomed to ADR as an integral part of civil litigation, and the culture of the bar and the court is generally hospitable to experimentation with alternative methods for resolving disputes.

In the CJRA plan proposed by the court's advisory group, the group did not recommend any specific new ADR programs. Instead, it noted the proven value of ADR and recommended providing full-time professional support to the court's ADR programs to enhance delivery of dispute resolution alternatives; a careful assessment of the court's current programs; and, if appropriate, development of a mediation program. The general approach of the advisory group—and of the court in its CJRA plan—was to take stock, consolidate the court's strengths, and then move forward.[122] By the time the court adopted its plan in late 1991, a study of the ENE program was well underway and the ADR office had been established. Through the work of the ADR office, the court's multi-option ADR program and mediation program were established in July 1993.

ADR Office

Prior to creation of the ADR office, Magistrate Judge Wayne Brazil administered the arbitration and early neutral evaluation programs, with staff assistance from the clerk's office. As the importance and demands of these programs grew, the court became convinced that full-time

[121] U.S.C. §§ 651-658.

[122] Pursuant to the Civil Justice Reform Act (28 U.S.C. § 474), the court's plan was reviewed and approved by the Judicial Conference and a committee of judges in the Ninth Circuit.

management was important for maintaining the quality of these programs. The advisory group, too, recommended additional staffing to support the programs, noting that "support services are thoroughly insufficient to achieve the desired results in the existing programs."[123] Thus, the court, with the support of the advisory group, established the ADR office as part of the demonstration program to provide full-time professional staff management of the court's ADR programs. The court hired experienced litigators as director and deputy director of ADR programs in the belief that seasoned litigators would enhance the credibility and quality of the programs and would engender greater respect by the bar.

Multi-Option Pilot Program and Mediation

As part of their duties, the director and deputy director of ADR programs, in consultation with Judge Brazil and members of the advisory group, explored whether the court should offer additional ADR programs. The advisory group had suggested consideration of mediation, the only principal form of ADR missing from the court's options.

After a year of study and deliberation, the court adopted mediation as part of a broader new program titled the Multi-Option Pilot Program. The purpose of the program, according to the general order by which it was implemented, was to provide litigants in certain civil cases a range of court-connected alternative dispute resolution processes (arbitration, mediation, ENE, magistrate judge settlement, or private options), in the hope that these processes would reduce cost and delay and provide potentially more satisfying alternatives to litigation without impairing the quality of justice or the right to trial (General Order 36). The multi-option program was adopted because, explained an advisory group member, "nothing is a cure-all" for every type of case. The advisory group felt that different types of ADR are more suitable for different types of cases, and that the multi-option program would provide both a choice to litigants and a method by which the court could learn how to select the optimal alternative for each case.

The judges cited several purposes for adopting the multi-option program:[124] providing parties an opportunity to choose from among various ADR options, including some the court had not offered in the past (e.g., mediation); saving cost and time by having cases resolved early through ADR; heightening bar awareness of ADR and making lawyers think about which ADR process will be most appropriate for a particular case; determining to a limited extent which ADR processes work best for various types of cases; and determining the effect of applying a presumption that parties will choose a form of ADR.

3. Description of the Court's ADR Programs

Alternative dispute resolution is an integral part of the Northern District's case management procedures. Parties in virtually all civil cases in the court must at least consider whether ADR would be appropriate for their case and must certify to the court that they have considered the

[123] *Supra*, note 94, p. 5.

[124] For a description of our research and data collection process, see Appendix A.

available options. All of the court's ADR processes and the multi-option program are overseen by the ADR office. The primary ADR processes used by cases in the court—arbitration, mediation, early neutral evaluation, magistrate judge settlement conferences, and private ADR—are summarized in Table 62 (next page).

Certification of Discussion of ADR Options

By general order, the court has required parties and their attorneys to file and serve a signed certification indicating that they have read the court's brochure *Dispute Resolution Procedures in the Northern District of California*; that they have discussed the available court-connected and private ADR options; and that they have considered whether their case might benefit from any of them. On September 1, 1995, these requirements and other provisions relating to ADR were incorporated into ADR Local Rules for the Northern District.

ADR Multi-Option Pilot Program

Cases to Which the Program Applies

When the court implemented the multi-option program in July 1993, the program applied to the caseloads of only five district judges (one of whom left the bench during the demonstration period). In March 1996 the program was extended to apply to cases that had consented to jurisdiction by the magistrate judges in San Francisco. Under the multi-option program, which was implemented originally under General Order 36 and is now incorporated into ADR Local Rule 3, there is a presumption that litigants in cases assigned to the participating judges will participate in a court-connected or private alternative dispute resolution process. The ADR processes offered by the court for cases assigned to the multi-option program include non-binding arbitration, early neutral evaluation, mediation, or early settlement conference with a magistrate judge.

For cases assigned to the remaining judges on the court, the ADR programs that pre-date the demonstration program continue to apply. These are the arbitration and ENE programs, in which cases meeting specified eligibility requirements are automatically referred to these programs. In other words, within the district during the demonstration period there have been two groups of judges operating under two different programs: a larger group of judges whose cases, if they meet specified eligibility criteria, continue to be automatically referred to arbitration or ENE as in the past, and a smaller pilot group of judges, for whom all civil cases are expected to participate in ADR, using one of several options offered by the court or the private sector.

Selection of an ADR Option

In cases subject to the multi-option program, parties may stipulate to a procedure after discussing the court's ADR options with each other. If they do not stipulate, counsel may be required to participate in a telephone conference with the director or deputy director of the court's ADR program to discuss which ADR option might be appropriate for their case. General Order 36 provided that this telephone conference occur 95 to 105 days after filing, but ADR Local Rule 3-4 provides that it will occur "at a time designated by the court."

Table 62
Alternative Dispute Resolution Procedures
Northern District of California

ADR Procedure	Characteristics
Non-binding arbitration	Referral for cases not in the multi-option program is made automatically by the clerk at filing based on case characteristics (nature of suit and size of demand); by stipulation or order of the court if the case meets the criteria for automatic referral but was not assigned at filing; or by order of the court upon written consent of parties if the case does not meet the automatic referral criteria. Referral may also be made through the ADR multi-option program. Parties are required to attend the arbitration hearing unless excused. Arbitrators are paid by the court. Either party may reject the non-binding award and request a trial de novo.
Early neutral evaluation	Referral is made automatically by the clerk at filing based on nature of suit and docket number (even-number cases) if case is not assigned to the multi-option program or referred to arbitration; by stipulation, motion or order subject to availability of resources; or through the ADR multi-option program. Parties are required to attend the ENE session unless excused. Evaluators volunteer their preparation time and first 4 hours of ENE sessions; the fee is $150/hour thereafter, split by the parties. Nonbinding
Mediation	Referral may be made from the multi-option program or, subject to the availability of resources, by order of the assigned judge following a stipulation of all parties; on motion; or on the judge's initiative Parties are required to attend the mediation session unless excused Mediators volunteer preparation time and first 4 hours of mediation sessions; fee is $150/hour thereafter, split by the parties Nonbinding
Early settlement conference with magistrate judge	Referral may be made in multi-option cases on the judge's initiative, on the request of a party, or on stipulation of the parties; in non-multi-option cases, referral is made only on order of the assigned judge. Any civil case is eligible. Nonbinding
Private ADR	Referral may be made from the multi-option program. Parties may select from private sector providers of ADR services, including arbitrators, mediators, fact-finders, neutral evaluators, and private judges. Virtually all charge fees for their services.

After the telephone conference, the ADR office sends the assigned judge a memo summarizing the parties' selection or making a recommendation if the parties have not selected a process. If the litigants have not chosen an ADR process by the time of the initial case management conference, the judge will discuss ADR options with counsel at the conference. The judge will select an ADR process for the case at the end of the conference if the parties have not been able to agree on one, unless the judge finds that the costs of using an ADR process will outweigh the benefits in that particular case.

Mediation Program

Method of Referral

Along with its ADR multi-option pilot program, the court adopted a mediation program to broaden the range of court-connected dispute resolution processes available to litigants. This program was implemented originally under General Order 37 and is now incorporated into ADR Local Rule 6. Mediation is described in the rule as a "flexible, non-binding, confidential process in which a neutral lawyer-mediator facilitates settlement negotiations." The process is available for cases in the multi-option pilot program and in other civil cases "subject to the availability of administrative resources and of a suitable mediator" (ADR Local Rule 6-2). Cases not in the multi-option program may be referred to mediation by order of a judge following stipulation by the parties, on motion by a party, or on the judge's initiative.

Mediation Process

No later than ten days prior to the first mediation session, parties submit to the mediator and serve on other parties a written mediation statement identifying persons with decision-making authority who will attend the mediation session, identifying persons connected to opposing parties whose presence might substantially improve the mediation or the prospect of settlement, describing the party's views on key issues in the suit, identifying discovery or motions that promise best to position the parties for settlement negotiations, describing the status of settlement negotiations, and attaching documents likely to make the mediation session more productive.

Clients are required to attend the mediation unless excused by the ADR magistrate judge after showing that personal attendance would impose "an extraordinary or otherwise unjustifiable hardship" (ADR L.R. 6-9(c)). The mediator may hold joint and separate private caucuses with parties as needed. Within ten days after the mediation session, the mediator reports to the ADR office whether the mediation resulted in settlement, whether any follow-up was scheduled, and any stipulations the parties have agreed may be disclosed. Mediators volunteer their preparation time and the first four hours of their mediation time and may agree to continue longer than four hours without pay. If the parties wish to continue the mediation beyond the four-hour point and the mediator does not want to continue without compensation, the parties may agree to pay the mediator at the rate of $150 per hour for the remainder of the time in mediation.

Selection of Neutrals

Whether a case is referred to ADR through the multi-option program or through another method, neutrals are selected in different ways depending on the ADR process chosen. If the case is to be arbitrated, parties select the arbitrators through a process of ranking and striking from a list of ten names supplied by the court in accordance with ADR Local Rule 4-4(a). If early neutral evaluation or mediation is selected, the neutral is assigned from the court's panel by the ADR office. For settlement conferences, parties may stipulate to a preference for a particular magistrate judge or (rarely) district judge, which the court attempts to honor subject to intra-division needs and judge availability (ADR Local Rule 7-3).

4. Implementing and Maintaining the ADR Programs

As noted above, the ADR office was established and the positions within it filled before the multi-option and mediation programs were created.

Staffing of the ADR Office

The Director and Deputy Director of ADR Programs

The court's first director of ADR programs was an attorney who had extensive litigation, training, and management experience and was a law firm partner prior to being hired by the court. She also had experience as a volunteer mediator and arbitrator. The deputy director was also an attorney, had a masters in public policy, and also had litigation experience as a law firm associate.[125]

When they were hired, the court charged the director and deputy director of ADR programs with improving ADR in the court. Responsibilities include operating and monitoring the court's ADR programs; participating in telephone conferences with parties in the multi-option pilot to help them choose an ADR method appropriate for their case; writing memoranda to the assigned judges about the conference call and the status of ADR in the cases in which they hold conference calls; recruiting, screening, and training neutrals; and assigning neutrals to cases for the early neutral evaluation and mediation programs. Throughout their tenure at the court, these staff members also assisted with the court's case management program in various capacities, initially through preparation of the court's CJRA plan and implementation of the case management pilot program adopted by the plan and routinely through the ADR telephone conferences.

Other Program Staff

The court received two additional CJRA positions, both of which support the ADR office. One is the administrative assistant to the ADR program, who handles incoming calls; performs a preliminary conflicts check to make sure potential neutrals are not from the same law firm as attorneys in a case to which they might be assigned; assists in selecting neutrals; assists in

[125] Very recently the director has left the court for a new position and the deputy director has become the director. A new staff member has been appointed to the deputy director's position.

administering the ADR programs and training sessions; and works with members of the clerk's office in refining and developing databases and report forms for the ADR programs. The other position is an ADR case systems administrator, who dockets events in the ADR programs, sends materials to the neutrals when they are assigned to cases, and contacts them at various intervals to make certain they schedule and conduct the sessions as required and return their evaluative reports. Both provide support for the ADR telephone conferences, including obtaining the case files and handling scheduling of the conferences.

Space Requirements

The court provides office or carrel space and furniture for each of the CJRA positions. If charged on a square footage basis, the space for the four employees supporting the ADR program would be about $19,840 per year. The space used to house the ADR staff was, however, already part of the courthouse when the program began, and therefore the court did not actually incur additional space costs to implement the ADR program.

Budget

Since the demonstration districts could, under the CJRA, receive additional funding in support of their programs, the Northern District of California was able to acquire funds for operation of the ADR office and ADR programs. Table 63 (next page) summarizes the cost of the program, including one-time or historical costs and ongoing costs, based on information provided by the court.[126] On a per case basis, the cost of maintaining the program for the past four years has been roughly $480 per case that participates in the programs administered by ADR office.[127]

Staff

By far the greatest portion of the program's cost is in staff salaries. As noted above, the court decided the director and deputy director should be highly qualified professionals with considerable knowledge and experience. The level and salary range for the ADR positions are as follows: Director of ADR Programs (CL 31; $75,516-$98,191); Deputy Director of ADR Programs (CL 30; $64,200-$83,461); the Administrative Assistant to ADR Programs (CL 25; $31,505-$40,960); and the ADR Case Systems Administrator (CL 25; $31,505-$40,960).

Materials

The court has incurred copying costs of approximately $2,740 per year from FY92 to present for materials related to the CJRA programs, including copies of general orders implementing the

[126] Letter from R. Wieking to D. Stienstra, September 30, 1996, on file at the Federal Judicial Center.

[127] This figure could be calculated a number of different ways. We have multiplied the FY96 program cost by three and then divided by the number of cases that were referred to ADR over the past three years out of the multi-option program plus non-multi-option cases that were referred to ADR or mediation (since the ADR office has responsibility for training neutrals for these ADR processes, assigns neutrals in referred cases, and monitors referred cases.

programs, the CJRA plan, CJRA annual assessment, and ADR training materials. The court does not expect these costs to continue. Each year the court also prints additional copies of its booklet, *Dispute Resolution Procedures in the Northern District of California*, which is distributed at filing to litigants and counsel. Over the last three fiscal years, the cost of printing this booklet has been approximately $5,000 per year, and the court expects to continue producing the booklet.

Table 63
Estimated Historical and Annual Costs of ADR Programs
Northern District of California[128]

Budget Category	Historical Expenditures	Estimated Ongoing Costs (Annual)
Staff salaries		$202,726 - 263,572
Materials		
General orders, training materials, etc.	2,740/year	——
ADR booklet	5,000/year	5,000
Equipment	7,000	——
Rent to GSA		19,840
Consultants	89,260	2,600
Training neutrals	36,020	——
Total		$230,166 - 291,012

Equipment

The court purchased a fax machine for the ADR office and provided a computer to each of the CJRA-funded staff. Total cost of this equipment is estimated at $7,000.

Consultants

At the beginning of the CJRA period, the court and advisory group retained a consulting group to study the court's ENE program. This study provided information that was used to improve the ENE program and contributed to the development of the multi-option pilot. The total cost of this evaluation was $89,260. Smaller consultant projects during the demonstration period, averaging about $2,600 per year, included assistance in generating a handbook for ENE evaluators, assistance

[128] All costs are estimated and include costs of support for the court's full ADR program, rather than just the multi-option program. The court does not actually incur additional costs for space rental, but the equivalent amount is provided here for the benefit of other courts. In addition to providing support for the ADR programs, the court's ADR staff provides case management assistance as well.

with graphic design for revision of the dispute resolution booklet, and other projects related to interim evaluation and improvement of the court's case management and ADR programs. The court anticipates a modest ongoing need for consultants, and we have used the $2,600 figure as an estimate of ongoing cost in this area.

Training of ADR Neutrals

After a mediation option was created as part of the multi-option program, five two-day training sessions were conducted in FY93 and FY94 by two outside trainers with assistance from the ADR director and deputy director. The trainers' fees and expenses averaged approximately $6,200 per training session.

For ENE neutrals, four one-day training sessions were held. These were conducted by Magistrate Judge Wayne Brazil and the ADR staff without use of a consultant.

The court has held three five-hour arbitration training sessions and paid a consultant $2,520 to assist in designing and conducting these training sessions and to write, with assistance from Judge Brazil and the ADR staff, an 87-page arbitrator's handbook that will be used by the court in future arbitration training sessions.

The court has also incurred additional miscellaneous costs averaging $2,500 per year in connection with ADR training programs.

At no additional cost to the court, the ADR staff has conducted thirteen in-service training programs, such as programs to address the issues confronted by attorneys who serve as ENE neutrals in specific types of cases. The court anticipates that most future training will be provided by the ADR staff without use of consultants.

5. The ADR Programs in Practice

In this section we examine how the court's ADR program operates in practice, looking first at the number of cases referred to ADR, then at the criteria judges and attorneys use to select a form of ADR, and then at several aspects of the ADR sessions such as the number and length of sessions. Our discussion is based on docket data about ADR referrals, responses from judge interviews, and the attorney questionnaires.

Number of Cases Referred to Various Types of ADR

Table 64 (next page) shows the number of cases that have been referred to various forms of ADR since the multi-option program began on July 1, 1993. The table indicates that use of the court's ADR processes varies between multi-option and non-multi-option cases. Specifically, while large numbers of cases are referred to arbitration when that referral is automatic, few are referred to arbitration when it is one of several choices. ENE referrals, on the other hand, are very frequent when they are a matter of choice, as they are when the referral is automatic. ADR referrals that are more common for multi-option cases than for non-multi-option cases include mediation, magistrate

judge settlement conferences, and private ADR. Regarding mediation, keep in mind that its availability to non-multi-option cases is limited (although most requests to date have been granted). And both private ADR and early magistrate judge settlement conferences are docketed only in multi-option cases.[129]

Table 64
Number of Cases Referred to ADR, By ADR Type, Cases Filed 7/1/93-6/30/96
Northern District of California

Type of ADR	Multi-Option Cases	Non-Multi Option Cases
Arbitration	28	803
Mediation	221	82
Early neutral evaluation	458	585
Early magistrate judge settlement	195	0
Private ADR	59	0
Subtotal	**961**	**1470**
Other ADR	1594	1151
Total	**2555**	**2621**

Altogether, it appears that when attorneys in this district are given a choice, their preference is for ENE, secondarily for mediation and magistrate judge settlement conferences, very occasionally for private ADR, and infrequently for arbitration. These differences are probably not explained by attorneys' familiarity with the different ADR types, since arbitration is the court's oldest program while mediation is its newest. The distribution across ADR types for multi-option cases does suggest that many parties, when selecting an ADR process, are looking for one that provides an evaluation of their case—a specific feature of ENE and a likely expectation regarding magistrate judge settlement conferences.

Also noteworthy in Table 64 is the number of multi-option cases selecting an ADR process—961, using a more conservative number—compared to the number of cases from the rest of the caseload that are referred to ADR, many of them automatically—1,470 cases. Considering that the multi-option cases represent a smaller portion of the civil caseload—the caseloads of four district judges and the consent cases of the San Francisco magistrate judges—it appears that the proportion of cases using ADR is relatively higher for multi-option cases than for non-multi-option cases. Examination of other data indicated this to be the case as well (though as noted in the next paragraph, there is reason to be cautious about the referral data).

[129] Recall that magistrate judge conferences *early* in the case are an ADR choice under the multi-option program. Later conferences in other cases are very likely a common occurrence, but as they are not docketed we cannot provide a count. And because early magistrate judge settlement conferences were not docketed initially when the multi-option program began, the number in Table 64 is an undercount.

While Table 64 gives an idea of the distribution of cases across ADR types and between the multi-option and non-multi-option segments of the ADR program, we suggest a degree of caution in using the numbers because of some problems in the court's electronic docket data, from which the numbers were derived. First, docketing of ADR referrals has not been consistent until recently, which results in different counts of cases depending on the criteria one uses to search the docket. Table 64 represents our best estimate, based on all possible ways of docketing the ADR referral.

Second, as the table shows, there are large numbers of cases that appear to have had an ADR referral but for which the precise type of ADR cannot be determined. The cases are identified on the docket simply as having an "ADR" referral. For multi-option cases, the bulk of these are cases presumptively referred to ADR by virtue of being assigned to a judge participating in the multi-option program, but the cases ultimately are not referred to a specific form of ADR (i.e., do not participate in ADR). We have no explanation for the "Other ADR" cases that were not part of the multi-option program. Elimination of the "Other ADR" category would undercount the number of cases referred to ADR, while inclusion of them very likely overcounts the number of referrals.

Altogether, using the more conservative count of ADR referrals—i.e., not including multiple referrals or "Other ADR"—about 15% of the court's total civil caseload is referred to ADR.[130]

How Cases Are Referred to Particular ADR Processes

Table 64 suggests that in a substantial portion of the cases that are referred to ADR—at minimum the multi-option cases—a decision must be made about the type of ADR that will be used. When the judges and parties have to determine which ADR process is appropriate for a particular case, what factors do they consider?

In assigning cases to particular ADR processes, the judges generally allow the attorneys to choose a process and usually agree to the attorneys' selection. In the absence of attorney selection, judges noted they would consider ENE if the case requires evaluation or subject matter expertise; mediation if the case requires facilitation; and magistrate judge settlement conferences for "garden variety" cases. One judge pointed out, however, that particular magistrate judges are especially capable of handling certain types of cases.

Of the attorneys, 177 indicated that they and/or their client had been involved in the selection of the ADR process used for their case.[131] The attorneys were asked how important various factors were in influencing that choice. The factors and their responses are presented in Table 65.

[130] This understates the use of ADR because the civil caseload includes many cases not eligible for ADR, such as prisoner petitions and cases that do not reach a stage where ADR would be used. Although we tried to define an "eligible" caseload for purposes of calculating a more accurate figure, we were not successful because using either case type or stage at which the litigation ended as indicators of eligibility eliminated too many cases.

[131] Of the 382 attorneys who responded to the question about referral method, 42% said the parties selected the process, 37% said the case was automatically assigned, 11% said the judge chose the process, 1% said some but not all parties chose the process, and 9% said the ADR process was chosen some other way. We oversampled for multi-option cases and therefore have a proportionally greater number of cases in which the parties made the choice.

Table 65
Attorney Ratings of Why Party Chose Their Particular ADR Process
Northern District of California (N = 177)

Factor	Importance of Factor (in percents)			
	Very Important Factor	Somewhat Important Factor	Somewhat Unimportant Factor	Not at All a Factor
We wanted to resolve the case more quickly.	80.0	16.0	2.0	2.0
We wanted to reduce litigation costs in this case.	77.0	18.0	2.0	3.0
We wanted someone to facilitate settlement discussions.	72.0	22.0	2.0	4.0
The ADR process would permit more flexibility in finding a solution than the regular litigation process would.	43.0	31.0	12.0	14.0
We wanted an expert prediction of the likely outcome of the case.	33.0	33.0	14.0	20.0
This process was the least burdensome of the ADR options.	18.0	19.0	10.0	53.0
We wanted a judge's opinion of the case before proceeding to trial.	18.0	18.0	14.0	50.0
We wanted help with narrowing or clarifying the issues in dispute.	17.0	38.0	19.0	26.0
We wanted to maximize client involvement in resolving the case.	15.0	35.0	24.0	27.0
We wanted to preserve ongoing relationships between the parties.	10.0	13.0	23.0	54.0
We felt we had to choose something so we chose this one.	9.0	13.0	13.0	66.0
We wanted to preserve confidentiality.	6.0	11.0	21.0	62.0
We wanted to avoid having the judge select an ADR process for this case.	5.0	11.0	12.0	72.0
The judge encouraged us to use this process.	4.0	13.0	9.0	74.0
This was the only process the other side would agree to.	2.0	5.0	11.0	82.0
We wanted help with planning discovery and/or motions.	2.0	4.0	17.0	77.0
The ADR director or deputy director suggested this process.	2.0	2.0	4.0	92.0

The top three reasons given for selecting an ADR process were (1) to reduce costs; (2) to resolve the case more quickly; and (3) to facilitate settlement. More than 90% of attorneys said these factors were either somewhat or very important for their choice of an ADR process. Thus, attorneys and parties expect ADR to speed up their case, reduce costs, and facilitate settlement. The top three reasons for selecting a process were shared for all of the court's ADR processes—arbitration, mediation, ENE, and magistrate judge settlement conferences.

Other considerations were rated as highly important for particular ADR processes. More than 80% of attorneys whose parties chose mediation said that obtaining more flexibility than could be had through the regular litigation process was a somewhat or very important factor in selecting this method (the overall average was 74%), while more than 80% of attorneys who chose ENE said obtaining an expert prediction of the likely outcome of the case was somewhat or very important (the average was 66%). Almost two-thirds—62%—of attorneys who selected magistrate judge settlement conferences said getting a judges' opinion before trial was a somewhat or very important factor in selecting that process (the average was 36%). At most a quarter of the attorneys referred to arbitration identified any factor other than cost, time, and settlement as important in their selection of that process, with 25% saying they selected it because it preserved confidentiality (compared to an average of 17%).

Table 65 suggests attorneys do differentiate among the types of ADR in the kind of assistance each can provide, but with respect to the parties' main expectations—that ADR will reduce time, lower costs, and facilitate settlement—the processes appear to be more alike than different.

Participation in ADR Sessions

Number of Cases That Participated in an ADR Session

Because we expected that many cases referred to ADR would not actually go to an ADR session, and because we wanted to know why they did not participate in a session, our sample was made up of cases *referred* to ADR, not only cases that went to a session. Survey responses show that of the 425 attorneys who responded, 45% indicated that their case, though referred to ADR, did not go to an ADR session.[132]

As Table 66 (next page) shows, whether or not cases participated in a session varied by the type of ADR to which the case was referred.[133] Very few cases referred to arbitration actually went to an arbitration hearing, while most of the cases referred to mediation went to a session, as did about three-quarters of the cases referred to ENE or a magistrate judge and nearly two-thirds of those referred to private ADR. Cases subject to the multi-option program were more likely to participate in an ADR session, with 63% of these cases doing so compared to 46% of non-multi-

[132] We did not rely on the dockets for information about whether a session was held because the information has not until recently been systematically recorded.

[133] We report only relationships that were statistically significant in a Chi-square analysis at the $p < .05$ level, except as otherwise noted.

option cases.[134] Further, participation in an ADR session differed by the specific method of referral to ADR, with cases in which the parties or judge selected the ADR process much more likely to participate in a session (81% and 71%, respectively) than cases in which the referral to ADR was automatic (32%).[135]

Table 66
Percent of Cases Referred to ADR That Had an ADR Session, By ADR Type
Northern District of California

Type of ADR to Which Case Was Referred	Percent in Which ADR Session Was Held
Arbitration (N=63)[136]	8.0
Mediation (N=72)	86.0
Early Neutral Evaluation (N=93)	75.0
Magistrate Judge Settlement Conference (N=64)	73.0
Private ADR (N=14)	64.0

The most frequent reasons cases parties gave for not participating in an ADR session were that the case was resolved or was moved to another court before any ADR activities had occurred. Seldom did the referral of a case to ADR in itself produce a settlement. Only eight attorneys reported this to be the case. Interestingly, of these eight, five were cases referred to arbitration, while the other three were scattered across mediation, ENE, and magistrate judge settlement conferences. The numbers are very small but suggest that the prospect of arbitration is more likely to prompt settlement than the prospect of other forms of ADR. To the extent arbitration occurs later in the litigation than the other processes—by design it occurs later than ENE, mediation, and magistrate judge conferences—this should not be especially surprising. Arbitration hearings also

[134] Some of this difference may be due to the timing of referral in ENE cases. For cases referred to ENE that are not in the multi-option program, the referral is made at filing. A portion of the referred cases will have terminated before there is a possibility of holding the ENE session. For cases referred to ENE from the multi-option program, the referral is made later, after early hurdles to continuing (such as a non-answering defendant), have been cleared, and thus the cases are more likely to have an ENE session.

[135] The question asked respondents whether their case was referred to its particular ADR process because all parties chose it, some but not all parties chose it, the judge chose it, it was automatically referred to the ADR process, or some other method was used. See *supra*, note 131, for the response categories. Throughout our discussion we will refer to this variable as the method of referral.

[136] Because our sample included all multi-option cases, our respondents over-represent that caseload. Where the responses of multi-option and non-multi-option respondents differ, the difference is noted. Here we note that because few multi-option cases select arbitration, the number of arbitration cases in our sample is lower relative to the other ADR types than it is in the overall ADR caseload.

generally require greater preparation and the cases themselves typically involve smaller dollar amounts.

Number of ADR Sessions

The great majority of attorneys—80%—participated in only one ADR session. Sixteen percent of attorneys reported that their case participated in two ADR sessions, and only 4% reported their case went to three or more ADR sessions. The number of sessions did not vary by whether the case was a multi-option case or by the method of referral to ADR. There is some indication the number of sessions varied by type of ADR to which the case was referred, with cases referred to private ADR having more sessions, but we did not have a sufficient number of cases to confirm such a relationship.[137]

Hours Spent in ADR Sessions

Of the attorneys who participated in an ADR session, over half—58%—reported that altogether they spent four hours or less in face-to-face ADR sessions and telephone conferences. Nearly a third—31%—said they spent five to eight hours in ADR sessions, and 10% said they spent nine hours or more. Again, there were no differences by whether the case was a multi-option case or by the method of referral to ADR. And, as before, there was a suggestion that hours spent varied by the type of ADR, with more hours spent in private ADR sessions, as well as in ENE and mediation, than in arbitration or magistrate judge settlement conferences, but again we did not have enough cases to confirm these relationships.

Neutral Preparation for ADR Session

Most neutrals (93%) reported spending four hours or less preparing for the ADR session. The number of hours spent in preparation ranged from zero to twenty, with a median (midpoint) of two hours. The hours needed for preparation did not vary by whether the case was referred to the multi-option program or not, although there was a suggestion that neutrals spent more time preparing for ENE sessions. Again, we had too few cases to achieve the statistical power needed to confirm this relationship.

Client Attendance

For three of the ADR programs offered by the court—arbitration, mediation, and early neutral evaluation—parties are required to attend unless excused by the court. Most attorneys—85%—said their client attended the ADR session in person, 6% reported their client attended by telephone, and 9% reported their client did not attend. This is consistent with responses of the neutrals, where 90% reported that in the ADR session over which they presided, clients attended in person. About three-quarters of attorneys (76%) and 88% of neutrals reported that

[137] With very few cases reporting more than one session and very few cases referred to private ADR, there were too many cells with under five cases to rely on the Chi-square test, even though it was statistically significant.

client attendance made the ADR session more useful. There were no differences in these responses by the method of referral to ADR, the type of ADR to which the case was referred, or whether the case was a multi-option case.

Party Preparation for ADR Session

We asked neutrals whether the parties were adequately prepared for the ADR session. The great majority of neutrals (89%) reported that both parties were adequately prepared, while 10% reported that some but not all parties were adequately prepared, and one neutral (1%) reported that none of the parties was adequately prepared. Again, ADR type and multi-option participation made no difference in how prepared the parties were in the view of the neutrals.

Expertise of Neutral

Most attorneys (76%) reported that the neutral in their ADR process had an appropriate level of subject matter expertise or that subject matter expertise was not needed for the case (14%). Ratings of the appropriateness of the neutral's expertise were significantly associated with the type of ADR to which the case was referred, with attorneys from ENE cases—the type of ADR in which expertise is expected—more likely to report that the neutral did not have an appropriate level of expertise. All neutrals who responded to our survey (93) reported that the case to which they were assigned was an appropriate case for them, although one neutral said s/he did not have an appropriate level of subject matter expertise for the case.

Summary of ADR Program in Practice

These findings suggest that close to half of the court's ADR caseload is referred to ADR through the multi-option program and that the typical ADR case participates in one ADR session, spends less than four hours in an ADR session, has clients present at the ADR session, and is assigned a neutral with an appropriate level of expertise. The most frequently used ADR method is ENE. An ADR session is more likely to occur when the case has come to ADR through the multi-option program and when the attorneys have selected the ADR process themselves.

When parties are involved in selection of an ADR process, the criteria most important to them are whether the process is likely to reduce disposition time, lower litigation costs, and lead to settlement. The importance of these three factors did not differ by whether the responding attorneys had been referred to arbitration, mediation, ENE, or magistrate judge settlement conferences, suggesting that attorneys' primary expectations for the ADR process are similar across the various types of ADR. Beyond these three universal criteria, other criteria are important in selecting each type of ADR.

C. The Impact of the Court's ADR Programs

Because the court's multi-option program and individual ADR processes are so closely intertwined, in the following discussion of the demonstration program's impact we use the word

"program" to cover all the court's ADR services, distinguishing between the different ADR types and referral methods when necessary. Before proceeding, we summarize our findings.

- Most judges think the court's multi-option program is achieving its intended effects and that it is beneficial to be able to offer a range of ADR options to litigants. Judges generally spoke in superlatives about the ADR office and the help it provides and pointed out that for an ADR program with multiple options to be successful it is important to have professional staff running it.

- Just over 60% of attorneys indicated that the entire case about which they responded settled as a result of ADR. Thirty-five percent said ADR did not contribute to a settlement, and 4% said part, but not all, of the case settled as a result of ADR.

- More than 60% of attorneys said the ADR process reduced time and costs in the named case. Most of the remaining respondents said the process had no effect on time or cost, although 13% of attorneys thought ADR increased cost and 11% thought it increased time.

- The 62% of attorneys who said that ADR decreased costs reported substantial savings. The estimated savings ranged as high as $500,000, with a median (midpoint) estimate of $25,000 and mean (average) of $43,000. These client savings are realized at a cost to the court of approximately $480 per case.

- Caseload data do not show a significant drop in disposition time for civil cases, although the court's new ADR programs were, until recently, available to only a subset of judges and therefore affected only a portion of the civil caseload.

- Attorneys generally reported that ADR either reduced or had no effect on the amount of formal discovery or number of motions in the case, with only 3% of attorneys thinking each of these was increased.

- Attorneys were generally satisfied with the outcomes of their cases (81%), and to an even greater degree (98%) they thought the procedures used in the ADR process were somewhat or very fair. Ninety-four percent of attorneys would volunteer a future case for the ADR process, and 83% said the benefits of being involved in ADR outweighed the costs in their case.

- Attorney ratings of ADR's effects on litigation time, cost, and settlement, as well its effect on the amount of discovery and number of motions, did not vary by the type of party represented or by the type of ADR, suggesting that the various ADR processes are equally beneficial generally and are equally beneficial for both plaintiffs and defendants.

- Attorneys whose cases had settled in the ADR process were significantly more likely to report time and cost savings than attorneys in cases where ADR did not contribute to a settlement.

- Attorneys whose cases were referred through party choice were more likely to say ADR reduced litigation costs, to report that their case settled as a result of ADR, to say that the ADR process reduced discovery and motions, to find the ADR process fair, and to say the benefits of ADR outweighed any costs.

- Attorneys who rated the neutral positively were more likely than those who rated the neutral negatively to find that ADR reduced litigation cost and time, that it prompted settlement, that its outcome was satisfactory, that the process was fair, and that the benefits of ADR outweighed the costs.

- According to attorneys, the ways in which ADR was most helpful in their cases were (1) moving parties toward settlement; (2) clarifying or narrowing monetary differences; (3) encouraging parties to be more realistic in their positions; (4) allowing parties to "tell their story"; (5) providing a neutral evaluation of the case; (6) clarifying or narrowing liability issues; (7) allowing clients to become more involved; and (8) improving communication between the different sides in the case. There were some differences in these responses by the type of ADR to which the case had been referred.

- Attorneys and neutrals generally (83-90%) thought the timing of the ADR session in their case was about right, with slightly more thinking it was too early than too late.

- The great majority of attorneys (87%) reported that their clients did not pay anything to the neutral, and over a third of attorneys (35%) reported that the ADR session and preparation for it cost less than $500, including attorneys' fees and costs. The median cost for preparation and attendance was $1,500. Only 4% of attorneys reported that they ended ADR early to avoid paying the neutral for time beyond four hours.

- When asked about their preference for the future of the court's ADR programs, the highest proportion of attorneys (38%) and neutrals (51%) said they prefer a system in which there is a presumption of ADR in all cases with parties allowed to opt out only upon consent of the assigned judge, a system essentially like the multi-option program now being tested by the court.

- Telephone conferences with the ADR director or deputy director were held in 23% of cases in the survey. Around 40% of attorneys found the conference call helpful.

1. Judges' Evaluation of the ADR Programs

Overall Benefits of the Multi-Option Program

As noted previously, the judges cited a number of purposes for the multi-option pilot program, including providing parties an opportunity to choose from among various ADR options; saving cost and time by having cases resolved early through ADR; heightening bar awareness of ADR and making lawyers think about which ADR process will be most appropriate for a

particular case; determining to a limited extent what ADR processes work best for various types of cases; and determining the effect of a presumption that parties will choose a form of ADR.

Most judges who have contact with the ADR multi-option program think the program is achieving its goals, although at least one cautioned that it is too early to tell the effects of the program. One judge said s/he sees a "striking difference" in cases that have been through the multi-option program, in that these cases often have an "early breakthrough" that s/he learns about at the case management conference or that even obviates the need for the case management conference. Another judge said s/he thinks the program has led to earlier settlements, and a third judge noted that bar awareness of ADR options is much higher now.

Benefits for Judges

In interviews, about a third of the judges said that having a greater number of ADR options available (with the addition of mediation to the court's array of ADR options) did not have a great impact on their management of cases, with two judges stating that attorneys do not understand the differences between the various ADR forms. Other judges pointed out that "different things work for different cases" and said that having a greater number of ADR options increases the likelihood that attorneys and parties will find an option they think is appropriate and will choose to participate in ADR. One judge noted that when fewer options were available at the court it was not uncommon to encounter situations where a lawyer had had a negative experience with one of the options and would not want to choose that form of ADR for a case; now, there is a greater chance that one of the options will be acceptable to the parties and attorneys. Finally, one judge described the multitude of options as providing an opportunity for dialogue between the court and attorneys. "There is a sense," s/he said, of the bar and court working together, which encourages respect for the administration of justice. We don't have to say 'Try your case or nothing' or 'Try your case or go to arbitration'—it's a dialogue, an opportunity to work together."

The Court's Perspective on Attorney Response to the Multi-Option Program

Judges familiar with the ADR multi-option program report that attorneys have generally responded favorably to it, with some judges pointing out that ADR has now become accepted as part of the culture of the court. Two judges said they had heard complaints about cases being assigned to ADR too early, with one noting that s/he did not pay much attention to this type of complaint because "it's too results-oriented; ADR can narrow the issues even if a resolution isn't achieved." The other judge who reported hearing this type of complaint said that "this is why case management is important; I don't want them going to ADR unless the case is ready for it."

Key Features of the Multi-Option Program

The judges with experience in the multi-option program cited the following features as most valuable for the program:

- that the program makes attorneys get together and talk;
- that attorneys and parties are forced to think about ADR as a way to solve their problems, rather than considering litigation as the only option;
- the conferences attorneys have with the ADR professionals;
- the reports the ADR office writes for judges;
- the fact that the program has caused judges to become more knowledgeable about ADR;
- the menu of choices provided to parties; and
- that the program "leads to and encourages early resolution."

Judges did not report any detrimental features of the program, although one pointed out that "we need good people running it" and this is a cost to the court.

The ADR Office

Staff of the ADR office provide services to cases both inside and outside of the ADR multi-option program, although some of their services—including telephone conferences with parties to help them select an ADR option—are generally available only to cases in the multi-option program. Several judges had never called on the ADR office for assistance with a case, but those who had generally spoke in superlatives about the usefulness of the ADR office and its staff. Example comments include the following:

> "They're wonderful, very knowledgeable ... the best addition [to the court] in years."
>
> "The ADR unit is invaluable. They're worth anything they're paid."
>
> "The ADR office is very effective...I refer cases to them and never think about the cases again, which is how much I trust them."

Judges who had worked with the ADR office reported receiving help in a number of ways, including scheduling the ADR session for a case; screening and appointing neutrals; identifying cases for which ADR might not be appropriate; and talking with the attorneys about ADR and providing the judge with a short memo summarizing that discussion.

The judges said the professional identity of the ADR office is important because it represents to the bar the court's view of ADR—that it is a valuable service provided by the court. The office also plays the essential role of ensuring quality control over the many outside neutrals who serve in the ADR programs. According to our interviews, the work performed by the director and deputy director requires legal training and experience and could not be absorbed by members of the clerk's office staff.

Recommendations and Advice to Other Courts

The great majority of judges who have had exposure to the multi-option program said quite enthusiastically that they would recommend such a program to other courts. When asked what advice they would give, two stressed the need for adequate resources; as one judge said:

> "Start small and do a quality program; don't have a half-baked, superficial program with too few resources trying to reach too many cases. Only service the cases you can service well—including quality control of neutrals."

In addition, two judges said an ADR program should be integrated into a court's case management program, with one going further to say that such a program "probably only works in a district where there's a fairly active case management program—the two go hand in hand."

2. Attorneys' Evaluation of the ADR Programs

To determine the impact of the ADR program on cases that participated in it, questionnaires were sent to a random sample of attorneys. The questionnaires focused on the ADR program's impact on time and cost in a particular case, but also asked the attorneys about their satisfaction with the ADR process in which their case participated and about other effects the process might have had on the progress of the case or the relationship between the parties.

In reporting on the attorneys' responses, we examine not only their assessment of the ADR processes but whether their assessment is related to other factors such as the type of ADR process, whether the attorney represented plaintiff or defendant, and whether the case settled. It is important to keep in mind that findings based on the survey cannot tell us whether the program definitely had the reported effects, only that the attorneys believed it did.

It is also important to keep in mind who the subjects of the discussion are. The sample was drawn from cases filed since the multi-option program began but that completed their ADR process in 1995. Within that group, the questionnaire was sent to all attorneys whose cases were subject to the multi-option program, to all attorneys whose cases were referred to mediation, and to a sample of cases referred automatically to arbitration and ENE. Because the questionnaire was sent to *referred* cases, a substantial number of respondents—45%—did not actually participate in an ADR session. Most of the findings below are based on responses from those who participated in a session.

Table 67 (next page) shows the distribution of responding attorneys according to whether their case was in the multi-option program, the type of ADR to which the case was referred, and whether an ADR session was held. As seen above for the general caseload (discussion at Table 64), the distribution of cases across ADR types also varies by whether or not the case was in the multi-option program. There are disproportionately fewer arbitration cases, however, because we oversampled for multi-option cases and these cases seldom select arbitration as their ADR option. The oversampling also explains why there are a greater number of ENE cases in the multi-option group than in the non-multi-option group and why there are more mediation cases in the non-multi-option group than we might expect from the overall population figures.

Because of the nature of the sample, it will be important to distinguish whether the findings apply to all cases or a segment of the ADR caseload. Thus, for each analysis we examine whether the responses vary by ADR type and by whether the case was subject to the multi-option program.

We first examine the attorneys' assessments of ADR's effects on settlement, then discuss their estimates of ADR's effects on time and cost, and then explore other effects of ADR, including ways in which ADR might facilitate the settlement process even if settlement does not occur. Finally, we examine attorney satisfaction with the overall ADR process and outcome.

Table 67
Number of ADR Referrals in Cases of Attorneys Responding to the Survey
Northern District of California

Type of ADR	Multi-Option Cases		Non-Multi Option Cases	
	No. Referred	No. With Session	No. Referred	No. With Session
Arbitration	5	2	58	3
Mediation	36	28	36	34
Early neutral evaluation	68	52	56	41
Magistrate judge settlement	65	47	0	0
Private ADR	14	9	0	0
Other	39	5	48	13
Total	227	143	198	91

Program Effects on Settlement

An ultimate goal of virtually all ADR processes is to effect settlement directly or to provide the parties with information, such as a neutral evaluation of the case, that will facilitate the settlement process. As shown in Table 68, almost two-thirds (65%) of attorneys in this study reported that all or part of their case had settled as a result of the ADR process, with most of these attorneys indicating that the entire case had settled.

Table 68
Attorney Reports of Whether Case Settled as a Result of Participation in an ADR Session
Northern District of California

Response	% of Respondents Selecting Each Response (N = 231)
The *entire* case settled as a result of ADR	61.0
A *part* of the case settled as a result of ADR	4.0
ADR did not contribute to a settlement in this case	35.0

Responses to this question did not vary significantly by the type of ADR to which the case was assigned or whether the case was a multi-option case, but the responses were significantly related to whether the case was referred to ADR through party choice, judge choice, or by automatic assignment. Specifically, nearly three-quarters—72%—of the attorneys who selected their own ADR process said their entire case settled because of the process, whereas just under half—49%—of the attorneys whose cases were automatically referred to ADR reported that their case settled because of the ADR process.

Program Effects on Time to Disposition

Timing of First ADR Session

Cases are referred to ADR at different times depending on the type of ADR, judges' or attorneys' judgments about when ADR might be beneficial for a particular case, availability of an appropriate neutral, and other factors. As shown in Table 69, the great majority of attorneys and neutrals (83% and 90%, respectively) thought the initial ADR session was held at an appropriate time. Most of those who did not think the timing was appropriate thought the session was held too early; 6% of attorneys, and no neutrals, thought the session was held too late. Responses did not vary significantly by the type of ADR to which the case was assigned, whether the case was in the multi-option program, or how the case was referred to ADR.

Table 69
Attorney and Neutral Ratings of Timeliness of First ADR Session (in percents)
Northern District of California

Rating of Timing of First ADR Session	Attorneys (N = 239)	Neutrals (N = 90)
Too early	11.0	10.0
At about the right time	83.0	90.0
Too late	6.0	0.0

Most attorneys and neutrals who said the session was held too early noted that one or both parties had not completed enough investigation or discovery prior to the session. There was no pattern among the four attorneys who provided an explanation of why the session was held too late: one said the case had to be reassigned to another neutral after the initial assignment; one said there had been difficulty finding a neutral with the necessary expertise; a third attorney explained that the session occurred after summary judgment motions had been filed and parties' positions had hardened; and the fourth merely noted there was a five-month lapse between the decision to use ADR and the attorney's first contact with the neutral.

Overall Effect of ADR on Timeliness of Case

A more critical question than the appropriateness of the timing of the first ADR session is the overall effect participation in ADR has on time to disposition in a case. As shown in Table 70, a high proportion of attorneys (61%) said the ADR process had reduced time to disposition in the case.[138] The attorneys' estimates that ADR reduced disposition time are consistent with findings discussed in Chapter III, where we found that attorneys whose cases had been referred to ADR were more likely than others to think that the court's case management program had reduced time to disposition in their case. Thus, from two different samples of attorneys in this district we find the same results regarding ADR's perceived impact on litigation time.

Table 70
Attorney Ratings of Effect of ADR on Time
to Resolve the Case (in percents)
Northern District of California

Rating of ADR Effect on Time to Resolve the Case	Percent of Respondents Selecting Each Response (N = 239)
Increased	11.0
No effect	23.0
Decreased	61.0
I can't say	6.0

Additional analyses revealed that the attorney ratings of the effect of ADR on disposition time were not significantly associated with the type of party represented (plaintiff or defendant), the nature of suit of the case, the type of ADR to which the case was referred, the method of referral, or whether the case was assigned to the multi-option program. Ratings were significantly related, however, to whether the case settled as a result of the ADR process. Of the attorneys who said their entire case settled because of the ADR process, 90% said the process reduced disposition time, whereas of the attorneys who said the ADR process did not contribute to settlement, 18% said the process reduced disposition time. Only twenty-four attorneys reported that disposition time was increased by participating in ADR, and these were evenly split between attorneys who reported their case settled through ADR and those who reported that it did not.

[138] It would be better to measure the time to disposition directly and compare ADR and non-ADR cases, but we have no directly comparable groups in this district. Cases that are not referred to ADR differ systematically from those that are—e.g., involve money damages over the $150,000 limit for automatic referral to arbitration or are thought by judges or attorneys in multi-option cases as unsuitable for ADR—and therefore cannot be compared to cases that are referred to ADR.

The relationship between ratings of ADR's effects on disposition time and ratings of its effects on settlement suggest that ADR may decrease litigation time by bringing about settlements earlier than they otherwise would have occurred.

Program Effects on Litigation Costs

Cost of ADR Sessions

As noted earlier, neutrals for mediation and early neutral evaluation in the Northern District provide preparation time and the first four hours of ADR sessions pro bono and then may be paid by the parties, if the parties agree, for time beyond four hours. Arbitrators are paid by the court, and magistrate judges hold settlement conferences as part of their regular duties.

Fee to the Neutral. Table 71 shows that the great majority of attorneys—87%—reported that their client paid no fee to the neutral. Only 2% of attorneys reported that their client had paid more than $4,000 to the neutral. The maximum amount paid was $5,000, the median was $0, and the mean (average) was under $200. These estimates did not vary by the type of ADR to which the cases was referred, whether it was a multi-option case, or whether the referral was by party choice or not. The number of parties paying a fee—twenty-three parties—is, however, so small, that if there were a relationship between, say, ADR type and the size of the fee, the statistical analysis would not be able to discern it.

Table 71
Attorney Reports of Fees Paid to Neutral for ADR Session(s)
Northern District of California

Amount of Fees Paid by Client to the Neutral	Percent Selecting Each Response (N = 177)
$0	87.0
$1 - $500	6.0
$501 - $1,000	2.0
$1,001 - $2,000	2.0
$2,001 - $4,000	1.0
> $4,001	2.0

Cost of the Session. Even though most parties do not pay the neutral for his or her services, they can incur costs, including attorneys' fees and out-of-pocket costs, related to preparing for and participating in the ADR session. Table 72 (next page) shows that more than a third (35%) of respondents reported that the ADR session(s) cost their clients less than $500. Although a

substantial minority (17%) reported the session(s) cost over $4,000, the median reported cost incurred was $1500. The cost of preparing for and attending the session did not vary by ADR type, by whether the case was a multi-option case, or by the method of referral to ADR.

Table 72
Attorney Reports of Client's Costs for ADR Session(s)
Northern District of California

Amount of Costs Incurred Preparing for and Participating in ADR Session(s)	Percent Selecting Each Response (N = 185)
< $500	35.0
$500 - $1,000	14.0
$1,001 - $2,000	17.0
$2,001 - $4,000	17.0
> $4,001	17.0

In only a small percentage of cases—4%, or six cases—did the parties stop the ADR process earlier than they otherwise would have to avoid paying the neutral for time spent beyond four hours. Although this small percentage indicates that at least some parties are willing to pay the neutral for time spent beyond four hours, it also reflects the fact that many ADR sessions were completed in less than four hours and that some neutrals continued to volunteer their time beyond the four-hour mark. Indeed, of the sixty-one neutrals who indicated that the four-hour rule applied in their case, a third (33%) said they did not ask to be paid for additional time spent.

Overall Effect of ADR on Litigation Costs

Knowing how much clients spent for ADR is not sufficient for determining the effect of ADR on the overall cost of a case. To get at this issue more specifically, we asked attorneys whether the ADR process in the subject case had increased, decreased, or had no effect on the cost to resolve the case. As shown in Table 73 (next page), a high proportion of attorneys (62%) said the ADR process had reduced costs in the case. These proportions are comparable to the proportions that reported the ADR process had reduced time to disposition.

Again, this pattern of results is consistent with findings from our case management survey in California Northern, where we found that attorneys whose cases had been referred to ADR were more likely than others to think that the court's management of their case had reduced costs.

Additional analyses revealed that ratings of the effect of ADR on costs in the case did not differ significantly by the type of party represented (plaintiff or defendant), the nature of suit of

the case, the type of ADR to which the case was referred, or whether the case was in the multi-option program. As with ADR's effects on time, however, attorney ratings of the effect of ADR on cost did vary significantly by whether the case settled as a result of the ADR process. Of the attorneys who said their entire case settled through the ADR process, 91% said the process decreased litigation costs, whereas of the attorneys who said ADR did not contribute to settlement, 16% reported that the process decreased litigation costs.

Table 73
Attorney Ratings of Effect of ADR on Cost
to Resolve the Case (in percents)
Northern District of California

Rating of ADR Effect on Cost to Resolve the Case	Percent Selecting Each Response (N = 239)
Increased	13.0
No effect	19.0
Decreased	62.0
I can't say	6.0

Unlike attorney ratings of ADR's effects on litigation time, attorneys' ratings of its effects on cost varied significantly by the method of referral to ADR: 76% of attorneys from cases in which parties chose the ADR process reported a decrease in costs from ADR, compared to 50% of attorneys from judge-referred cases and 60% of attorneys from cases automatically assigned to ADR. Although the majority of attorneys in each instance reported that ADR saved litigation costs, attorneys who selected their own ADR process were more likely to report a cost savings.

How much money does ADR save? We asked attorneys who reported that ADR had saved costs to estimate by approximately how much ADR had decreased their client's total litigation costs. The estimated cost savings were substantial, ranging as high as $500,000, with a median (midpoint) of $25,000 and a mean of $43,000. Table 74 (next page) shows the distribution of responses when combined into several cost intervals. At a cost, then, of about $480 per case, the court's ADR programs appear to be delivering sizable savings in client costs.

In contrast to the high amounts reported by attorneys who indicated that ADR saved costs, the twenty-one attorneys who provided an estimate of how much ADR increased costs reported a median increase of only $3,000, with a mean of $3,900 and a maximum of $15,000.

Table 74
Attorney Reports of Costs Saved Through ADR
Northern District of California

Estimated Litigation Costs Saved By Participating in ADR	% of Responses in Each Category (N = 106)
< $5,000	5.0
$5,001 - $10,000	26.0
$10,001 - $20,000	17.0
$20,001 - $50,000	33.0
$50,001 - $100,000	13.0
> $100,000	7.0

Program Effects on Motions and Discovery

As Table 75 shows, more than 40% of attorneys thought the ADR process decreased the amount of formal discovery and the number of motions in their case, with most of the remaining attorneys thinking ADR had no effect on these measures. Only 3% of attorneys thought ADR increased these measures.

Table 75
Attorney Ratings of Effect of ADR on Motions and Discovery
Northern District of California

Effect on Amount of Formal Discovery	Percent Selecting the Response (N=237)	Effect on Number of Motions	Percent Selecting the Response (N=237)
Increased	3.0	Increased	3.0
No effect	42.0	No effect	47.0
Decreased	49.0	Decreased	42.0
I can't say	6.0	I can't say	8.0

These findings are particularly interesting considering that very few attorneys whose parties had selected their ADR did so for assistance with discovery or motions (see Table 65). Ratings of effects of ADR on the amount of discovery or motions did not vary by the type of ADR to which the case was referred, the type of party represented, the nature of suit of the case, or by whether the case was a multi-option case. They did vary, however, by whether the case was referred to the ADR process through party choice, judge choice, or automatically—in particular, a higher proportion of

attorneys from cases referred through party choice thought motions and discovery were decreased than did attorneys from cases referred automatically or by the judge.

Other Effects of the ADR Program

In addition to the three primary measures—cost, time, and settlement of the case—we asked attorneys about other ways in which the ADR process might have been helpful to their case. The results are shown in Table 76.

Table 76
Attorney Overall Ratings of Ways in Which ADR Process was Helpful
Northern District of California

Way in Which Process was Helpful	Extent of Helpfulness (in percents)					
	N	Very Helpful	Moderately Helpful	Slightly Helpful	Of No Help at All	Not Applicable
Moving the parties toward settlement	238	51.0	14.0	11.0	19.0	4.0
Clarifying or narrowing monetary differences in the case	237	41.0	21.0	13.0	16.0	10.0
Encouraging the parties to be more realistic about their respective positions	240	35.0	32.0	14.0	16.0	4.0
Giving one or more parties an opportunity to "tell their story"	238	32.0	27.0	20.0	10.0	11.0
Providing a neutral evaluation of the case	237	30.0	25.0	19.0	13.0	13.0
Clarifying or narrowing liability issues in the case	238	29.0	28.0	19.0	13.0	11.0
Allowing the clients to become more involved in the resolution of the case	235	28.0	27.0	18.0	16.0	11.0
Improving communication between the different sides in this case	240	23.0	28.0	21.0	19.0	9.0
Allowing the parties to explore solutions that would not be likely through trial or motions	235	23.0	20.0	15.0	25.0	17.0
Allowing me to identify the strengths and weaknesses of the *other side's* case	237	19.0	30.0	27.0	15.0	8.0
Allowing me to identify the strengths and weaknesses of *my client's* case	237	18.0	27.0	32.0	15.0	8.0
Moving the parties toward entering stipulations and/or eliminating certain issues in this case	234	10.0	9.0	15.0	31.0	36.0
Preserving a relationship between the parties	235	9.0	17.0	16.0	34.0	24.0
Assisting the parties with planning the case schedule, discovery, or motions	235	6.0	6.0	5.0	37.0	36.0

Table 76 shows that more than half of the attorneys said the ADR process they selected was moderately or very helpful in:

- moving the parties toward settlement;
- clarifying or narrowing monetary differences in the case;
- encouraging the parties to be more realistic about their respective positions;
- giving one or more parties an opportunity to "tell their story";
- providing a neutral evaluation of the case;
- clarifying or narrowing liability issues in the case;
- allowing clients to become more involved in the resolution of their case; and
- improving communication between the different sides in the case.

Very few attorneys said the ADR process helped with case planning or entering stipulations.

Examination of these responses by the method of referral and whether the case participated in the multi-option program revealed no differences by either of these variables. Examination of the responses by the type of ADR to which the case was assigned revealed, however, several interesting patterns (see Table 77).

Table 77
Top Five Rankings of Ways in Which ADR Process was Helpful, by Type of ADR[139]
Northern District of California

Way in Which Process Was Helpful	Arbitration	Mediation	ENE	Magistrate Judge Settlement
Encouraging the parties to be realistic	–	2	1	2
Clarifying monetary differences	4	3	–	1
Moving the parties toward settlement	5	1	5	3
Providing a neutral evaluation of the case	1	–	3	–
Clarifying liability issues	2	–	2	4
Allowing parties to "tell their story"	–	4	4	–
Allowing attorney to identify strengths and weaknesses of other side's case	2	–	–	–
Allowing clients to be more involved in resolution of the case	–	5	–	5

[139] Rankings were determined by combining the percentages of attorneys saying the process was moderately or very helpful; where there was a tie, the distribution of other responses was factored in.

Attorneys from all of the court's standard ADR processes (arbitration, mediation, early neutral evaluation, and magistrate judge settlement conference) rated moving the parties toward settlement among the five most helpful aspects of the ADR process—although its importance is clearly greater to attorneys whose cases participated in mediation than to attorneys who participated in arbitration or ENE. To these latter attorneys, their ADR processes were particularly useful because they provided a neutral evaluation of the case and helped clarify liability issues. ADR's usefulness in encouraging realism in the parties is also apparent from Table 77, with attorney responses placing this as the first or second most important assistance provided by mediation, ENE, and magistrate judge settlement conferences. These processes are also more likely to involve the clients in the resolution of the case or to provide a forum in which the parties can "tell their story."

Altogether, Table 77 suggests that attorneys in the Northern District distinguish among the court's ADR options in the kinds of assistance each provides. This is consistent with our earlier, similar conclusion when we examined the reasons attorneys gave for selecting the ADR process to which their case was referred.

Satisfaction with ADR Outcome and Procedures

Within the goals of lowering litigation costs and time, has the court been able to preserve the fairness of its treatment of ADR cases? As Table 78 shows, more than 80% of attorneys were either somewhat or very satisfied with the outcome of their case and an even higher proportion (98%) thought the procedures used in the ADR process were somewhat or very fair, with fully 85% reporting that they were very fair. It appears, then, that the ADR program in the Northern District succeeds in lowering costs and time (as reported by attorneys) in a majority of cases while treating cases in a way that attorneys consider fair.

Table 78
Attorney Satisfaction With ADR Outcome and Procedures
Northern District of California

Satisfaction With Outcome	Percent Selecting the Response (N=220)	Fairness of Procedures	Percent Selecting the Response (N=222)
Very satisfied	52.0	Very fair	85.0
Somewhat satisfied	29.0	Somewhat fair	13.0
Somewhat dissatisfied	9.0	Somewhat unfair	2.0
Very dissatisfied	10.0	Very unfair	0.0

As might be expected from the high overall ratings, these responses generally did not vary significantly by nature of suit, the type of ADR the case was referred to, whether the case was in

the multi-option pilot program, or the type of party represented. Ratings on outcome satisfaction were, however, associated with whether the case settled: 97% of attorneys who reported their case settled as a result of the ADR process were somewhat or very satisfied with the outcome, while only 55% of attorneys whose cases did not settle were somewhat or very satisfied, and 45% were somewhat or very dissatisfied. This suggests once again that parties expect ADR to effect settlement in their cases.

In addition, ratings of the fairness of procedures were related to how the case was referred to ADR, with attorneys from cases that were automatically referred less likely to report that the procedures were very fair and more likely to report they were unfair than attorneys from party-referred or judge-referred cases. This effect was not extreme, however, as over 75% of attorneys from automatically-referred cases still reported that the ADR procedures were fair.

As another indication of their satisfaction with ADR, 94% of attorneys indicated they would volunteer an appropriate case in the future for the particular ADR process in which their case participated. This sign of approval of the court's processes was universal, varying neither by ADR type, method of referral, whether the case participated in the multi-option program, nature of suit, or type of party represented.

Finally, 83% of attorneys reported that the benefits of being involved in the ADR process were greater than the costs, while 17% said the benefits were not greater than the costs. These ratings were related to method of referral (with attorneys from automatically-referred cases less likely to think ADR was beneficial), but not to type of ADR, nature of suit, type of party, or whether the case was in the multi-option program.

When asked to explain what aspects of the ADR process made it beneficial or not beneficial, 106 attorneys provided comments. Those who said the process was beneficial most often noted that the case settled because of ADR; that the case settled earlier than it otherwise would have; that the ADR session made the parties more realistic; that it reduced costs; and that the session confirmed the correctness of the client's position. Those who did not think the benefits outweighed costs most frequently explained that one or both parties were inflexible in their positions; that the case did not settle; or that the neutral was ineffective or biased toward one side (this complaint was mentioned by only five attorneys).

The Effect of the Neutral

On every measure we have examined—ADR's effect on litigation time and cost, its effect on settlement, attorneys' satisfaction with the outcome of their case and the fairness of the ADR procedure—attorneys' responses varied by the quality of the neutral who conducted the ADR session.[140] Considering the overall measure, which asked attorneys to rank the neutral on a five-

[140] We asked the attorneys to rank the neutral in their case on a number of different dimensions, including the amount of pressure they applied, whether they treated the parties fairly, and several others.

point scale from "excellent" to "terrible," attorneys who ranked the neutral near or at the excellent end of the scale were significantly more likely to report that the ADR process reduced litigation cost and time, that their case settled through the ADR process, that the outcome was satisfactory and the process fair, that the benefits of using ADR outweighed the costs, and that they would volunteer a case for this form of ADR.

Attorneys who ranked the neutral negatively were more likely to report the opposite: that ADR increased costs and time, that they were very dissatisfied with the outcome, that their case did not settle, and that the costs outweighed the benefits. Generally attorneys who gave the neutral a middling ranking reported neither positive nor negative effects from ADR, except regarding costs, where the attorneys said a so-so neutral increased the costs of the litigation, and regarding volunteering a case for ADR, where two-thirds of the attorneys who gave a middling rank would still volunteer an appropriate case for ADR.

The number of attorneys reporting an ineffective neutral was fairly small—twenty-three out of 226 giving a negative rating and thirty-six giving a middling rating—but their responses reveal that the impact of a poor neutral is wide-ranging.

Attorney and Neutral Preferences for the Future of the Court's ADR Programs

Because the multi-option program is experimental, it applies only to cases from a small number of judges. Thus, two features of the multi-option program—the presumption that some form of ADR will be used in the case, and the high degree of input parties have with respect to the type of ADR selected—do not apply to all civil cases. We asked attorneys and neutrals what their preference would be for the future of the court's ADR programs, particularly with respect to the voluntary/mandatory nature of participation and how cases would be assigned to particular processes.

The results, shown in Table 79 (next page), reveal that almost two-thirds of attorneys and neutrals (62% and 65%, respectively) expressed a preference for a system with a presumption of ADR use in every case. The highest proportion of attorneys and neutrals (38% and 51%, respectively) said they prefer a system in which there is a presumption of ADR in all cases with parties allowed to opt out only upon consent of the assigned judge. This response did not vary by any of the measures we have been examining.

The respondents' preferred structure is very similar to the present multi-option program structure, and respondents' preference for it may reflect the fact that, while attorneys view the ADR processes in the court as beneficial, they are sometimes concerned that suggesting ADR in a particular case may be viewed as an acknowledgment that a client's position is weak. On the other hand, attorneys clearly want input with respect to the type of ADR selected, as only 10% said they prefer a system of automatic assignment to a specific ADR process.

Table 79
Attorney and Neutral Preferences for Future of Court's ADR Programs (in percents)
Northern District of California

Preference for Assignment of ADR Cases	Attorneys (N = 387)	Neutrals (N = 125)
ADR offered with no presumption of use and complete party discretion	13.0	6.0
Presumption of ADR use but parties can opt out freely	24.0	14.0
Presumption of ADR use; parties can opt out only with judge consent	38.0	51.0
Case ordered to ADR on request of one party	11.0	9.0
Each case automatically assigned to specific ADR procedure regardless of party preferences	10.0	14.0
Other	4.0	6.0

Telephone Conferences in Multi-Option Cases

As noted previously, most services of the ADR office—such as selection of neutrals for mediation and ENE cases—are available to all cases regardless of whether they are assigned to the multi-option program. One service that is offered only to multi-option cases, however, is a telephone conference with the ADR director or deputy director to discuss the court's ADR processes and to assist the parties in choosing an appropriate process for their case. Twenty-three percent of attorneys reported having participated in an ADR telephone conference. Their ratings of the effects of these conference calls are shown in Table 80 (next page).

Table 80 reveals that most attorneys did not note major effects of the ADR telephone conference; in fact, for most potential effects, over 50% said they did not occur at all. Around 40% of attorneys did, however, report finding the ADR telephone conference very or somewhat helpful for providing information about the ADR process; helping the attorney decide which process to select; and prompting counsel to stipulate to an ADR process. Overall, however, it appears that over half the attorneys did not find these telephone conferences especially beneficial.

Table 80
Attorney Ratings of Extent to Which ADR Telephone Conference Had Various Effects (in percents)
Northern District of California

Potential Effect	Percentage Selecting Each Response (N = 80)			
	Very Much	Somewhat	A little	Not at all
Provided me with helpful information about the ADR process.	23.0	23.0	14.0	41.0
Helped me decide which ADR process to select.	19.0	20.0	10.0	51.0
Prompted counsel to stipulate to an ADR process.	21.0	17.0	10.0	52.0
Persuaded me that ADR could be useful for this case.	10.0	19.0	9.0	62.0
Assisted in planning discovery.	5.0	6.0	5.0	83.0
Assisted in clarifying the issues in the case.	5.0	5.0	13.0	77.0
Persuaded me that ADR would not be useful for this case.	6.0	3.0	4.0	87.0
Unduly pressured one or more sides into choosing an ADR process.	4.0	0.0	4.0	92.0

Summary of the Attorneys' Evaluation of the Court's ADR Programs

Substantial majorities of attorneys who participated in an ADR session in the Northern District of California reported that the process lowered litigation time and costs, prompted settlement of the case, reduced discovery and motions, provided a satisfactory outcome, and treated parties fairly. Attorneys were more likely to report positive effects when their case settled as a result of the ADR process, when they selected the process themselves, and when the neutral was good.

Although attorneys' ratings of ADR's effects generally did not differ by the type of ADR to which the case had been referred, attorneys' decisions about which ADR process to use and their ratings of the benefits provided by ADR indicate that they distinguish between the several different types of ADR offered by the court. If the court changes its ADR programs in the future, the system preferred by the largest number of attorneys is one like the current multi-option program, which presumes ADR will be used but involves the parties in selecting the appropriate process.

3. Caseload Indicators of the Programs' Effects

The Northern District of California began its demonstration program with a relatively low median time to disposition for civil cases—eight months—which could make it difficult for any ADR or case management innovations to have observable effects on disposition time. To examine

whether it has, we graphed a number of measures of caseload activity in the years before and after implementation of the case management and ADR pilot programs. No single measure tells the full story, and we will therefore discuss the relationships among several measures. At the close of FY95, the median disposition time for cases subject to the case management and ADR programs was about seven-and-a-half months; 70% of this caseload was disposed of in about thirteen months.

Figure 5 shows several caseload and disposition time measures for non-administrative—or general civil—cases from fiscal year 1988 through 1995. The figure includes only non-administrative cases because it is this portion of the caseload that is subject to the court's pilot programs. The left-hand vertical line on the graph indicates the implementation date for the case management program, while the lighter, right-hand vertical line marks the date for implementation of the multi-option and mediation programs.

The graph shows that for the past seven years the measures of the court's ability to keep up with its caseload—median and mean age at termination, mean age of pending cases, and number of pending cases—have been essentially stable. Although there have been fluctuations in these measures during that time, the median disposition time for general civil cases has consistently been between seven and eight months, the mean age at termination has hovered around twelve months, and 70% of the caseload has been terminated within twelve to thirteen months.[141]

What is particularly noteworthy about Figure 5 is that the court has maintained the stability of these measures even as its filings have fluctuated. Figure 5 shows, in fact, that the court is very responsive to its filings, increasing its terminations as filings go up and decreasing its terminations as filings go down.

In addition to showing that the court has kept up with its filings, the graph reveals that in FY92 the court increased its termination of older cases, as seen in the increase in mean age at termination that year. The result is a reduction in the mean age of the pending caseload.

Figure 6 shows a second interesting occurrence in California Northern. The figure shows caseload trends for contract and personal injury cases, one of two segments of the caseload that differ significantly from the graph for the overall general civil caseload.[142] Figure 6 shows that in FY93 and FY94, the court's terminations of these cases exceeded substantially the number of filings. Again, the court was terminating older cases, shown by the increase in the mean age at termination and the decrease in the mean age of the pending contracts and personal injury caseload.

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[141] We used a number of other methods as well to examine the caseload data, such as the percentage of cases pending and terminated at various monthly intervals over the past decade. These are not shown here. Each confirmed the conclusions drawn above.

[142] The other caseload segment that differs substantially from the graph for all non-administrative cases is the civil rights caseload, where filings have risen more rapidly and consistently than the rest of the caseload (nearly doubling since 1990). Terminations have risen as well but lag behind filings, which may account for the slight rise in the age of the pending caseload in FY95.

Another way to examine caseload changes in the court is to look at the distribution of case dispositions by time intervals both before and after the demonstration programs were implemented. Using the implementation date of the case management program as the program start point, Table 81 shows the percentage of pre-program and post-program cases terminated at each of several time intervals.[143] The table reveals that since implementation of the case management pilot program a greater proportion of cases have been terminated during the very earliest time interval (zero-to-three months)—29% of pilot program cases compared to 25% of pre-program cases. Concomitantly smaller proportions of program cases have been terminated between four and nine months. At ten-to-fifteen months, the proportion of program cases disposed of is identical to the proportion of pre-program cases disposed of in that time frame, and beyond fifteen months slightly fewer program cases reach the longer time intervals to disposition.

Table 81
Percent of Cases Terminated by Time Intervals, Pre-Program and Post-Program
Northern District of California

Months to Disposition	Pre-Program	Post-Program
0-3	25.0	29.0
4-6	27.0	26.0
7-9	17.0	15.0
10-12	11.0	11.0
13-15	7.0	7.0
16-18	5.0	4.0
19-24	5.0	5.0
25-36	3.0	2.0
37+	0.2	0.3
No. of Cases	4,289	6,242

Although these data show that dispositions have accelerated since the case management pilot program was implemented, it is possible that factors other than the program brought about these shifts. The separate contribution, if any, of the ADR programs has not been factored in, for example. It is unlikely, however, that changes in the court's caseload mix explain the shift to earlier dispositions (if anything, the caseload has become more demanding) or that the CJRA reporting

[143] The analysis includes all civil cases, both general civil and administrative cases. The pre-program period includes cases filed between 7/1/89 and 6/30/92 and terminated before 12/31/92. The post-program period includes cases filed between 7/1/92 and 6/30/95 and terminated before 12/31/95.

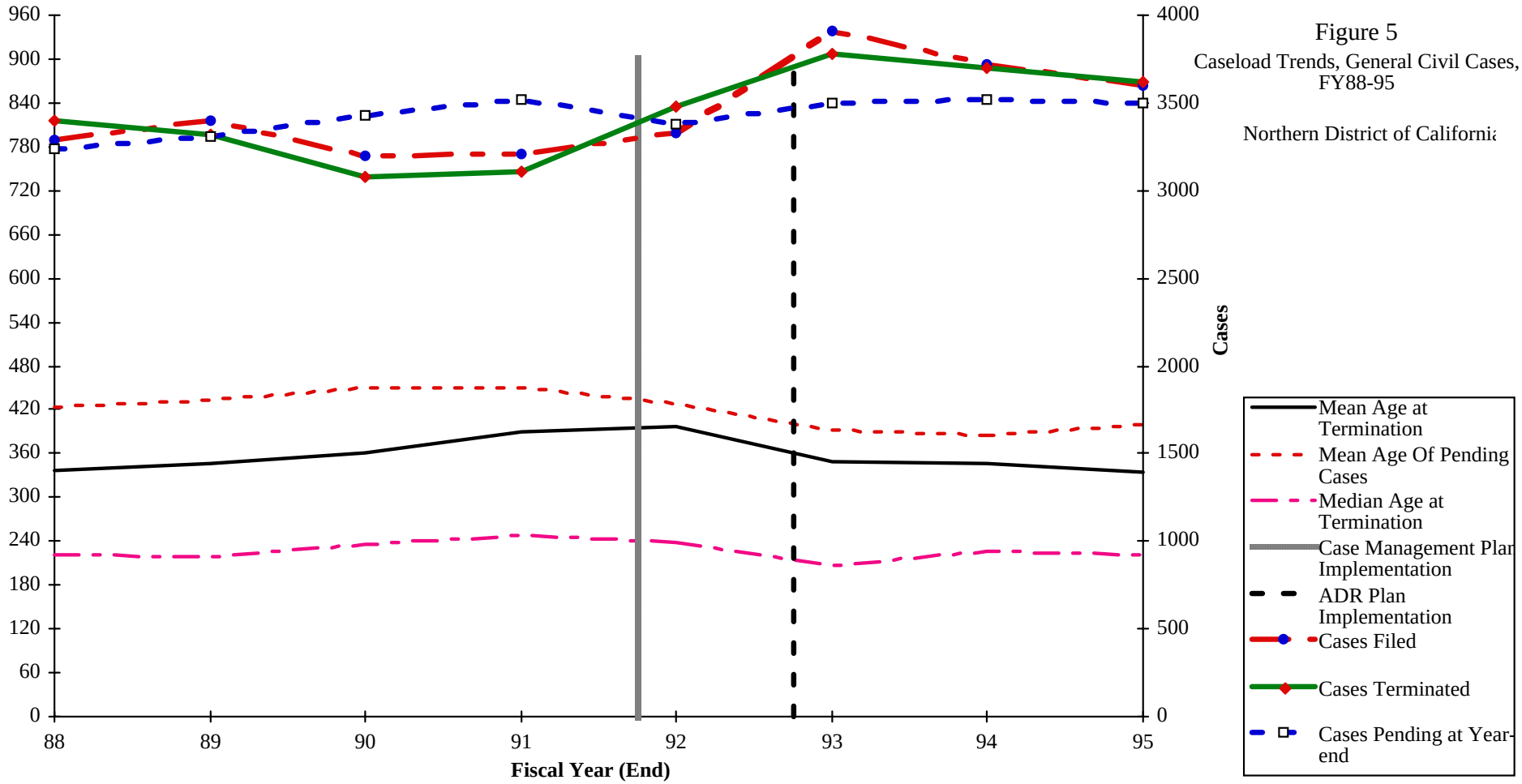

Figure 5

Caseload Trends, General Civil Cases, FY88-95

Northern District of California

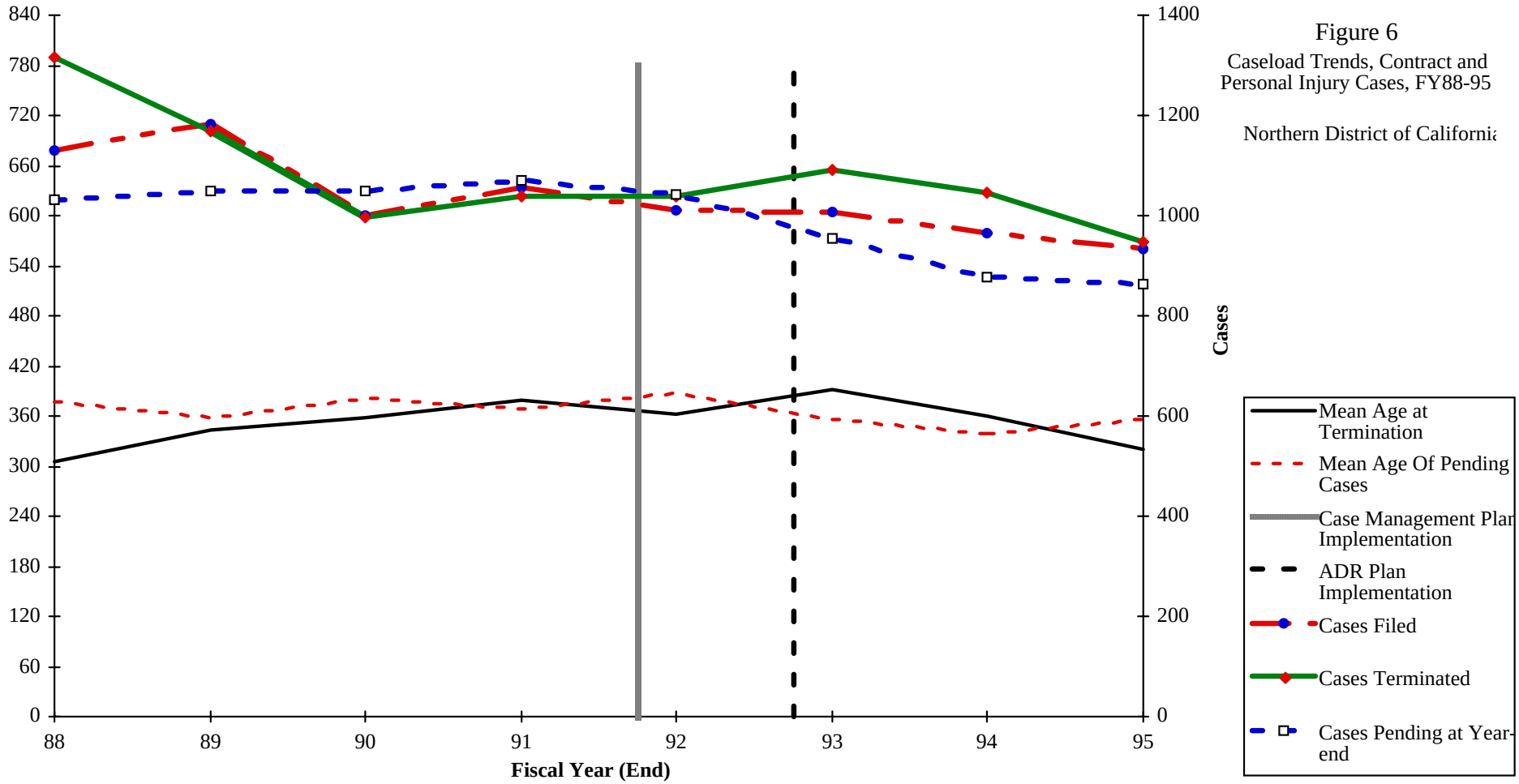

Figure 6

Caseload Trends, Contract and Personal Injury Cases, FY88-95

Northern District of California

requirements account for it, since these requirements are likely to reduce dispositions at the longest intervals, not increase them at the shortest interval. Nor did we find evidence that attorneys are more likely to voluntarily dismiss their case because of the case management requirements. The addition of two judgeships in 1991 may be a factor in the shift to earlier dispositions, but throughout the demonstration period there has always been one vacant judgeship as well as an active judge who was not able to carry a caseload. Whatever the cause, the data do indicate that more cases are disposed of at the very earliest stages of the litigation.

What conclusions, if any, can be drawn from these analyses of the caseload? Figures 5 and 6 indicate an unusual increase in terminations of older cases that began just as the court was implementing its case management program and continued through 1994. Further, Table 81 shows a shift to more dispositions within a short time of filing. The court's ability over the past four years to dispose of older cases, terminate a sizable number of cases at an earlier stage, and maintain stable disposition times overall in the face of rising filings and with at least one vacancy may signify a beneficial impact of the court's two pilot programs.

For two reasons, however, the specific effects of the programs are almost impossible to ascertain from caseload data. First, when two new programs are implemented in close proximity, as these were, the separate effects of each will be difficult to determine. Second, other requirements of the CJRA—for example, the requirement that courts publicly report the case names and assigned judges of cases that have not been terminated within three years of filing—could conceivably have affected the termination time for older cases. The court's above-average disposition of older cases over the past four years supports such an interpretation.

Although the caseload data cannot provide a definitive measure of the effects of the case management and ADR programs, they do suggest that at the very least these programs have not had a negative effect on disposition times in the district.

Chapter V

The Western District of Missouri's Early Assessment Program

Upon its designation as a demonstration district under the Civil Justice Reform Act, the Western District of Missouri adopted an experimental program in alternative dispute resolution. That program, which is known as the Early Assessment Program, or EAP, took effect in January 1992. In addition to reducing litigation cost and delay, the court and its advisory group had a number of other goals in mind as well, which are also considered in this discussion.

Section A presents our conclusions about the court's implementation of its Early Assessment Program and the impact of that program. Sections B and C provide the detailed documentation that supports our conclusions: section B gives a short profile of the district and its caseload, describes the court's program, discusses the process by which the court designed and set up the program, and examines how the court has applied the program requirements; section C presents our findings about the program's effects, looking first at the judges' experience with the program and then at its impact on attorneys, case disposition time, and litigation costs.

A. Conclusions About the Early Assessment Program

Set out below are several key questions about the demonstration program in the Western District of Missouri, along with answers based on the research findings discussed in sections A and B. As before, some of the findings presented below are based on interviews with judges and surveys of attorneys and reflect their subjective evaluations of the program. The measures of disposition time, however, are based on objective measures (filing and termination date) and, because the court established the EAP as a true experiment, permit conclusions about the actual impact of the Early Assessment Program on disposition time.

Does the Early Assessment Program lead to earlier case resolution?

The court and advisory group designed an ADR process they hoped would lead to earlier resolution of civil cases. The Early Assessment Program appears to have achieved this objective. Cases that are required to participate in the program have a median age at termination of 7.0 months, while cases not permitted to participate have a median age at termination of 9.7 months.[144]

Findings for a third group of cases, those permitted to participate in the Early Assessment Program at their discretion, are unexpected. Median age at termination for cases that volunteer to

[144] Civil cases eligible for the EAP are randomly assigned to experimental and control groups, so each group is made up of a full range of civil case types—i.e., the cases in each group are comparable.

participate is 9.2 months, longer than the median age for cases that choose not to participate (8.3 months) as well as for cases required to participate (7.0 months). The explanation lies in part in later initial sessions for the volunteer cases, which often occur two to three months later than the initial sessions for cases required to participate.

Cases that participate in the Early Assessment Program are somewhat more likely than cases that do not participate to be resolved by settlement, while cases that do not participate are more likely to be resolved by trial or other judgment. The Early Assessment Program appears, then, to prompt not only earlier case resolution but more settlements.

Although the age at termination is reduced for all case types subject to the Early Assessment Program, the reduction is greatest for contracts and, especially, civil rights cases.

Does the Early Assessment Program reduce litigation costs?

The court and advisory group hoped that by providing a program that would lead to earlier settlements they would also help parties reduce their litigation costs. Over two-thirds of the attorneys who participated in an early assessment session reported that the process did reduce their client's litigation costs. The median (midpoint) estimated savings was $15,000 per party. Twenty-four attorneys estimated savings over $100,000, with one reporting savings of $950,000 in litigation costs. Comparison of these estimates to attorneys' estimates of overall litigation costs suggests that the estimated savings may represent more than half of what these cases would have cost absent the EAP. More conclusive findings, however, require comparison between the litigation costs in EAP and non-EAP cases.

The 10% of attorneys who reported that the early assessment process increased their client's litigation costs estimated a median increase of $1,500. Those who reported increased costs were more likely to have gone to trial or to have reported that the EAP session was held too early, that a party did not participate in good faith, or that a neutral with subject matter expertise would have been preferred. Written comments suggest cases with certain characteristics may also experience increased costs from the EAP, particularly cases involving legal issues only and cases involving the government, which, according to written comments, often fails to send a representative with settlement authority.

Through what mechanisms does the Early Assessment Program affect time and cost?

In designing the Early Assessment Program, the advisory group and court wanted a process that would prompt earlier settlements by requiring parties to meet face-to-face early in the litigation to confront, in essence, the reality of their case—i.e., to assess the strengths and weaknesses of both sides and to appreciate the costs of proceeding. To effect this outcome, the court hired a program administrator to meet with attorneys and clients early in the litigation to make an assessment of their case.

The program appears to be providing exactly the kind of assessment the advisory group and court hoped it would. Over three-quarters of the attorneys who participated in an early assessment meeting reported that the session encouraged the parties to be more realistic about their positions.

Around two-thirds of the attorneys also said the session allowed them to better understand and evaluate the other side's position, prompted earlier definition of the issues, and allowed them to identify strengths and weaknesses in their own client's case.

Over-two thirds of the attorneys reported that the presence of their client in the early assessment meeting helped resolve the case. Although the court and advisory group, at the time they designed the program, debated the wisdom of this requirement, especially its impact on litigation costs, attorney responses clearly support mandatory party attendance at EAP sessions.

Both the attorneys and judges identified the program's administrator as a critical factor in the program's success. Over 80% of the attorneys who have participated in an early assessment meeting reported that he is well prepared and effective in getting the parties to engage in meaningful discussion of the case. Written comments, of which there were many, often praised the kind of assistance he provided. The judges, as well as several attorneys in their written comments, noted that an important factor in his success is his long experience in litigation before appointment to the court's position. In making the appointment, the court specifically decided to hire an attorney with experience and a superior reputation in the community, both to bring immediate credibility to the program and to ensure a high level of service to litigants.

What does it cost to provide an Early Assessment Program? Should the program be expanded? How?

The court estimates that the Early Assessment Program, with three staff and a separate office within the courthouse, will cost the court around $215,000 in FY96. Over the four years the program has been in operation that averages to about $700 per case that participated in the program. From attorney estimates of cost savings, it appears that many times that amount has been saved in client litigation costs. Judges say they also benefit through savings in time that would have been spent in pretrial management and decisionmaking in the many cases that are settled.

Both the bench and bar strongly prefer to continue the program. Not only did 84% of the attorneys who had participated in a session say the benefits outweighed any costs that might have been incurred in their specific case, but 96% said the program should continue and that they would volunteer an appropriate case for the program.

The court is currently considering how to expand the program to more cases and in doing so must confront directly whether the benefits are substantial enough to incur additional costs and how those costs might be met. The shortened disposition time for EAP cases and the attorneys' positive assessment of the program suggest the program provides substantial value to litigants. The program cannot be expanded, however, without additional persons to provide the early assessment/mediation service currently provided by the single administrator.

Three options are available: to turn to private sector attorneys to serve as neutrals, to use magistrate judges, or to expand the Early Assessment Program staff. For reasons of quality control and party confidence in the program, the judges would prefer not to establish a roster of private sector attorneys whose performance they would not be able to monitor closely. For

reasons of cost, the judges would prefer not to use the magistrate judges. They are already fully occupied, and to create another magistrate judge position would be more costly than expanding the EAP office. Funds for expanding that office, however, are not currently available, and budget constraints of the past several years do not suggest they will become available. To provide expanded service in these circumstance, the court will very likely have to turn to the assistance of private sector attorneys. Because these neutrals would, however, charge a fee for their service, the number of cases using these neutrals can be expected to be much lower than the number who turn to the court's program administrator for settlement assistance.

Is this program unique? Could other courts provide such a program?

The court and the advisory group believe there is nothing especially unique about the Western District of Missouri that suggests their Early Assessment Program could not be established in other courts. Some of the judges had misgivings about ADR and some members of the advisory group had doubts about some aspects of the program. If there is anything in particular that characterized both it was their willingness to experiment.

At the same time, the program's design and success depend, at this time, on the skills of the court's single administrator/mediator. While this study demonstrates that he has been effective in achieving the goals established for the demonstration program, it is important to keep in mind that these results would not necessarily be found if a different mediator conducted the sessions. While the judges believe they have hired an exceptional person for their program, they also believed that other such persons can be found.

The program designed by the court is unique in that it is the only district court program in which court staff, rather than attorneys or magistrate judges, conduct the ADR sessions. Other courts that might consider such a program would have to decide whether to give court staff the degree of responsibility this court has given its program administrator. The court's decision to do so, while unique among district courts, is not without precedent in the federal court system. Nearly all the courts of appeals provide settlement assistance through mediators who are members of the court staff.

The court's program is also unusual in the timing of the early assessment session, which takes place very early in the case. Conventional wisdom has held that ADR is unlikely to be effective until the parties have completed some or all discovery, but limited discovery has not, apparently, been a deterrent to early resolution under the EAP. The program is also unusual among district court mediation programs in that participation is mandatory in cases assigned to the program. While several attorneys suggested that under certain circumstances cases should be permitted to withdraw from the program, few attorneys objected to the mandatory nature of the program.

Absent any other considerations about whether to adopt a process like the Early Assessment Program, the one most likely to be decisive in many courts is the demand such a program would make on a court's budget. Without additional appropriations, many courts would not be able to establish a program and hire the experienced staff needed to gain the confidence of bench and bar.

B. Description of the Court and Its Demonstration Program

This description of the demonstration program adopted by the Western District of Missouri in January 1992 begins, as have those for the preceding courts, with a brief profile of the court's judicial resources and caseload. We then describe in detail the steps taken by the court to design, implement, and apply its Early Assessment Program.

1. Profile of the Court

Several features of the district are noteworthy for purposes of our discussion: a stable, though smaller-than-authorized, number of judges throughout the demonstration period; a higher than average weighted caseload per judge; and a higher than average caseload of social security cases. Because of the caseload mix, only about 60% of the civil cases filed are subject to the demonstration program.

Location and Judicial Resources

The Western District of Missouri is a medium-sized court, with a main office in Kansas City and three divisional offices. Two of the three divisional offices have a resident district and/or magistrate judge, but most of the judges reside in Kansas City.

The number of judgeships allocated to the district has been stable, at six judgeships, for at least the last ten years. Throughout the period of the demonstration program, however, two judgeships have been vacant at all times. Considerable service is provided by the court's senior judges; of the five, four carried a full caseload throughout the demonstration program. Only with the recent appointment of two new judges have two senior judges reduced their caseloads slightly. The court has five magistrate judge positions; all the magistrate judges were already on board by the time the demonstration program began. Altogether, then, the judicial resources of the district, though diminished by vacancies, have been stable throughout the demonstration period.

Size and Nature of the Caseload

Table 82 (next page) summarizes the caseload of the Western District of Missouri. During the demonstration period there has been some fluctuation in both the civil and criminal caseloads, with an overall rise in both since FY91. The court ranks in the top third of districts nationally in the number of civil and criminal felony cases filed, but a better measure of its caseload burden is the weighted filings per judge shown in Table 82. For each of the last five years the measure of weighted filings, which includes both civil and criminal cases, has been less than the actual filings. Nonetheless, in nearly every year shown in the table (except FY91), the weighted filings in this district have been higher than the national average—463 compared to 448 in FY95—suggesting a more demanding caseload than the average in the Western District.

Table 82
Cases Filed in the Western District of Missouri, FY91-95[145]

Statistical Year	Cases Filed			Filings Per Judgeship	
	Total	Civil	Criminal	Actual	Weighted
1991	2594	2342	252	432	380
1992	2801	2501	300	467	417
1993	2995	2677	318	499	469
1994	2871	2583	288	479	457
1995	2890	2572	318	482	463

As Table 83 shows, almost half of the district's civil caseload was made up of prisoner petitions in FY95, which is much higher than the national average of 26%. The court's social security filings, at 8% of the filings, are also substantially higher than the national average of 4%.

Table 83
Principal Types of Civil Cases Filed, FY95[146]
Western District of Missouri

Case Type	Percent of Civil Filings	
	District	Kansas City
Prisoner petitions	47.0	36.0
Civil rights	17.0	23.0
Social security	8.0	5.0
Contract	8.0	12.0
Torts	7.0	9.0

While the figures for the district as a whole reflect the total burden on the judges, the figures for the Kansas City division show the makeup of the caseload potentially eligible for the court's demonstration program. Since neither prisoner petitions nor social security cases are subject to the program, about 60% of the civil caseload in the Kansas City division is eligible for Early Assessment Program.

[145] Source: Administrative Office of the U.S. Courts, Federal Court Management Statistics, 1995. The fiscal year ends on September 30—i.e., FY95 runs from October 1 to September 30, 1995.

[146] *Id.*

2. Designing the Demonstration Program: How and Why

The court's CJRA advisory group took the initial responsibility for designing the court's demonstration program but worked closely with the court in preparing the final design. Below we describe their work, relying on the advisory group's report to the court and on interviews with advisory group members, court staff, and judges.[147]

Within the statutory instruction to "experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution,"[148] the group made an early decision to focus on ADR. Based on an examination of the court's caseload, the advisory group concluded that delay was not a problem in the district and decided, therefore, to design a program to reduce litigation costs.[149] This could best be accomplished, they believed, through a program that would prompt *earlier* resolution of cases. Thus, they designed an alternative dispute resolution program whose purpose was to bring about earlier case termination. The court, too, believed that, since most cases settle, earlier settlements should be the goal.

The advisory group thought that earlier resolution could be achieved if parties could be encouraged to do several things early in the case:

- meet with and consider the views of the other side;
- hear a neutral assessment of the facts and issues in the case; and
- gain an appreciation for the projected costs if the case were to proceed through the traditional litigation process.

To accomplish these goals, the advisory group designed several specific features into their proposed ADR program. First, they decided there should be a presumption that parties would participate in some form of ADR. Thus, they recommended a program that would be mandatory and also recommended that the court add other ADR options to its already-existing mandatory arbitration program.[150]

Second, they thought intervention should occur much earlier in a case. Thus, they recommended that the initial ADR event—labeled the "early assessment meeting"—be held within thirty days after completion of responsive pleadings. Even at this early date, they believed, the goal

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147 For a description of our research and data collection process, see Appendix A.

148 *Supra* note 1.

149 Report of the Advisory Group, Civil Justice Reform Act of 1990, Western District of Missouri, December 23, 1991, p.13. Although the advisory group thought delay was not a problem, at the time they prepared their report the court's median disposition time for civil cases had, for several years, been one to two months longer than the national average. See Administrative Office of the U.S. Courts, Federal Court Management Statistics, 1995.

150 The court's program was one of the ten mandatory pilot arbitration programs authorized by 28 U.S.C. §§ 651-658. Under the EAP, the mandatory feature was dropped and arbitration became one of several ADR options.

should be settlement of the case, but if this were not possible, the meeting should be used to determine which ADR process would be suitable and to schedule it to occur within ninety days.

The advisory group also recommended that clients be required to attend the initial meeting. Although some members of the advisory group, as well as the court, were reluctant to require party attendance, the majority believed that mandatory attendance was essential because the participation and education of the parties was necessary for achieving earlier case resolution.

Finally, the advisory group designed into the initial session discussion of discovery and schedules for information exchange. With important information acquired early and expeditiously, they reasoned, parties would be better equipped to hold meaningful settlement discussions at an earlier stage in the litigation.

Having established the early assessment meeting as the key feature of the plan, the advisory group and court faced the question of who would conduct the meetings. The advisory group thought it could be a magistrate judge or a member of the court's staff, but they did not want the program—at least the initial meeting—to rest on volunteer attorneys. They wanted someone whose time would be dedicated to the program, so they recommended that the court create the position of EAP Administrator. Because this person would be serving not only as administrator but, when requested by the parties, also as a mediator, the advisory group and court recognized that they would need to appoint someone with both administrative and legal skills.

In designing the program, the advisory group and court also confronted the question of whether cases assigned to the new ADR program should continue on the court's traditional pretrial path while involved in the ADR effort. Several judges believed that dual processing could result in duplication of effort and that cases should go through the early assessment process before being made subject to traditional pretrial case management procedures. Others thought the traditional procedures should not be suspended during the EAP process, which is the approach the court ultimately adopted.

Although the statute required the court to adopt ADR and although the advisory group was generally enthusiastic about instituting an ADR program in the district, some judges on the court had reservations about the need for an ADR program or the desirability of a mandatory program. They were persuaded in the end to adopt the program as an experiment that would help them resolve a longstanding question: Does ADR really make a difference—particularly, does it bring about earlier dispositions?

Thus, the court and advisory group agreed that cases in the Kansas City division would be randomly assigned to one of three comparison groups: 1) a group of cases that would automatically participate in the program; 2) a group that could volunteer to participate in the program; and 3) a group that would follow a traditional litigation path without participating in the EAP. This design would permit comparison of cases subject to the program with cases not subject to it and would, the court hoped, help them determine whether the program actually succeeded in meeting its goals.

3. Description of the Early Assessment Program

The Early Assessment Program (EAP), which is authorized by a general order dated October 31, 1991, became effective January 1, 1992 for cases filed in the Kansas City division after that date.[151] All civil cases except certain enumerated case types (e.g., social security and prisoner cases) are assigned randomly at filing to one of three groups: 1) cases that must participate in the EAP, or the "A" cases; 2) cases that may voluntarily participate in the EAP, the "B" cases; and 3) cases that may not participate in the EAP, the "C" cases. All cases, regardless of the group to which they are assigned, remain subject to traditional pretrial case management procedures.

For cases participating in the EAP, the general order provides that an early assessment meeting with the program administrator will be held within thirty days after responsive pleadings are filed. Party attendance is required at these meetings, unless excused by the administrator, and the attorney who will be primarily responsible for handling the case at trial must also attend.

At the early assessment meeting, the administrator is to advise parties and their lawyers of the various alternative dispute resolution options available to them; help the parties devise a discovery plan, if appropriate; and help the parties identify areas of agreement and explore the possibility of settling the case through mediation. If the parties agree, the mediation process may begin immediately, with the administrator serving as the mediator.

Finally, the order provides that if the parties do not choose to mediate the case with the administrator, they "must select, with the assistance of the administrator, one of the ADR options."[152] The court-based options available to parties in EAP cases include: mediation; early neutral evaluation; non-binding arbitration; and a settlement conference with a magistrate judge.[153] A second session with the administrator may be held if he determines that the parties should continue a mediation process they have begun with him or if he thinks they should meet again to discuss referral to an appropriate ADR process.

If the parties select an ADR procedure other than a mediation session conducted by the program administrator, they are to select a neutral from a list maintained by the administrator. The neutrals on the list must meet certain experience and training requirements in order to be included and are compensated by the parties at regular market rates. No payment is required if the parties select as their ADR option a settlement conference with a magistrate judge or further meetings with the program administrator.

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151 Pursuant to the Civil Justice Reform Act (28 U.S.C. § 474), the court's plan was reviewed and approved by the Judicial Conference and a committee of judges in the Eighth Circuit.

152 See General Order Implementing Early Assessment Program, October 31, 1991, p. 3.

153 Only cases in the EAP are eligible to participate in court-annexed alternative dispute resolution. If parties in cases not eligible for the EAP want to use alternative dispute resolution procedures, they can request to be included in the EAP (these requests are normally denied), or they can agree to use some form of private (not court-annexed) alternative dispute resolution.

The general order also provides that an ongoing internal evaluation of the EAP take place to track the success of the program.

4. Implementing and Maintaining the Early Assessment Program

Once the Early Assessment Program had been adopted, the court established it as a separate office supervised directly by the judges, although the positions are part of the clerk's office allocation.

Staffing of the Early Assessment Office

The Program Administrator

The program administrator was hired shortly after the court approved the advisory group's plan in October 1991. After en banc interviews with five finalists, the court hired an experienced litigator who was well-respected and well-known by the local bar. The judges thought that because the program was new and unusual, the court needed an administrator who would have the immediate respect and confidence of the bar.

Other than the few duties named in the general order, the court gave the new administrator little formal guidance, so he had considerable discretion in setting goals for the program and deciding how it would operate. In addition to the responsibilities named in the general—to administer the program, select cases and determine whether cases should be exempted or permitted to withdraw, hold the EAP sessions, and report to the court on the status of the program—the administrator spent considerable time early in the program speaking to the bar to acquaint them with the new program. The administrator also schedules the EAP sessions, so as to control attorney requests for continuances.

Other Program Staff

The Early Assessment Program is supported by two additional staff, a management analyst and program secretary. Both were positions already allocated as part of the clerk's office staffing The position of management analyst had been created as a CJRA position, with responsibility to carry out the CJRA's directive to analyze conditions in the district. With adoption of the EAP the position was assigned to the program.

The management analyst tracks all cases eligible for EAP sessions in order to carry out the internal monitoring required by the general order and to assist the administrator in preparing quarterly reports to the judges. For these purposes, the analyst maintains an automated database of information about each "A", "B", and "C" case, including such information as the number of sessions held and who attended. The analyst also tracks which cases are assigned to the "A" and "B" groups so the EAP office can schedule them promptly (see below) and sends questionnaires to attorneys who attend.

Space Requirements

In both its initial location (an empty chambers) and its new office in the courthouse, which was designed specifically for the program, the Early Assessment Office has had the accommodations needed for carrying out the program's functions—i.e., in addition to space for staff, several small rooms for holding private caucuses with individual parties.

Recruiting Neutrals

According to the general order authorizing the EAP, the court is to make available to parties a variety of ADR options. When the program began, only an arbitration program had been operating in the district. Thus, the court recruited and trained private sector attorneys to serve as mediators and neutral evaluators for parties who might select those ADR options. There were many applicants and a roster of about seventy-five neutrals was quickly established.

Budget

Because the demonstration districts could, under the CJRA, receive additional funding in support of their programs, the Western District of Missouri was able to acquire funds for operation of the Early Assessment Program. Budget information provided by the court and summarized in Table 84 (next page) shows the initial cost incurred for providing equipment for the program and the annual operating cost for FY96.[154]

By far the greatest portion of the program's cost is in staff salaries and benefits. As noted above, the court decided the program administrator should be a person of considerable experience and reputation, which required establishing that position at a high level. The other two positions were pre-existing positions allocated to the clerk's office, but their time is currently devoted to the Early Assessment Program. Apart from salaries and benefits, the cost of daily operations is minimal, but the move of the office into previously unassigned space, prompted by the appointment of new judges, has added significant new costs for housing the program. On a per case basis, the cost of maintaining the program for the past four years has been roughly $700 per case that participates in the Early Assessment Program.[155]

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[154] Letter from R. Connor to D. Stienstra, October 18, 1996, on file at the Federal Judicial Center.

[155] This figure could be calculated a number of different ways. We multiplied the FY96 program cost by 4.5 and then divided by the number of cases that were required to participate in the EAP (the "A" cases) plus the number that volunteered to participate (about a third of the "B" cases) during the past four-and-a-half years. This somewhat over-estimates the cost per case because program costs were lower in the early years than they are now (though as staff costs rise in the future, the cost per case will likely rise as well unless more cases are handled by the program). It is a very substantial over-estimate if, as could be argued, all "B" cases should be included in the calculation. Though not all elect to participate, the program nonetheless incurs the administrative costs. On the other hand, it could also be argued that the cost per case is an under-estimate because only cases that go to an EAP session should be included in the calculation. We think not, given the administrative responsibilities the program has, in particular for all "A" cases. Our figure is, we believe, a reasonable compromise.

Table 84
Estimated Start-Up and Annual Costs of Early Assessment Program
Western District of Missouri, Kansas City Division

Budget Category	Start-Up Expenditures	FY96 Estimated Costs
Computer equipment	$4,400*	
Salaries and benefits		$197, 361
Rent to GSA		15,000*
Operations (paper, postage, etc.)		4,000*
Total	$4,400*	$216,361*

* Estimated

5. The Early Assessment Program in Practice

The general order authorizing the EAP (described at section B.3) established the broad outlines of the program. This section describes how it is carried out in practice, in particular how cases are assigned, how the EAP sessions are conducted, and how the Early Assessment Program meshes with the judges' pretrial case management.

Assigning Cases to the Early Assessment Program

When a new civil case of an eligible case type is filed, the intake clerk assigns it to a group by picking the next card from a deck containing an equal number of randomly shuffled cards labeled "A", "B", and "C". The assignment is docketed, which permits the EAP management analyst to identify the cases by group and enter them into the EAP database. The analyst then tracks the "A" and "B" cases to determine the appropriate time to communicate with them regarding the Early Assessment Program. Although the general order specifies that the process should begin after responsive pleadings, in fact the parties are contacted as soon as there is any docket activity indicating that a defendant is meaningfully engaged with the case (e.g., a motion to dismiss). Motions to extend time are not considered a triggering event.

For "A" cases, when there is evidence that a defendant has joined the case, the management analyst provides the EAP administrator the court file, which contains copies of the pleadings. The administrator then sets a time for the initial assessment meeting. Notice of assignment to the EAP is then sent to the attorneys, along with the time and agenda for the first meeting. Attorneys are expected to be prepared to discuss the material facts and legal issues in the case; a plan for prompt sharing of information necessary to enter into meaningful settlement discussion; areas of agreement; reasonably anticipated litigation costs for the client if the case is tried and if it is appealed; settlement of the case; and a plan for use of prompt alternative dispute resolution in the

case. In practice (as discussed below), the initial assessment meeting is generally an actual mediation session.

For "B" cases, the EAP office sends invitations to participate in the program, with strong encouragement to do so. If the administrator thinks a case is an especially good candidate for the program, he may also talk with the attorneys by telephone to urge their participation. If he thinks a case very unlikely to benefit from the EAP, which is rare, he may choose not to send an invitation to participate, as permitted by the general order. (Copies of the initial letters sent to "A" and "B" cases are at Appendix E.)

Because of the importance of random assignment in enabling evaluation of the program, the court does not allow cases to move from one group to another unless there are unusual circumstances.[156] For example, if an "A" case involved an issue of national significance that required a judicial decision, the EAP administrator would allow it to opt out of the program. If a party disagrees with the program administrator's denial of a request to change groups, the party may file a written motion appealing this decision to the judge assigned to the case. Absent special circumstances, however, the court does not reassign cases and has diligently maintained the integrity of the experimental and control groups.

Between January 1, 1992, when the program began, and August 31, 1996, 3,066 cases were eligible for random assignment to a group. Table 85 shows the distribution of assignments and demonstrates that close-to-equal numbers of cases have been assigned to each group. Further analysis showed that the composition of each group, as measured by nature of suit, is also equivalent.

Table 85
Number of Cases Assigned at Filing to Each of Three Groups Established by the Early Assessment Program, 1/1/92-8/31/96
Western District of Missouri, Kansas City Division

Group	Number of Cases[157]
Automatically assigned cases (Group "A")	1011
Voluntary cases (Group "B")	1017
Control cases (Group "C")	1038
Total eligible cases	3066

[156] See General Order Implementing Early Assessment Program, October 31, 1991, p. 3.

[157] Numbers were calculated from two sources: information recorded on the docket (ICMS) and information maintained by the EAP office in their automated database.

The Nature and Number of EAP Sessions

During our visit to the court we attended several EAP sessions. We also asked the program administrator, Mr. Kent Snapp, to describe how he generally conducts these sessions.[158] He emphasized that the program is not a "cookie cutter" program and that every case is handled according to its needs. With that caveat in mind—and with full acknowledgment that the sessions we attended were not necessarily representative of the EAP sessions in general—we describe briefly in this section the general process of the early assessment meetings.

The meetings are held in the program administrator's office in the courthouse and are attended by a client or client representative with settlement authority as well as the attorney who will handle the case at trial. Mr. Snapp seldom excuses parties from attendance, although he may be more lenient about this policy in "B"—or voluntary—cases.

Before the first early assessment meeting, the program administrator reviews the case file and outlines the complaint and answer. In some cases, he does research on the cause of action and looks at the type of jury instructions that would apply at trial. Mr. Snapp believes that the more prepared he is to discuss the case, the more attorneys will respect him and the process. He reports that attorney preparation for the meetings varies widely. In general, some discovery has taken place prior to the first assessment meeting, some takes place during the meeting, and, in cases that do not settle, some takes place after the meeting. The administrator tries not to make the attorneys do a lot of paperwork prior to the meeting—for example, he does not require them to file a statement of facts.

All party representatives and attorneys are generally together in one room at the start of the meeting, particularly if it is the first meeting for a case. At the beginning of the first early assessment meeting, the administrator describes the ground rules and what will happen during the session, explaining that there are not many rules but that courtesy toward the other participants is required. He also sets a relaxed tone and encourages informality by suggesting use of first names and by asking the clients to participate.

As part of the introduction, the administrator also briefly describes the other ADR options available at the court. He asks the parties to let him know if they have questions about these options or think one of these procedures would help them resolve their case. He also tells the parties he will be happy to help them resolve the case if they would prefer to mediate with him rather than use one of the other ADR options.

The purpose of the session, the parties are told, is to help them evaluate their case, understand the other side's view of it, and lay the groundwork for settlement by identifying the information they need.[159] Mr. Snapp emphasizes that everything that takes place during the meeting is

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[158] Although our visit occurred in 1992, recent conversations with Mr. Snapp confirmed that the general description given here still holds.

[159] Mr. Snapp said his goal in the early assessment meeting is to make sure the parties have a realistic view of their respective cases and to settle the case as soon as is practicable.

confidential and that he will work with the parties, if they wish, until settlement is achieved. Parties and counsel are asked to make a note of any additional information that might be needed before the case can be evaluated or settled and to remain flexible and not lock in to a position.

After the program administrator's introductory comments, the substance of the meeting begins with the plaintiff's presentation of the facts of the case, followed by the defendant's presentation of his or her view of the facts. The initial story is often told by the respective attorneys, although the parties themselves frequently add comments after their attorneys have introduced the issues. The discussion of facts is followed by a discussion of the legal issues involved. Mr. Snapp will often interject clarifying questions about the facts or the applicable law. He also explores what kind of discovery has been done prior to the meeting and what further discovery would be necessary for the parties to be able to evaluate the case. In private caucuses, he points out the strengths and weaknesses of each party's case and reminds them of the costs they will incur if the case goes to trial. Finally, he asks the parties to let him know if they think another ADR option would work for their case.

Nearly all parties elect at this point to mediate the case with the program administrator, and the session moves into a series of private caucuses with each side. At these individual caucuses, Mr. Snapp attempts to determine the conditions under which each party would be willing to settle and, if necessary, the extent of settlement authority possessed by the client representative for each party. He also examines whether some other events must take place before settlement potential can be determined (e.g., a judge ruling on a pending motion or further discovery activity).

If this series of caucuses does not end with a settlement, the administrator schedules, in consultation with the parties, the next events that will take place in the case, such as further discovery. As Mr. Snapp puts it, he prefers to work from "date certain to date certain." For cases that do not settle he also sets a date and time for a second EAP meeting, which like the first is aimed at resolution of the case.

Most of the program administrator's time is involved in preparing for and conducting the EAP sessions. Typically three sessions of two to three hours each are scheduled for each day, but because of attorney scheduling conflicts, often only one or two are held on any given day. The first session usually takes about three hours, though some may go on for nearly a day.

Between January 1, 1992 when the program began and August 31, 1996, the administrator held 845 initial meetings (see Table 86, next page), about two-thirds of them in "A" cases and about one-third in "B" cases. In a little over half of the cases, he held additional meetings with the parties, for a total of 456 followup meetings. The number of cases in which a session is held is somewhat less than the 1011 "A" cases assigned to the program over the same time period—and considerably less than the number of "A" and "B" cases together—because, as is typical of civil caseloads, a substantial number of cases terminate early and thus do not make it to the point of an EAP session.

Table 86
Number of Assessment Sessions Held in Cases Assigned to Groups "A" and "B" in the Early Assessment Program, 1/1/92-8/31/96
Western District of Missouri, Kansas City Division[160]

Type of Session	Number of Cases
Initial early assessment meeting	845
Followup meetings	456
Total	1301

Although a listing of other ADR options is a routine part of the introduction to each EAP session, Table 87 shows that very few cases have chosen to use ADR options other than the program administrator's assistance. The most favored alternatives are ENE and mediation—selected, though, by only a very small minority of EAP cases. No parties have selected arbitration, even though it was once the only form of ADR offered by the court (aside from magistrate judge settlement conferences).[161]

Table 87
Number of Cases Selecting an ADR Option Other than the Early Assessment Process, Cases Assigned to Groups "A" and "B", 1/1/92-9/30/96
Western District of Missouri, Kansas City Division

Type of ADR Selected	Number of Cases[162]
ENE/mediation	18
Magistrate judge settlement conference	10
Summary jury trial	1
Arbitration	0
Total	29

160 Numbers were derived from the automated database maintained by the EAP office.

161 The court established its arbitration program as one of ten mandatory pilot programs authorized by 28 U.S.C. §§ 651-658. Under the EAP, which offers arbitration as one of several ADR choices, the court no longer maintains the arbitration program authorized by the statute. The mandatory program was included in the Federal Judicial Center's study of the ten mandatory arbitration programs. See B. Meierhoefer, Court-Annexed Arbitration in Ten District Court. Federal Judicial Center, 1990.

162 Number of cases reported by the EAP office as of September 30, 1996. The number of mediations is an undercount, probably on the order of two to three per year. Magistrate judge settlement conferences include only those chosen as an option within the EAP and not the many settlement conferences they hold later in cases. For reporting purposes the court does not make a distinction between ENE and mediation but reports that not more than two or three cases have chosen ENE.

The discussion above shows that the court has carefully followed the requirements of the Early Assessment Program that cases be randomly assigned to one of three designated groups. Likewise, early assessment sessions have been held in all eligible "A" cases and many "B" cases. The program has not, however, directed many cases into other forms of ADR. Rather, most parties have chosen to mediate their case with the program administrator.

C. The Impact of the Court's Demonstration Program

Section C explores the impact of the Early Assessment Program on the court and the cases subject to it, looking first at the judges' views of the program, then at the evaluation of attorneys who have participated in the EAP process and at the program's effect on case disposition time. Before presenting detailed findings, we summarize the key points, keeping in mind that the purpose of the program is to prompt earlier settlements and thus lower litigation costs.

- The judges believe the program is effective in producing earlier settlements, enhancing attorney satisfaction, and reducing judicial workload. They are fully satisfied with the program and attribute its effectiveness to two features: (1) the requirement that parties meet early to candidly evaluate their case and (2) the skills and reputation of the program administrator, who mediates most of the cases referred to the program.

- For several reasons the judges favor use of an in-house staff mediator over use of magistrate judges or private sector mediators. Ensuring the quality of the mediator and the reputation of the program are the principal reasons for using in-house staff instead of a roster of private sector neutrals. The demands of the program and the heavy load already carried by magistrate judges are the principal reasons for not using that resource. To expand the program using court staff would require additional funding.

- Most attorneys who participated in an EAP session agreed that the program is functioning well: the timing of the EAP session is appropriate and the program administrator is fair, well prepared, and engages the parties in meaningful discussions.

- In a program in which the ADR session is held very early in the case, only 14% of the attorneys said it was held too early. Written comments suggested some attorneys thought more discovery should have been done before the session.

- Comparison of the median age at disposition for cases required to participate in the program, the "A" cases, and cases not permitted to participate in the program, "C" cases, showed that cases required to participate terminated more than two months faster than cases not permitted to participate (7.0 versus 9.7 months), indicating that the Early Assessment Program has achieved its goal of earlier dispositions.

- Cases from the "B" group that volunteered to participate in the EAP did not terminate as quickly as "A" cases, in part because of delays in scheduling the EAP session. Volunteer cases also did not terminate as quickly as "B" cases that did not choose to

participate, perhaps because of differences in the characteristics of cases that volunteer compared to those that do not, but this is conjecture at this point.

- Comparison of "A" and "C" cases also showed a difference in the type of disposition reached, with somewhat more "A" cases resolved by settlement and more "C" resolved by trial or other court judgment.

- Of the cases that participate in an EAP session, 38% settle at the session, an additional 19% within a month of the session, and another 18% within three months.

- The great majority of attorneys who participated in an EAP session reported that the process reduced the cost of resolving their case. The median estimated savings in litigation costs per party was $15,000. These client savings are realized at a cost to the court of approximately $700 per case.

- The EAP session appears to reduce time and cost through several specific features designed into the program. Two-thirds or more of the attorneys reported that the session (1) gives parties a better understanding of their own and their opponents' case, (2) prompts earlier definition of issues, (3) encourages the parties to be more realistic about their respective positions, and (4) allows the parties to be more involved in the resolution of their case than they otherwise would have been.

- Ninety-six percent of the attorneys who have participated in the Early Assessment Program said the program should be continued and that they would volunteer an appropriate case into the program.

- Attorneys' written comments reveal very substantial support for the Early Assessment Program and many point to the skills of the program administrator/mediator as a principal reason for the program's effectiveness.

1. The Judges' Evaluation of the Early Assessment Program

The Impact of the Early Assessment Program

The judges universally said the Early Assessment Program has achieved its purpose of bringing about earlier settlements, as demonstrated, several noted, by the statistics provided in the program's quarterly report.[163]

In addition to earlier settlements, said the judges, the program provides several other benefits. An important one is the substantial satisfaction litigants have expressed about the process. This is

[163] Each quarterly report shows the median disposition time for "A", "B", and "C" cases and has consistently shown a shorter time for "A" cases. The report also summarizes the findings from the attorney survey.

particularly noteworthy, said one, because at the outset there was a good deal of reluctance on the part of the bar. "Overwhelmingly," said the judge, "they really like it now." Another judge pointed out that "the program has been helpful because the bar sees the court as caring about the cases and the parties." One judge said s/he had heard a small number of negative comments about the program "from cases where all parties thought it would be a futile effort and it was." The judge pointed out, however, that "it's hard to distinguish [those cases] from those that look futile but end up settling."

Nearly all the judges thought the Early Assessment Program also helps reduce their workloads and saves court time. Two other judges pointed out that early settlements in the program obviate the need for the case to go through motions practice or extensive discovery, thus reducing the judge's workload. As one said, "One or two times a week I get a note from Kent that a case has settled. Those are cases in which I don't have to do a scheduling order, handle discovery disputes, or hold discovery conferences." Several respondents said the program has also resulted in fewer cases being sent to the magistrate judges for settlement conferences. Because of the EAP, said these judges, the court has been able to be more flexible in its use of magistrate judges and in particular has been able to enrich their caseload by including them in the civil case draw.[164]

While it is clear to the judges that cases settled by the EAP benefit from it, they were less certain that cases that do not settle also benefit from it. One noted that s/he frequently finds that "the parties [who have been through the EAP] will at least have set parameters on the action," and have moved "more toward the middle rather than the ends of the spectrum." But another judge, who generally sets cases for trial within a year, said the program might delay a case if it doesn't settle in or shortly after the session. A magistrate judge observed that when parties have been through the EAP they are sometimes more resistant to undergoing a later settlement conference for which the clients must appear in person again.

Altogether, the judges said they are very satisfied with the program, with several noting that at the outset there had been substantial skepticism on the part of some judges. After more than four years' experience with the program, the judges fully agree today that the program has been valuable for the court and for the litigants.

Coordination Between the EAP and the Judges' Pretrial Case Management

Participation in the Early Assessment Program does not exempt a case from proceeding through the court's usual pretrial procedures (described in the advisory group's report as embodying the case management principles advocated by the CJRA).[165] The judges reported, however, that this has not presented a problem. Most said they do not treat the EAP cases any differently from non-EAP cases, and several noted that they often do not even know if a case is an

[164] In June 1994 the court adopted a policy of including the magistrate judges in the civil draw. In FY96, twenty-five civil cases will be drawn for each magistrate judge. If parties do not affirmatively request reassignment to a district judge, their case is decided by the assigned magistrate judge.

[165] *Supra*, note 149, p. 14.

EAP case. On occasion, said several of the judges, they will delay discovery or otherwise alter the management of a case if it looks as though it will settle in the EAP, but these situations are relatively rare. As one judge said, "[There's] not a recurring or serious problem of coordinating."

Critical Features of the Program

The judges identified two features as central to the program's success. The first is that the program brings parties together very early in a case with a qualified neutral and forces them to candidly evaluate the merits of the case. "The key," said one judge, "is in the title—early assessment. Many litigants file law suits before they have an idea of what they've got." The program's encouragement of early exchange of information helps the parties "get realistic," said another judge.

The second key feature of the program, identified by all the judges, is the present program administrator. From comments made to the judges and surveys sent to attorneys, the judges have learned that his mediation skills and handling of cases are highly regarded by the bar. He is, they said, very effective and much of the success of the program is due to him.

The Value of Using In-House Staff to Provide Mediation Services

While the staff person chosen by the court has proven very effective, the more general question about the court's program is whether there is a particular advantage to using a staff neutral rather than private sector mediators or magistrate judges to provide mediation assistance.

In comparing a staff position to using private sector mediators, the judges identified several advantages in having in-house staff. First, the quality and reputation of the person conducting the mediations is very important for gaining the confidence of the bar, and several judges thought it might be difficult to develop a qualified panel and convince litigants of their skills. As one judge said, "The strength of a program like this depends on the perception of the bar. Do they perceive it as another hurdle? That would doom it. Or do they perceive it as really helpful? That is crucial, but would the perception exist if the court used a pro bono panel? Can the court do the work necessary to develop a quality panel and convince the bar of its quality?"

Second, several judges noted, because the court would not be able to closely monitor a large group of mediators, neither the judges nor the parties would have as much confidence in them as they have in the court's administrator. As one said, "We wouldn't know how good they are."

The judges also said they believe the cost savings to litigants of using in-house staff makes them more likely to agree to mediation. Referring to both the cost savings and the reputation of the present program administrator, one judge said, "The easier you make it and the more you eliminate uncertainty, the more likely it will be used."

Several judges pointed out as well that because ADR is the program administrator's full-time job, he not only has excellent skills but has fewer scheduling problems than would be encountered by attorneys trying to balance ADR responsibilities with their own workloads.

In addition to these advantages, one judge pointed out that many parties, particularly in small cases, want to "hear the advice of a judge" and might perceive the program administrator as having "close to the same clout" as a judge, whereas private attorneys would have less. Another judge noted that the administrator "has his finger on the pulse of the court" through his regular contact with the judges and would be able to give parties a better idea of how a judge would react in a case.

With respect to using full-time, in-house staff rather than magistrate judges to perform the ADR service, most judges indicated that because the magistrate judges are heavily involved in civil cases and criminal pretrial matters, they would not have time to hold early assessment meetings in the number of cases currently assigned to the program. Two judges said it would be more costly to "beef up" the magistrate judge staffing than to support separate staff devoted to handling ADR. And one magistrate judge pointed out that the magistrate judges have varying skill levels with respect to mediation and therefore not all of them would be suited to this task.

Generally, the judges agreed that using in-house staff to provide mediation is a valuable feature of their program and that, given adequate funding, they would continue with this practice.

Expansion of the Program

If there is one drawback to relying on the program administrator for most of the mediations it is that there is a limit to how many cases he can handle, a limit that is close to being reached. Because the program has proven successful and the court hopes to continue it, the judges are faced with the question of how to expand it to all civil cases (excluding such cases as prisoner petitions and social security cases). It is clear that a single administrator could not handle all the cases that would bring into the program.

The judges noted several ways in which the court might provide mediation service to more cases. One would be to reinstitute the original EAP plan, under which the program administrator would direct more cases to other forms of ADR. Some judges expressed some concern that because this aspect of the program had never been fully implemented, the court had disappointed the attorneys who signed on to be neutrals and had not given other forms of ADR a fair try. At the same time, the judges recognized two compelling reasons for this outcome. First, there is no fee for the program administrator's mediation assistance, whereas the parties would have to pay the attorney neutrals in other ADR processes, and second, the program administrator has an excellent reputation. As one judge said, the reason parties choose mediation with the administrator is "because he's cheap and he's good."

A second suggestion was that the court hire a "junior Kent Snapp" or a "Kent Snapp #2" to assist the current program administrator. The drawback of this solution, the judges recognized, is its budget implications and the difficulties of getting sufficient funds to hire qualified staff. Another way to expand the service, said several judges, might be to rely on magistrate judges or bankruptcy judges to perform some EAP functions. However, they noted, since most of these judges already carry full workloads and because, as one said, "It takes a lot of time to bring parties together," this is not a completely adequate solution either.

As a temporary solution—and perhaps a long term one if no other possibilities emerge—the program administrator is trying to convince more litigants to use attorneys from the court's roster to mediate their cases.

Concerns About the Program

The judges were hard-pressed to think of any detrimental aspects of the EAP. Each of the following was named by one or two judges: (1) the clients don't always like being required to attend the EAP sessions; (2) the program creates personnel and space costs; (3) if a case goes to the program and does not settle, the trial date may be delayed or costs may be increased; and (4) the existence of the program may give the impression that the court is "just trying to get cases resolved." These concerns were not strongly expressed, however, and one judge's comment seemed to capture the views of most. The only detrimental feature, he said, is that the program "does not apply to all cases."

Recommendations for Other Courts

The judges' view that the program is working very well is reflected in their enthusiastic recommendation of the program to other courts. This would depend, of course, said one judge, on the court's particular situation—for example, whether the bar in the court was interested in alternative dispute resolution. Also, said another judge, it takes support from the judges and a commitment to the program over a long enough period to give it a fair try. Involvement of the bar in designing an ADR program is important, too, said several judges.

Most important of all, the judges emphasized, the program requires a capable program administrator who can gain the confidence of the bar. As one judge said, "The personality of the person doing it is critical." Another emphasized that it is important for the administrator to have authority and to be backed by the court.

When asked what qualities courts should look for in a program administrator—or, in essence, a staff mediator—the judges unanimously emphasized the importance of selecting someone with substantial litigation experience. As one judge said, "Don't just hire someone with academic credentials and little experience," and a second said, "You can't do it on the cheap; you need experience." Extensive litigation experience is particularly important, said one judge, when a program is just being established. Because the court's program administrator had substantial experience, he has been able to gain the respect of the bar and he also knows, said one judge, "how and where to push parties." Other important characteristics cited by the judges were trustworthiness, patience, maturity, a sense of values, vigor, and someone "who has walked both sides of the street."

In the end, however, said one judge, courts should realize that a program like the EAP is "not a panacea." Courts cannot, s/he said, "just pass a local rule and expect immediate success. It takes a lot of work and commitment."

2. Attorney Evaluation of How Well the Program Functions

In the next several sections we consider whether the Early Assessment Program has had the desired effects in individual cases, but before doing so we examine whether the program is functioning well in the eyes of the attorneys who have been subject to it. The findings are based on a questionnaire sent by the EAP office to each attorney who participated in an EAP session.[166] In considering the survey results, we note that we cannot calculate to what extent attorney responses were influenced by returning the questionnaire to the court rather than a non-court entity. It is possible that responses may be more positive than they would be under other circumstances, though anonymity was promised to all respondents. We also must keep in mind that findings based on the survey cannot tell us whether the program definitely had the reported effects, only that in the attorneys' experience it did.

Table 88 (next page) shows that on each of several features—several of which are discussed in the following subsections—the great majority of attorneys who participated in an EAP session reported that the EAP process is working well.

Timing of the EAP Session

Of particular interest are the attorneys' responses regarding the timing of the session. Conventional wisdom asserts that meaningful settlement discussions cannot occur until some discovery has been done. However, in this court where the ADR process occurs very early, only 11% of the attorneys reported that it began too early in their case. There was no relationship between the attorneys' assessment of the timing and an indicator of whether any discovery had occurred in the case, but written comments indicate that a number of attorneys thought the session would have been more productive if there had been more discovery. Illustrative of the dozen or so attorneys who mentioned this problem is one who wrote, "The first meeting comes too early. Make sure some discovery—interrogatories, documents, and depositions of parties—have occurred before the first meeting. Without this basic discovery, it is very difficult to realistically evaluate the case."

On the other hand, several attorneys suggested that discovery should be stayed during the EAP process because additional costs are incurred when the parties have to meet the requirements of the judge's scheduling order while participating in the EAP. "Since the best intentioned parties," wrote one, "have nothing to gain by costly discovery if serious discussions are underway, the threat of falling behind schedule perhaps motivates discovery to satisfy the court's schedule.... Cases assigned to the early assessment program should receive an automatic stay of discovery." Only a handful of attorneys noted this problem, but it coincides with the concern of some judges when the program was designed that it might be burdensome for cases to run on both tracks.

[166] See Appendix A for information about the questionnaire.

Table 88
Attorney Ratings of How Well the Early Assessment Program Functions
Western District of Missouri, Kansas City Division[167]

Program Function	% of Attorneys Selecting Response		
	Agree	Disagree	Neither Agree Nor Disagree
The EAP process began too early (N=1301)	11.0	63.0	26.0
Administrator was effective in getting parties to engage in meaningful discussion of the case (N=1305)	81.0	8.0	11.0
Administrator was well prepared to discuss the case with the parties (N=1301)	82.0	4.0	14.0
Administrator treated all parties fairly (N=1304)	92.0	4.0	4.0
Administrator put too much pressure on the parties to settle	9.0	66.0	26.0
The opposing attorney was not well prepared for the EAP session (N=1303)	16.0	59.0	25.0
Some parties did not participate in good faith in the EAP session (N=1301)	18.0	63.0	19.0
The opposing party was represented at the session by someone with settlement authority (N=1304)	77.0	17.0	7.0
The EAP session would have been more effective if conducted by a judge (N=1299)	9.0	64.0	26.0
The EAP session would have been more effective if conducted by someone with subject matter expertise (N=1298)	14.0	61.0	26.0
Administrator adequately described dispute resolution alternatives (N=1300)	83.0	4.0	13.0
EAP helped parties determine whether case could be resolved through method other than formal litigation (N=1301)	72.0	10.0	19.0

Of those attorneys who reported that the EAP process started too early in their case, a higher percentage of attorneys in "A" cases—i.e., those that are required to participate in an EAP session early in the litigation—found this to be a problem than in "B-EAP" cases.[168] Although a minority of both said the EAP process began too early, 14% of "A" case attorneys reported that effect, while 7% of "B-EAP" attorneys did.[169] As discussed below, the EAP session is generally held

[167] Agree=Strongly agree and agree. Disagree=Strongly disagree and disagree.

[168] Some parties who participate in the EAP have chosen, after being assigned to the "B" group, to participate in the EAP. We designate these cases the "B-EAP" cases. Parties assigned to the "B" group who do not choose to participate in the EAP are labeled the "B-no EAP" group.

later in "B-EAP" cases than in "A" cases; the findings may suggest that some cases benefit from a greater degree of maturation before the EAP session.

Overall, however, only a small minority of attorneys found the timing of the EAP process to be too early for their case.

Performance of the Program Administrator

Table 88 shows that most attorneys participating in an EAP session found the program administrator helpful. A great majority found him well prepared, fair to all parties, and effective in getting the parties to engage in meaningful discussion. Attorneys' written comments, many of which focus on the program administrator, illustrate some of reasons behind the ratings shown in Table 88:

> "Kent Snapp was very helpful—even-handed, emotionally neutral, and very focused on the issues presented. I doubt this case could have settled without his involvement."
>
> "It worked for us because of Kent Snapp. He brings the right amount of tact, knowledge, and pressure to the meetings and participants."
>
> "The Administrator here is probably the key to the success of the program because he is an older lawyer with extensive experience and knows the problems of litigation."

At the same time, 10% of the respondents said the administrator put too much pressure on them to settle. A number of the written comments also registered complaints about the administrator—e.g., that he was overbearing or embarrassed them in front of their client—but by far the greatest number of comments about the administrator were positive, often praising his skills and demeanor.

Performance by Counsel and Parties

To the extent the attorneys' ratings identified problems, the problems seem to be due to counsel and the parties. Table 88 shows that 18% of the attorneys said some parties did not participate in good faith, 16% said the opposing attorney was not well prepared, and 17% said the opposing side was not represented by someone with full settlement authority. If there are barriers, then, to the effectiveness of the program, they appear to lie mostly with the parties and their counsel.

Several dozen comments mentioned either that a party had participated with no intention of compromise and/or that one side had failed to bring settlement authority. Particular frustration was evident over the failure to have settlement authority present, with many of these comments focused

[169] We report only relationships that were statistically significant at $p < .05$ in a Chi-square analysis. Regarding subject matter experts, 16% of civil rights attorneys and 18% of labor attorneys agreed that an expert would have been helpful, whereas 11% of attorneys in contract cases and 8% of attorneys in tort cases said so. Vice versa, 69% of contract and tort attorneys said an expert was not needed, while 55% and 52% of civil rights and labor attorneys, respectively, said so.

on the government. Several comments suggested the administrator be given greater authority to compel appropriate conduct, including the authority to impose sanctions, as shown in the examples below:

> "The representative of the [government agency] had no settlement authority, so everyone's time was wasted."
>
> "The administrator needs authority to sanction parties (even governmental agencies) who do not participate in good faith."
>
> "It was obvious defense counsel had no intention of settling early in the case. It was also obvious client's representative had no meaningful settlement authority. Early Assessment administrator should be given some tool to enforce this provision of program."

As with the timing of the EAP process, the responses regarding attorney and party behavior differed by the group to which the case had been assigned. A higher proportion of attorneys who were required to participate early—"A" case attorneys—reported absence of good faith, lack of preparation, and lack of settlement authority, as compared to attorneys who volunteered to participate. As noted above, sessions are held somewhat later in "B-EAP" cases, permitting, perhaps, a degree of case development in those cases that cannot occur in "A" cases.

Use of Subject Matter Expertise

Table 88 identifies just one area where the program itself may not meet parties' needs. Fourteen percent of attorneys agreed that it would have been helpful to have a neutral with subject matter expertise. Written comments suggested few specific kinds of cases in which an expert would have been helpful, although several attorneys expressed the same view as one who wrote, "This procedure should be mandatory for every commercial dispute." Further analyses showed that attorneys who agreed that a subject matter expert was not necessary—i.e., that the program worked for them—were more likely to be representing contract cases (and tort cases). Among those who would have preferred a subject matter expert, civil rights and labor cases were more likely to express this view.

Altogether, however, the ratings reported in Table 88 suggest that the program is functioning well. For most cases, it appears that the administration of the program presents no barriers to achieving the goals established by the advisory group and court. In the next several sections, we examine whether in fact the program has had its intended effects in cases that have participated in early assessment sessions.

3. Program Impact on Timing and Type of Disposition

Although the advisory group, when it was designing its demonstration program, thought the court had no problem resolving cases in a timely manner, it concluded that earlier case resolution would be desirable so that litigation costs might be reduced. In this section we consider whether the Early Assessment Program has, in fact, resulted in earlier disposition of cases. The analysis is

based on the EAP questionnaire and examination of disposition times within groups "A", "B", and "C".

Attorney Ratings of Disposition Time

By far the greatest proportion of attorneys who participated in an EAP session reported that the process had helped move their case to resolution. As Table 89 shows, 59% said it was very helpful for this purpose and an additional 25% said it was somewhat helpful. Only 3% reported that the process was detrimental.[170]

Table 89
Attorney Evaluation of the EAP's Helpfulness in Moving Their Case Toward Resolution
Western District of Missouri, Kansas City Division

Helpfulness of the EAP in Moving Case Toward Resolution	% of Attorneys Selecting Response (N=1304)
Very helpful	59.0
Somewhat helpful	25.0
No effect	13.0
Somewhat detrimental	2.0
Very detrimental	1.0

Attorney opinions about whether the Early Assessment Program helped move the case to resolution did not differ by type of party. Defense and plaintiffs' attorneys were equally as likely to say they found it helpful and a few of each said it was detrimental. There was also no relationship between attorney assessments of the EAP's effect on disposition time and overall litigation costs in the case. At each level of litigation costs—from less than $5,000 to over $50,000—similar proportions of attorneys said the EAP was helpful or detrimental in moving the case along.

Not unexpectedly, those who were more likely to rate the program negatively on its administrative features (listed in Table 88) were also more likely to say the program had a detrimental impact on moving their case. For example, those who reported that a party had participated without adequate settlement authority were more likely than those who reported the opposite to say the program had a detrimental effect or no effect on time to disposition. In each instance, however, the number reporting that the program had such an effect was very small.

[170] Findings from a separate questionnaire sent to a random sample of attorneys in closed cases (see Appendix A) show that most attorneys in Missouri Western—83%—believed their case was moved along at an appropriate pace, 10% thought their case was moved too slowly, and 2% thought their case was moved along too fast. Since the sample on which these findings are based may underrepresent cases disposed of early through the court's ADR program, the findings may overstate the number of attorneys who thought their case moved too slowly.

More interestingly, attorneys with civil rights cases were especially likely to report that the Early Assessment Program moved their case along.[171] Although a substantial minority of this group had agreed that a subject matter expert would have been helpful, it appears that for many of these attorneys that preference did not have a negative impact on disposition time.

Finally, attorneys who had volunteered into the EAP process were more likely to report that it was "very helpful" compared to attorneys who were required to participate, while those who were required to participate were disproportionately likely to say it had no effect.[172] These differences may suggest that attorneys who volunteer to participate select more appropriate cases or that they are predisposed to see a benefit from the EAP, but as we will see below, actual disposition time for these cases is not as short as disposition time for cases that are required to participate.

Disposition Time of Cases by Group

While the attorneys' assessments provide valuable information—and in many instances the only information that may be available—about program effects on disposition time, in the Western District of Missouri we are fortunate to have an additional basis for determining the impact of the demonstration program on disposition time. By establishing the program as an experiment, the court provided three groups for comparison: those required to participate in the program, the "A" cases; those not permitted to use the program, the "C" cases; and those permitted to volunteer into the program, the "B" cases. Figure 7 shows case disposition by age for the three groups.[173]

The solid lines in Figure 7 show the percentage of cases that terminate in each month, from zero months (or the filing date) to thirty-six months. The percent terminated is read from the left vertical axis. As we can readily see, more cases in group "A" terminated during months two to eight (i.e., at two to eight months old) than terminated for groups "B" and "C". Likewise, the cumulative percentage terminated, which is represented by the hatched lines and is read from the right vertical axis, is higher at each case age for "A" cases than for "B" and "C" cases.

Table 90 (next page) presents two additional measures of case age, based on the same analysis shown in Figure 7. As suggested by the lines in Figure 7, the median age for "A" cases is shorter than for "B" and "C" cases—2.7 months shorter when comparing the cases mandatorily referred to the EAP, the "A" cases, with cases not permitted to use the EAP, the "C" cases. The mean age

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171 Of the principal civil case types, the percentage saying the EAP moved their case along is as follows: Contracts, 80%; torts, 82%; civil rights, 89%; and labor, 82%.

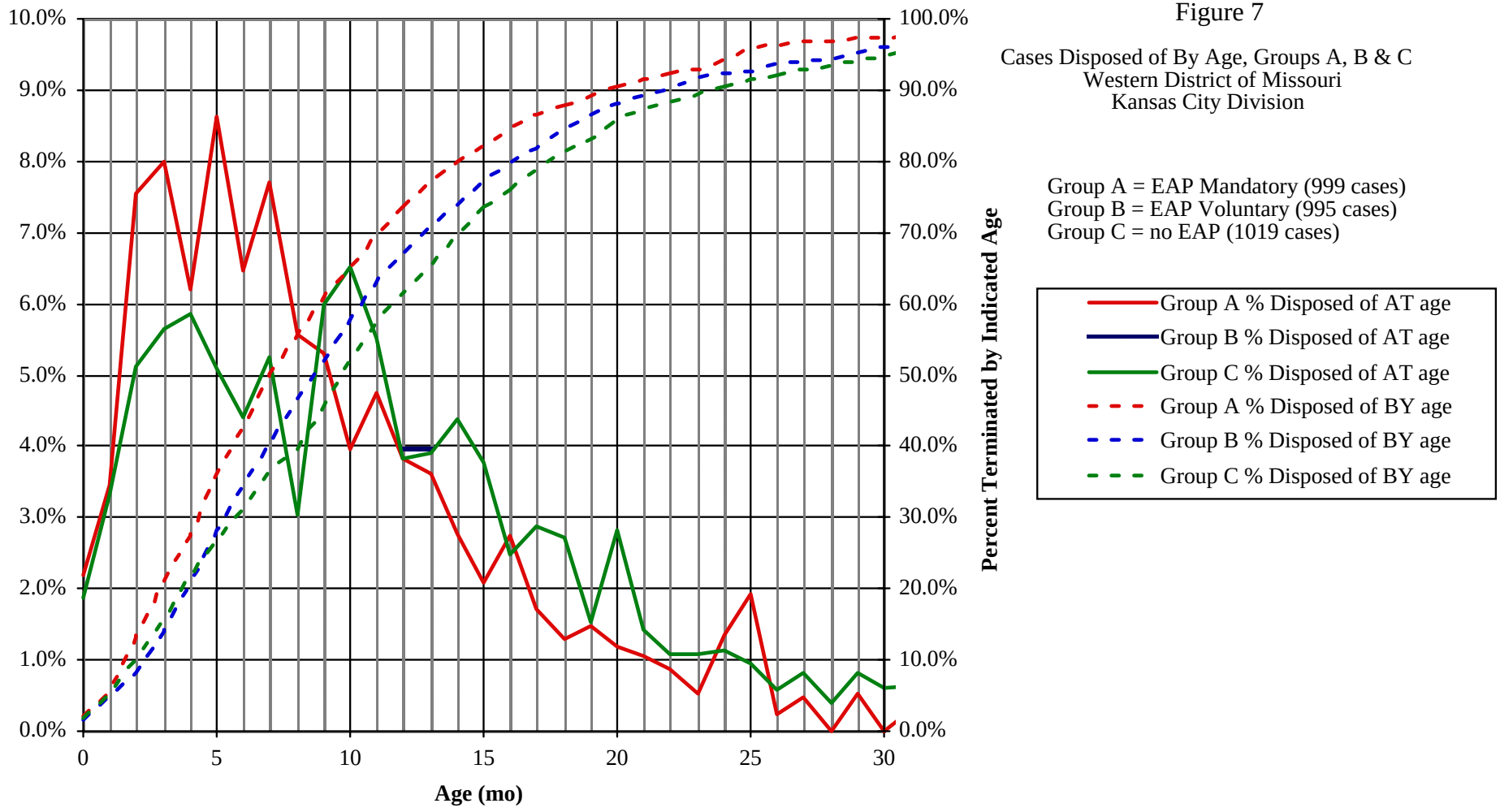
172 Of attorneys who volunteered, 67% said the EAP was very helpful, compared to 56% of attorneys who were required to participate. In contrast, 15% of those who were required to participate said the program had no effect compared to 6% of those who volunteered.

173 The lines in Figures 7 and 8 are based on an actuarial, or survival, analysis that takes into account pending cases. If only terminated cases were used in the analysis, case age would be distorted—i.e., shortened—because only cases that terminate fastest would be included in the analysis. See Appendix A for a fuller explanation. Figures 7 and 8 are based on 3,013 civil cases assigned to one of the three EAP groups and filed between January 1, 1996 and August 31, 1996.

Figure 7

Cases Disposed of By Age, Groups A, B & C
Western District of Missouri
Kansas City Division

Group A = EAP Mandatory (999 cases)
Group B = EAP Voluntary (995 cases)
Group C = no EAP (1019 cases)



at termination is shorter as well. These findings show that the Early Assessment Program has reduced disposition time in cases required to participate in the process.[174]

Table 90
Median and Mean Age at Termination, in Months, for Group A, B, and C Cases
Early Assessment Program
Western District of Missouri, Kansas City Division

Group	Median Age at Termination	Mean Age at Termination
A (N=999)	7.0	9.7
B (N=995)	8.6	10.7
C (N=1019)	9.7	11.4

The program has also reduced disposition time for the group of cases permitted to volunteer into the program—the "B" cases—although the reduction is somewhat less for group "B" cases as a whole compared to "A" cases, which is not unexpected, since not all "B" cases participate in the EAP. Figure 8 shows, however, that the behavior of cases in group "B" is not in fact what might be expected. Again reading from the left vertical axis the percent terminated in each month, we see that the number of terminated "B-no EAP" cases—those that did not volunteer to participate in the EAP—peaks during months two to five, while the number of "B-EAP" cases—those that chose to participate in the EAP—peaks during months four to nine, suggesting an older termination age for cases that volunteer to participate in the Early Assessment Program compared to cases that do not—the reverse of what would be expected. Table 91 shows that age to be 9.2 months, compared to 8.3 months for cases that do not volunteer to participate in the EAP—and approaching the 9.7 months of "C" cases.

Table 91
Median and Mean Age at Termination, in Months, of B, B-EAP, and B-No EAP Cases
Early Assessment Program
Western District of Missouri, Kansas City Division

Group	Median Age at Termination	Mean Age at Termination
B (N=995)	8.6	10.7
B-EAP (N=301)	9.2	11.5
B-no EAP (N=694)	8.3	10.4

[174] Because the court randomly assigned cases to the experimental, voluntary, and control groups, cases in each group are equally subject to all conditions other than the experimental condition, permitting conclusions that, all else being equal, the observed effects are due to the experiment.

What explains this apparent anomaly? Why do cases that volunteer to participate in the EAP process take nearly as long to terminate as cases not permitted to use the process and far longer than cases mandatorily assigned to the process? The longer disposition time for "B-EAP" cases is due substantially to the scheduling of EAP events for these cases. The court's practice is to send *invitations* to "B" cases when they are ready for the EAP, while a *notice of session date* is sent to the "A" cases when they are ready. Within a short time—often no more than a month after the EAP office determines that an "A" case is ready for a session—the session is held. For "B" cases, however, the office must await a response to the invitation, follow up with the non-respondents, and then schedule a session date. Examination of dates in the "B" cases revealed that the lag time between the invitation and the EAP session can be substantial, often on the order of two to three months.

Once the "B-EAP" cases are scheduled, however, it appears that the EAP has the effect of accelerating their disposition. Figure 8 shows a marked increase in dispositions of "B-EAP" cases at 7 months, two months after the peak of dispositions for "A" cases shown in Figure 7. At that point the cumulative dispositions of "B-EAP" cases also catches up with and then surpasses the cumulative dispositions of "B-no EAP" cases. The overall effect of the delay in scheduling the "B-EAP" cases is, however, to prolong their life more than two months beyond the life of the "A" cases, though not quite so long as cases that are not permitted to participate in the EAP process. For the "A" cases, on the other hand, where scheduling is prompt and the EAP session is held early, the EAP process has the clear effect of reducing disposition time.

Type of Disposition by Group

The Early Assessment Program not only produces quicker dispositions, it also results in somewhat more dispositions by settlement. Because the coding of disposition data may have some ambiguities, however, we must be cautious in our conclusions regarding disposition type.[175] Using available data and comparing "A" and "C" cases, we found that "A" cases, those subject to the EAP, were more likely than "C" cases to have terminated with a settlement, while "C" cases, those not permitted to participate, were more likely than "A" cases to have terminated by a trial or other judgment—i.e., 33% of the "A" cases settled while 27% of the "C" cases did, and 15% of the "C" cases went to judgment while 10% of the "A" cases did. The cases most likely to settle were the "B" cases who volunteered into the EAP—48% settled—suggesting that these cases may be more inclined to volunteer into the process because they are ready for the assistance it provides.

Proximity of Settlement to the EAP Session

The analyses above indicate that the Early Assessment Program results in earlier case resolution and in somewhat more settlements. Table 92 (next page) shows the proximity of case disposition to the EAP session. In many cases—38% of those that participate in the EAP

[175] At disposition, each case is given a code to indicate its disposition. The code of interest to us is "dismissed, settled," but it is possible that some settled cases are coded "voluntary dismissal" or "dismissed, other" because the nature of the disposition is not specified when the case terminates. Proportionally more "A" cases were terminated in each of these categories than "C" cases, though the biggest difference was in the "settled" category.

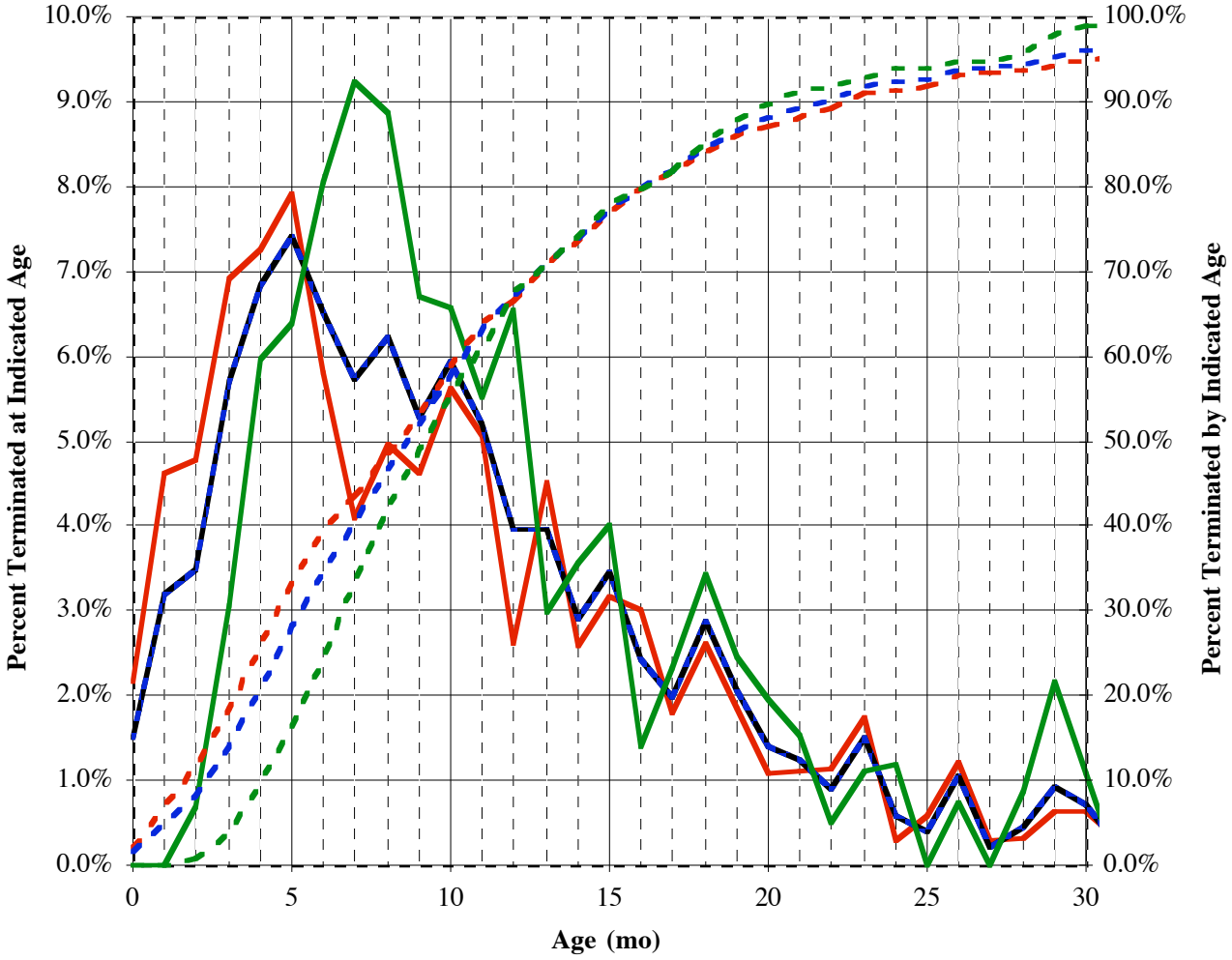


Figure 8

Cases Disposed of By Age, Group B
Western District of Missouri
Kansas City Division

Group B = EAP Voluntary (995 cases)
Group B-no EAP (694 cases)
Group B-EAP (301 cases)

Group B-no EAP % Disposed of AT age
Group B % Disposed of AT age
Group B-EAP % Disposed of AT age
Group B-no EAP % Disposed of BY age
Group B % Disposed of BY age
Group B-EAP % Disposed of BY age

session—case resolution comes immediately—i.e., at the session itself. Another 19% are resolved within a month of the session and an additional 17% within the next two months.

Table 92
Proximity of Case Resolution to the Early Assessment Session in Cases Terminated After at Least One EAP Session, 1/1/92-8/31/96 Western District of Missouri, Kansas City Division

Timing of Case Termination	% of Cases (N=605)
At EAP session	38.0
1-31 days after session	19.0
32-91 days after session	17.0
92+ days after session	26.0

Age at Disposition by Case Type

The age at disposition within each EAP group varies by case type, as shown in Table 93 (next page). Compared to the "B-EAP" cases, "B-no EAP" cases terminated more quickly within each principal case type category except civil rights; the difference is especially great for torts and labor cases. Once one of these two types of cases had volunteered into the program, they took an unusually long time to terminate—much longer than "A" and even "C" cases of the same nature of suit. It is not clear why torts and labor cases that volunteer into the EAP are relatively more prolonged than other case types. Some caution should be used, in any case, when examining the "B-EAP" group of cases, since the number of cases used in the analysis is quite small for some case types.

Table 93 also shows the types of cases in which the EAP process seems to be particularly effective. Comparing "A" to "C" cases, the differences in median age at termination is especially large for contract and civil rights cases. Civil rights cases are also the only type of case to have fared well, compared to "C" cases, when they volunteered into the EAP process.

The anomaly is why the "B-no EAP" cases terminate as quickly as they do—more quickly than "C" cases and, for torts and labor cases, as quickly as "A" cases. Perhaps it is due to the nature of cases that volunteer and do not volunteer into the EAP process. It is possible, for example, that the "B-EAP" cases differ systematically from other groups in their complexity, contentiousness, or other characteristics that lengthen their disposition. The fact that these cases volunteered into the program may reflect recognition on the part of the attorneys that special assistance was needed. Their participation may also be the result of specific attention from the program administrator, who in some instances makes a special effort to bring "B" cases into the program. On the other hand, it is possible that the "B-EAP" cases are average cases—the kind

attorneys might think the EAP could quickly resolve—and that the EAP process is slowing them down. The attorneys' assessment of the EAP's impact on disposition time, however, argues against this hypothesis. As shown earlier, the great majority of attorneys reported that the EAP reduced disposition time, and "B-EAP" attorneys were even more likely to say so than group "A" attorneys.

Table 93
Median Age at Termination (Mo's) by Nature of Suit and EAP Group
Cases Filed 1/1/92-8/31/96 and Terminated by 8/31/96
Western District of Missouri, Kansas City Division

Case Type		"A"	"B-EAP"	"B-No EAP"	"C"
Contracts	N	7.2	9.7	8.7	9.9
	Median	209	49	126	174
Torts	N	8.0	11.2	7.9	9.9
	Median	168	61	102	175
Civil Rights	N	7.3	8.1	10.0	10.6
	Median	307	128	210	325
Labor	N	5.8	9.3	5.6	6.8
	Median	142	33	122	135
Other Civil	N	6.8	9.3	8.5	8.7
	Median	173	30	134	210
All	N	7.0	9.2	8.3	9.7
	Median	999	301	694	1019

If the more difficult "B" cases are volunteering into the EAP, we can understand why some "B-no EAP" cases terminate as quickly as the "A" cases. What would be left in that group after the "B-EAP" cases entered the EAP would be cases that are more straightforward in their issues or other characteristics—i.e., cases attorneys think will be resolved shortly anyway. Such cases would very likely have a shorter disposition time relative to other groups. Why this should be concentrated in torts and labor cases, however, we do not know, and, in any case, these suggestions are conjecture and do not answer the question why "B-no EAP" cases terminate more quickly than "C" cases and, for some case types, as quickly as "A" cases.

Overall, however, the analysis of case age at termination shows that the Early Assessment Program has been effective in reducing disposition time in cases that must participate in the program Within that group of cases, all case types benefit from the EAP, but contracts and civil rights cases—the court's largest, non-prisoner civil caseloads—are particularly accelerated by the EAP process. This process also appears to be effective for civil rights cases that volunteer to participate. Looking across both "A" and "B-EAP" cases, then, civil rights cases in particular are accelerated by the EAP process.

4. Attorney Estimates of the Impact of the EAP on Litigation Costs

In moving cases to earlier disposition, the court and advisory group hoped the EAP process would also reduce litigation costs. Table 94 shows that a little over two-thirds of the attorneys who participated in an EAP session reported that the EAP reduced litigation costs—a somewhat smaller percentage than said it helped move their case along, but still a large majority of those who participated. On the other hand, nearly 10% said the program had a detrimental effect on costs, more than the 3% who said it had a detrimental effect on litigation time, though still a small percentage.[176]

Table 94
Attorney Estimates of the EAP's Impact on Their Client's Total Litigation Costs[177]
Western District of Missouri, Kansas City Division

	% of Attorneys Selecting Response (N=847)[178]	Median Per Party	Mean Per Party
Decreased client's costs	69.0	$15,000 N=383	$32,007 N-383
Increased client's costs	10.0	$1,500 N=67	$3,552 N=67
No effect	21.0	NA	NA

Table 94 also shows the median estimated savings per party—$15,000—as reported by attorneys who said the early assessment process decreased their clients' litigation costs.[179] (The median is identical for "A" and "B-EAP" cases.) Estimates ranged as high as $950,000, with twenty-four attorneys estimating client savings of $100,000 or more. The mean estimated savings per party was $32,007 (slightly higher for "A" cases, slightly lower for "B-EAP" cases). The median

[176] Findings from a separate questionnaire sent to a random sample of attorneys in closed cases (see Appendix A) show that 63% of attorneys believed the cost of litigating their case was about right, 19% thought the cost was too high, and 11% thought the cost was too low. Since the sample on which these findings are based may underrepresent cases disposed of early through the court's ADR program, the findings may overstate the number of attorneys who thought their case cost too much.

[177] Median savings are reported per party, not per questionnaire respondent. That is, when more than one attorney responded for a single party, the attorneys' estimates are averaged.

[178] The first 400 questionnaires did not ask the attorneys to estimate cost savings, thus the number of responses available for this analysis is less than for the other questions. A question asked of all questionnaire recipients—was the EAP helpful or detrimental in reducing litigation costs—produced a very similar pattern of responses: 73% said the program was helpful in reducing costs, 9% said it was detrimental, and 18% said it had no effect.

[179] The question was as follows: "Please consider for a moment what your client's *total litigation costs* through settlement, judgment, or other disposition (including attorneys' fees and expenses) would have been if this case had *not been assigned* to the Early Assessment Program. Compared to these costs, what effect do you think participation in the Program had on your client's total litigation costs?" The choices were no effect, increased costs, and decreased costs.

estimated total litigation costs in these cases, all of which had terminated, was $10,000. If these estimates are reliable, they indicate that the EAP is saving clients more than half of what their case would have cost.[180] The client savings may, then, be considerable, although they come at a cost to the court of about $700 per case. Some caution must be used, however, in reaching conclusions about the EAP's effect on costs, not only because the findings are based on attorney estimates but because we lack comparable information about cases that did not participate in the EAP.

The attorneys who reported that the EAP process increased their client's litigation costs did not report nearly as great an effect as the attorneys who said it saved costs. As Table 94 shows, the median estimated cost increase was $1,500, with a mean, or average, of $3,352. Those who reported increased costs were more likely to have gone to trial or to have reported that the EAP session was held too early, that a party did not participate in good faith, or that a subject matter expert would have been preferred. A slightly larger proportion of attorneys in the most costly cases (litigation costs over $50,000) also reported that the EAP increased costs.

Several written comments suggested the EAP can increase cost and time when it is used for the wrong kinds of cases. The two or three kinds of cases the attorneys thought unsuitable for the EAP process included cases involving legal issues only, cases where attorneys are very experienced and have worked together before, cases where there is no agreement on liability, and government cases. Just as many attorneys, however, said they thought every case should be required to go through the EAP process, and several expressed disappointment that, because of the random assignment process, other cases they were representing could not participate.

These comments suggest that some screening might be helpful to identify cases not suitable for the EAP. The incidence of problems is, however, so low that the time needed to screen cases might not be worth the gain—though for the individual party disadvantaged by the process this is obviously not an acceptable conclusion.

Overall, these findings suggest the EAP may provide substantial savings in litigation costs and very seldom increases litigation costs. We caution that these are attorney estimates of cost savings, but also note that they are consistent with the findings regarding nature of the disposition in these cases. Compared to cases that did not participate in the EAP process, cases that did participate more often terminated before issue was joined ("A" cases) and by settlement ("A" and "B-EAP" cases), whereas non-participating cases more often terminated with a judgment, either by trial or motion, and thus incurred the additional costs required by those procedures.

5. Ways in Which the Early Assessment Session is Helpful in a Case

The advisory group and court hoped to bring about earlier settlements and reduce litigation costs through a number of specific features of the Early Assessment Program. First, of course, was the early meeting with a neutral. At that meeting, they hoped, the neutral would help the

[180] One reason to be cautious about the estimates, apart from the fact that they are estimates, is the relatively low number of attorneys responding to the question: around 380 out of potentially 1300 respondents provided estimates of cost savings and total litigation costs.

parties make a realistic assessment of their case, settle it if possible, and, if not, plan for expeditious discovery so settlement discussions could be held.

As Table 95 shows, many attorneys found the EAP session helpful in a number of ways, with the greatest percentage of attorneys—77%—saying the session encouraged the parties to be more realistic about their positions. Around two-thirds of the attorneys also said the session allowed them to better understand and evaluate the other side's position, prompted earlier definition of the issues, and allowed them to identify strengths and weaknesses in their own client's case. The program, then, appears to be encouraging exactly the kind of assessment the advisory group hoped it would.

Table 95
Attorney Ratings of the EAP's Helpfulness in Providing Several Kinds of Assistance
Western District of Missouri, Kansas City Division[181]

Assistance EAP is Intended to Provide	% of Attorneys Saying the EAP		
	Was Helpful	Was Detrimental	Had No Effect
Encouraging the parties to be more realistic about their respective positions in this case (N=1301)	77.0	4.0	20.0
Allowing the parties to become more involved in the resolution of this case than they otherwise would have been (N=1301)	72.0	1.0	26.0
Enabling you to meet and talk with the opposing attorney (N=1304)	71.0	1.0	28.0
Allowing you to better understand and evaluate the other side's position (N=1296)	68.0	1.0	31.0
Prompting early definition of the issues (N=1300)	67.0	1.0	33.0
Encouraging the parties to consider methods other than litigation to resolve their dispute (N=1297)	66.0	1.0	33.0
Allowing you to identify the strengths and weaknesses of your client's case (N=1303)	65.0	1.0	34.0
Providing an opportunity to evaluate the other side's attorney (N=1297)	63.0	1.0	36.0
Improving communications between the attorneys in this case (N=1299)	60.0	3.0	38.0
Improving communications between the parties in this case (N=1296)	55.0	5.0	40.0
Improving relations between the parties in this case (N=1297)	42.0	8.0	50.0
Encouraging earlier discovery (N=1284)	38.0	2.0	60.0

[181] Helpful=Very helpful and somewhat helpful. Detrimental=Very detrimental and somewhat detrimental.

The assessment provided by the program, through the combination of processes listed above, appears, in turn, to be instrumental in reducing cost and delay. Where, for example, the attorneys reported that the EAP encouraged parties to be more realistic or allowed them to evaluate the other side's position, they were also much more likely to report that the program reduced litigation time and cost. In contrast, those who said the program had a detrimental effect in these areas were more likely to say the program increased cost and slowed down their case (but the numbers saying so were very small).

Even when attorneys reported that the program had no effect on the dimensions listed above, they were nonetheless more likely than not to say the Early Assessment Program reduced the time and cost of litigating their case, suggesting that other practices under the EAP are also instrumental in reducing time and cost. One of these, as Table 96 shows, is the requirement that parties attend the EAP session.

Table 96
Effect of Party Presence on Resolution of the Case
Western District of Missouri, Kansas City Division

Client Was	% of Attorneys Selecting Response (N=1289)	Helped Resolution	Hindered Resolution	Had No Effect
Present	91.0	70.0	1.0	29.0
Absent	9.0	3.0	7.0	90.0

Table 96 shows that in most cases the client did attend the EAP session and, according to three-quarters of the attorneys, the client's presence helped resolve the case. Of the attorneys who reported that their client was not present, 7% said their absence hindered resolution. Attorneys' written comments underscore the ratings reported in Table 95 and reveal some of the reasons why client attendance is viewed as important, as the following examples show:

> "Some questions came up that I did not know the answer to, and having my client there, who did know the answers, helped move things along."
>
> "I think the presence of each client and/or insurance company representative is critically important to an early resolution of the case. They gain a personal impression of the opposing party, counsel, and an unbiased assessment of facts, issues, and problems with their position."
>
> "I think it is *essential* to have clients at these meetings. Without the clients, the lawyers can simply posture to each other. With them, the clients are faced with the reality about the facts, the law and the risks."

> "There are times the client does not want to hear what their lawyer is telling them. Having a third party (Plan Administrator) give his thoughts on the case can certainly get the client's attention and bring them back to earth."

These comments represent many others that pointed out why many attorneys considered client attendance essential and why it should, in the view of a number of attorneys, continue to be mandatory. There were, nonetheless, also several attorneys who criticized the court's requirement, noting that in their cases party attendance had simply increased costs because the party had had to come some distance for the meeting. Clearly the weight of opinion and experience, however, is on the side of the advisory group, which thought that an early settlement would be more likely if the clients were involved in the EAP sessions.

Interestingly, Table 95 does not suggest that the EAP process encourages earlier discovery, presumably one of the benefits that might follow from the early assessment meeting. Other data, however, suggest the program may have some effect on discovery. Using data from a separate questionnaire to a random sample of attorneys in closed cases, we found that attorneys whose cases were assigned to group "C" were more likely than attorneys in group "A" to report that there was unnecessary discovery. These data are only suggestive, however, since we did not find a significant difference between groups "A" and "C" on several other measures of discovery, such as the number of interrogatories and depositions. On the other hand, we have some reason to think the sample may underrepresent the number of group "A" cases disposed of very early.[182] Were more of these cases in the sample, we might see greater differences in the amount of discovery in "A" and "C" cases.

Perhaps one of the most striking features of Table 95 is the very small percentage of attorneys who reported that the EAP session was detrimental in any way. Altogether, it appears that the session has a positive outcome and that what happens in it is very close to what the program's creators wanted to have happen—i.e., it is giving parties a better understanding of their own and their opponents' case, prompting earlier definition of issues, encouraging the parties to be more realistic about their respective positions, and engaging the clients in resolution of the case.

6. Attorneys' Overall Evaluation of the Early Assessment Program

As might be expected from the findings above, the great majority of attorneys who have participated in an EAP session found that the benefits of doing so outweighed any costs that might have been incurred—84% of all participating attorneys, as Table 97 (next page) shows.[183] Further,

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[182] The sample was based on cases in which issue was joined, the start-point for the EAP process as specified by the court's general order, but in fact cases are often scheduled for the EAP session and terminated before issue is joined. See Appendix A for a fuller discussion of this questionnaire and its limitations.

[183] Attorneys who were required to participate in the EAP were somewhat more inclined to say the benefits did not outweigh the costs than were attorneys who volunteered to participate in the EAP—18% of "A" attorneys saying benefits did not outweigh costs compared to 10% of "B-volunteer" attorneys.

nearly all said they would volunteer an appropriate case for participation in the Early Assessment Program and that the program should be continued—96% in both instances. Table 97 also suggests that many attorneys who believed the benefits did not outweigh the costs in their particular case would nonetheless volunteer a case into the program. Written comments by the attorneys suggested this as well.

Table 97
Attorney Judgments of the EAP's Overall Value (in percents)
Western District of Missouri, Kansas City Division

	Do the benefits outweigh costs? (N=1295)	Would you volunteer an appropriate case? (N=1298)	Should the program be continued? (N=1286)
Yes	84.0	96.0	96.0
No	16.0	4.0	4.0

Attorneys who have participated in the early assessment process do not, however, in general appear to be more satisfied than non-participants with the outcome of their case or with the court's overall management of their case. Using data from our random sample of attorneys in closed cases, we found no difference between attorneys in "A", "B", or "C" cases in their satisfaction with the outcome in their case, the fairness of the outcome, the court's management of the case, or the fairness of the court's management. The groups did not differ, either, in their levels of satisfaction with the timeliness or cost of their litigation. Again, the sample may underrepresent the number of "A" cases terminated early and therefore may not reveal differences that in reality do exist.

Altogether, the analyses above suggest the Early Assessment Program has been very effective in realizing the goals set by the court and advisory group. As they had hoped, it appears to provide a meeting at which parties can come to a more realistic understanding of the litigation and engage in settlement planning and discussions. For cases required to participate, the program provides this assistance early in the litigation, thereby shortening the time to disposition, leading to more settlements and fewer court judgments, and, it appears, reducing the cost of the litigation. The great majority of attorneys who have participated in the process believe it should continue.

Further confirmation of the effects reported above and the attorneys' positive evaluation of the Early Assessment Program can be found in the several hundred written comments, which lean heavily in favor of the program. Below are several examples:

> "The Early Assessment Program is an outstanding concept. It reduces litigation costs for both parties. It shortens the time for resolution of the dispute and thereby reduces stress and pressures generated by delayed justice. It permits the parties to participate in a forum where they can state their positions to each other and to a third person. It permits the parties to obtain justice, to resolve their differences and to maintain their dignity. It does all these things with a very significant savings to the federal court system."

"The presence of a neutral, employed by the courts and thus without apparent agenda other than to help the parties resolve the issues, has a powerful impact on my clients and seems to similarly affect opposing parties."

"The *only* dissatisfaction I have with the Program is that is currently selective in the cases that can participate. I have several cases I wish could be part of the program, but which were assigned to the control group. I look forward to the day when *all* cases can at least opt into the Program."

"*Early Assessment* is the *best thing* I have seen in the judicial system in 15 years. Why? Gets the attorneys to talk. Makes parties realistic about the case."

"I was extremely skeptical, as this was my first mediation. The result was excellent for all three parties, and I suspect that some $300,000 in legal fees was saved in total, plus taking a couple of years of litigation out of the system. This mediation collapsed the time required to learn a case. The clients were there at the beginning, rather than getting involved late in the case. The lawyers were required to give a fair assessment to the value of their case initially, rather than a year or two down the road after wasting substantial sums on conflicts between and among lawyers and not grappling with the real issues."

"This program is the fairest, most efficient compulsory/voluntary mediation/arbitration assessment program I have been involved in as a trial lawyer. Mr. Snapp is the right man, in the right job. His patience, preparation and peoples skills make the program worth having even if its cost were assessed to the members of the federal bar in the Western District as part of their dues. Please find some way to continue this program."

"Based upon my experience with this client and this kind of litigation, I can say with certainty that this case would have settled with or without EAP. But because of EAP, it settled sooner, and my client saved legal fees."

These comments and the ratings shown in Table 97 reveal very substantial support for the court's Early Assessment Program by those who have participated in it. A number of the comments also identify one of the principal reasons for the program's effectiveness—its current administrator/mediator. This evaluation is, then, really two evaluations, one of the advisory group's theory that an early meeting of the parties to assess the case would prompt earlier settlements, and the other an evaluation of the individual who has carried out the advisory group's design. Our findings provide support for the theory and show that it has been realized largely through its successful application by the program administrator. Whether the early assessment process would have the same effect if a different mediator conducted the sessions cannot be determined from this program.

Chapter VI

The Northern District of West Virginia's Settlement Week Program

In response to the Civil Justice Reform Act's designation of the court as a demonstration district, the Northern District of West Virginia formalized and continued a settlement week program that had originally been adopted in 1987. In this chapter we examine why the court adopted the program, how it has changed, and the impact it has had.

As in preceding chapters, in section A we present our conclusions about the court's implementation of its settlement week program and the impact of that program. Sections B and C provide the detailed documentation that supports our conclusions: section B gives a short profile of the district and its caseload, describes the court's settlement week program, discusses the process by which the court designed and set up that program, and examines how the court has applied the settlement week process; section C summarizes our findings about the program's effects, looking first at the judges' experience with the program, then at its impact on attorneys, and finally at its effect on the court's caseload.

A. Conclusions About the Settlement Week Program

Set out below are several key questions about the demonstration program in the Northern District of West Virginia, along with answers based on the research findings discussed in sections B and C. Many of the findings are based on interviews with judges and surveys of attorneys. While their estimates of the program's effects are important for understanding the role of the settlement week program in this district, they should not necessarily be taken as evidence of actual program impact.

Has the settlement week program reduced disposition time in civil cases?

Because the settlement week program began several years before it became a formal demonstration program, it is difficult to ascertain the effects of the program on time to disposition in civil cases. Caseload statistics are inconclusive on the question. Almost half (46%) of attorneys who had a case subject to settlement week, however, believed that the program decreased time to disposition (most others reported no effect). Attorneys who said their cases settled because of settlement week were especially likely to say settlement week decreased disposition time, while attorneys who said settlement week did not contribute to settlement were more likely to say the program had no effect on disposition time. Altogether, while we cannot draw any conclusions from caseload data, it appears that many attorneys who participated in settlement week perceive it as lowering disposition time in their case.

Has the settlement week program reduced litigation costs in civil cases?

Half of the attorneys who participated in settlement week reported that the program decreased litigation costs, while 17% said it increased costs. The median cost savings reported by the attorneys was $10,000 per party. Attorneys who reported their cases settled as a result of the program were most likely to believe that it reduced costs, while a significant minority of those whose cases did not settle reported that the program increased costs.

Considering the findings on disposition time and cost together, it appears that when the settlement week conference produces a settlement, participants are more likely to believe it is effective in reducing litigation time and costs. When it does not produce a settlement, they are less likely to perceive a positive effect and more likely to report negative effects.

Does settlement week move cases to settlement?

More than half of the attorneys whose cases were subject to settlement week reported that all or part of their case settled as a result of the program. Attorneys identified several ways in which the settlement week conference facilitated the settlement process, including: (1) encouraging parties to be more realistic about their respective positions; (2) allowing clients to be more involved in the resolution of the case than they otherwise would have been; (3) giving one or more parties an opportunity to "tell their story"; and (4) improving communication between the different sides in the litigation. In nearly all cases clients were present at the settlement week conference, and 70% of the attorneys reported that the client's presence helped in resolving the case. Attorney comments suggest the skills of the mediator and the good faith participation of the parties are also important factors in producing a settlement.

A significant minority of attorneys reported that the settlement conference was held too early in their case and cited insufficient discovery as a problem in those instances, but we did not find either of these related to whether a case settled.

Are participants in settlement week satisfied with the process?

The great majority of attorneys who participated in settlement week were satisfied with the process and thought it fair, a finding that was underscored by written comments attesting to the program's value. However, most attorneys who had not participated in settlement week were also satisfied with how the court handled their case and thought the procedures used in their case fair.

What does it cost to provide a settlement week program?

The principal costs of the settlement week program for the court are the staff time needed for scheduling the approximately 150 cases that are referred to settlement week each year. For FY96, the estimated cost of staff time for this program was $3,000. Because the court has several

divisions and settlement week is held in each, the court will also spend about $2,000 for staff travel between divisions. If the court did not have a stable, qualified pool of neutrals, it would also have to spend several thousand dollars on training, but it has not had such costs since the beginning of the program when it first established its roster of neutrals. Altogether, the court's program costs about $45 per case referred to settlement week.

There is no cost to the parties who participate in settlement week because mediators provide their services pro bono. At very little cost, then, to itself or the litigants, the court is able to provide a service that the great majority of participants find satisfying and fair and that about half the participants believe is effective in reducing the time and cost of litigation.

B. Description of the Court and Its Demonstration Program

This section provides a description of the demonstration program adopted by the Northern District of West Virginia, beginning with a brief profile of the court's judicial resources and caseload and continuing with a discussion of the steps taken by the court to design, implement, and apply its settlement week program.

1. Profile of the Court

Several features of the court are noteworthy for understanding the implementation and effects of its demonstration program: the court's small size; the high criminal caseload before the demonstration program began and its subsequent decline; and the changes on the bench during the demonstration period.

Location and Judicial Resources

The Northern District of West Virginia is a small court, with a main office in Wheeling and three divisional offices. The principal clerk's office is located in Wheeling.

The court has three authorized district judgeships, with the third having been created under the Civil Justice Reform Act of 1990 and filled in September 1992. The court also has one full-time magistrate judge, two part-time magistrate judges, and two senior judges, one of whom—the former chief judge—took senior status in the summer of 1995. The judgeship vacated at that time was left unfilled until September 1996. In addition, one of the active judges was very ill during 1993 and was not able to maintain full caseload responsibilities. During the demonstration period, then, there was quite a bit of change on the bench, with the filling of a new judgeship, a new chief judge, and a judge converting to senior status whose position was not filled immediately. The former chief judge continues to maintain about 80% of a full civil caseload, while the other senior judge carries approximately 25% of a full civil caseload in addition to criminal cases.

Size and Nature of the Caseload

During the four years leading up to the demonstration program, civil case filings in the Northern District remained relatively constant, while the number of criminal felony filings almost doubled between FY85 and FY90. The advisory group report noted, in fact, that in 1990 the district ranked 9th out of 94 districts in the number of criminal filings per judgeship, but 78th in the number of civil filings per judgeship. The per judge pending caseload from 1985-1990 ranged from about 500 to 750 cases, and terminations per judge ranged from about 400 to 550 cases per year. These termination figures reflected some help from visiting judges.[184] Over the four-year demonstration period the number of criminal filings dropped substantially (see Table 98), with the result that the district now ranks 71st out of 94 districts in the number of criminal felony filings per judgeship.

Table 98
Cases Filed in the Northern District of West Virginia, FY90-95[185]

Statistical Year	Cases Filed			Filings Per Judgeship	
	Total	Civil	Criminal	Actual	Weighted
1990	721	546	175	361	455
1991	653	513	140	218	250
1992	819	588	231	273	391
1993	748	642	106	249	260
1994	636	516	120	212	255
1995	701	597	104	234	297

While case filings tell us something about the demands on the court, a better measure is the court's weighted filings per judgeship, which takes into account the relative demand of different types of civil and criminal cases. As Table 98 shows, the court's weighted filings are systematically higher than its actual filings, although the weighted filings are still low relative to the national average of 448 weighted filings per judge: in 1995 the court ranked 84th out of 94 districts with respect to weighted filings.

Table 99 (next page) shows the principal types of civil cases filed in the Northern District of West Virginia. The top two types of cases filed—in line with the proportions in national statistics—are prisoner petitions and torts. The court's percentage of contracts cases—18%—is higher than the national average of 12%, while its percentage of civil rights cases—11%—is slightly lower than the national average of 15%.

[184] Report of the Advisory Group to the United States District Court for the Northern District of West Virginia, (no date), pp. 7-8.

[185] Source: Administrative Office of the U.S. Courts, Federal Court Management Statistics, 1995.

Table 99
Principal Types of Civil Cases Filed, Northern District of West Virginia, FY95[186]

Case Type	Percent of Civil Filings
Prisoner Petitions	28.0
Torts	21.0
Contracts	18.0
Civil Rights	11.0

2. Designing the Demonstration Program: How and Why

In 1991, when the court and its CJRA advisory group began to design the court's demonstration program, their statutory obligation was to "experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution." (Judicial Improvements Act of 1990, Title 1, Sec. 104). Below we describe their work, relying on the advisory group's report to the court and on the interviews we conducted with the advisory group chair, court staff, and judges.[187]

In contrast to other demonstration districts, the core of the Northern District's demonstration program has been in existence in the court since well before the CJRA was passed—in fact since 1987. In October 1987 the district, in cooperation with the West Virginia State Bar, had implemented a settlement week program, under which selected civil cases were referred to mediation with a volunteer attorney mediator during specific weeks designated as settlement weeks. During each settlement week, all referred cases were scheduled for mediation sessions at the courthouse. The purpose of the program at that time was to reduce a backlog in civil litigation. These settlement weeks were held once or twice a year between 1987 and 1990.

Issues Considered and Recommendations Made by the Advisory Group

After examining the condition of the court's caseload, the advisory group noted in its report to the court that the time to disposition in civil cases in the district was very high compared to national figures. The advisory group attributed this problem primarily to the large criminal docket and the Speedy Trial Act, which assigns priority to criminal cases over civil cases.[188] According to the advisory group, because the court could not set firm trial dates for civil cases, other pretrial deadlines—such as discovery cutoffs and dates for rulings on motions—were often extended, allowing cases to languish on the docket. In addition, although visiting judges were brought in

186 *Id.*

187 For a description of our research and data collection process, see Appendix A.

188 *Supra*, note 184, p. 9.

frequently to assist in handling both civil and criminal cases, the advisory group thought this practice often drove up costs because litigants were given short notice of trial dates and other deadlines to accommodate the visiting judge's schedule, and trials were frequently held away from the normal point of holding court.[189]

The advisory group concluded that the key to reducing delay and avoidable cost in the district was for the court to "regain control" of its civil docket.[190] To help effect this goal, and in recognition of the court's designation as a demonstration district for alternative dispute resolution, the advisory group developed a plan that built "upon the success and the acceptance of settlement week in this district as a solution to the problems of the civil docket."[191]

The plan proposed by the advisory group contained several elements. First, following the suggestions of the Civil Justice Reform Act, the group recommended a system of differential case management. Specifically, it proposed that civil cases be divided into three types for purposes of case management: 1) Type I, or administrative cases, which would continue to be managed largely by the clerk's office until they were ready for disposition; 2) Type II-standard cases, which would be subject to initial disclosures and discovery deadlines and would be monitored by the clerk's office for compliance with these deadlines; and 3) Type II-complex cases, which would be given active judicial management from the start, including a scheduling conference within forty-five days of filing of the answer, at which the assigned judge would tailor the discovery and other pretrial activities to meet the particular needs of the case.

Second, the advisory group recommended that the court adopt a local rule requiring disclosure, patterned after the federal rule then under consideration. Through disclosure, the advisory group felt, cases would more quickly reach a stage to be considered suitable for referral to ADR.

Third, the advisory group recommended that the settlement week program be expanded to all civil cases in which discovery was completed—unless the parties agreed, with the consent of the court, to some other form of alternative dispute resolution. Cases would also be exempt if the court found no beneficial purpose would be served by requiring the case to be submitted to a settlement week conference. The advisory group also recommended that settlement week be held at least three times a year on a regular basis instead of the occasional use it had had in the past. The group noted that the submission of cases for mediation "is consistent with the fact that most civil cases nationally and in this district settle before trial" and explained that the purpose of the mediation settlement week is "to facilitate the settlement discussion and process."[192]

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189 *Supra*, note 184, p. 8.

190 *Supra*, note 184, p. 32.

191 *Supra*, note 184, p. 34.

192 *Supra*, note 184, p. 36.

Fourth, for cases exempted from settlement week or cases not settled as result of settlement week, the plan provided for the setting of a deadline for submission of a pretrial order or conference and a firm date for trial.

The overall goal of this plan, according to the advisory group, was to provide an incentive to focus discovery and a "linkage" between the completion of discovery and the referral of the case for alternative dispute resolution, with the expectation that if settlement efforts proved unsuccessful a firm trial date would be set.[193]

The Court's Role and Goals in Designing the Settlement Week System

Because the court had been heavily involved in the initial design and implementation of the settlement week program and had several years of experience with it, the notion of formalizing and expanding the program was readily agreed to by the court. Its primary reason for adopting the settlement week program, both in 1987 and continuing in 1991, was to resolve civil cases more quickly by bringing parties (litigants and attorneys) together to talk about their case, exchange information, and enter into settlement discussions earlier. Judges generally agreed that the specific purpose of the settlement week program is to encourage earlier resolution of cases through settlement; as one judge said, "no one here doubts that the goal of this program is settlement."

An important aspect of the settlement week program with respect to saving potential litigant costs is that mediators serve pro bono—that is, they are not paid by the court or the parties. Judges and court staff said the court had never seriously considered paying the attorney neutrals, with one saying "it's part of the culture to volunteer," and another pointing out that "attorneys do it for the intellectual satisfaction, not the money." One judge indicated s/he would prefer to have the court pay the neutrals, particularly in big cases. The advisory group did not make recommendations regarding compensation of neutrals.

When asked about the rationale for holding settlement weeks at long intervals rather than providing mediations on an ongoing basis, one judge explained that settlement weeks are an accommodation to the attorneys, allowing them to better plan their calendars in other courts. Another described settlement weeks as creating a "very convivial" environment. "The attorneys talk in the halls, get a lot done," s/he said. "It's like the old docket calls in rural state courts."

The court also adopted the other aspects of the advisory group's plan, including differential case management, initial disclosures in standard civil cases, and the setting of firm trial dates. Settlement week, however, was the only aspect of the advisory group's plan that was actually implemented during the demonstration period. The court held off on implementing the initial disclosure provisions pending adoption of a final national rule governing disclosure; in new local rules adopted March 1, 1996, the court adopted the initial disclosure provisions of amended Fed. R. Civ. P. 26(a)(1). It is not clear why other elements were not implemented; one of the judges suggested the continuing burden of the criminal docket when the demonstration period began may have prevented the court from more fully implementing the program.

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193 *Supra*, note 184, p. 36.

3. Description of the Settlement Week Program

The remainder of our report focuses on the settlement week program in the Northern District. A program of settlement week conferences was formally implemented December 18, 1991, by a court order adopting the advisory group's Plan for Civil Justice Delay and Expense Reduction.[194]

Under that plan, settlement week conferences were to be scheduled at regular intervals and not less than three times per calendar year. All civil cases in which discovery was complete, except for certain exempt categories of cases, were to be referred to a settlement week conference with a neutral attorney mediator selected from a list maintained by the court. A case could be exempted from settlement week if parties agreed, with consent of the court, to use some other form of alternative dispute resolution. These provisions, which are the only formal provisions made for settlement week, were in effect during the period covered by this study.

On March 1, 1996, the court adopted revised local rules, including L. R. Civ. P. 5.01 relating to Alternative Dispute Resolution (Mediation Program—Settlement Week). This rule incorporates most of the principal elements of settlement week as set forth in the 1991 plan and states formally many of the informal rules and practices that have been part of settlement week. The rule states that the mediation program is mandatory for cases selected by the assigned judicial officer. It does not set forth criteria for judges to use in determining whether and when to refer a case to mediation, although it indicates that parties may request mediation and can do so without disclosing the request to the other side. The rule does not specify the frequency with which settlement weeks will be held nor does it require that mediation sessions be held only during settlement weeks.

The rule describes the mediators as "attorneys who have been professionally trained in mediation techniques that will enable them to assist the parties in reaching a resolution of their dispute," with no power to make decisions in regard to the cases they mediate.

Each mediation conference is scheduled for two hours, although some take more or less time. Counsel and parties or their representatives who have authority to make binding decisions are required to attend. While acknowledging that different mediators and different cases might be amenable to different approaches, the rule provides that "in general the mediation process will involve a series of discussions with the mediator jointly (all parties and their counsel together) and individually (individual parties and their counsel alone)" (L.R. 5.01 (c)). The rule also provides that "every effort shall be made" to have a judicial officer and court reporter available should the need for either arise during the mediation session (L.R. 5.01 (i)). There is no limit in the rule on how many mediation conferences may be held in a particular case.

The program places strong emphasis on confidentiality. The identity of the mediator is not disclosed until the mediation conference begins, and the mediator is required to keep all communications made at conferences totally confidential (L.R. 5.01 (a)). The only information about a mediation conference that the mediator reports to the court is (1) the fact that the conference

[194] Pursuant to the Civil Justice Reform Act (28 U.S.C. § 474), the court's plan was reviewed and approved by the Judicial Conference and a committee of judges in the Fourth Circuit.

was held, (2) whether the case settled, and, if it did not, (3) whether the mediator intends to conduct further mediation in the case and (4) whether the mediator thinks the case should continue through the normal judicial pretrial process or might profit from a status or settlement conference before the court (L.R. 5.01 (e)).

4. Implementing and Maintaining the Settlement Week Program

Before the CJRA, the settlement week program had been coordinated by a law professor who was involved with the court in designing the program. When the court adopted the program as its demonstration program, the clerk of court became responsible for program administration.

The Role of Court Staff and Judges

The clerk of court's responsibilities in administering the settlement week program include scheduling settlement week conferences, reserving rooms in the courthouse (where all settlement week conferences are held), assigning mediators to cases, and receiving reports from mediators at the conclusion of settlement week conferences. The complexity of the task is somewhat compounded by having to carry it out for each of the four divisions for each of the three settlement weeks held each year.

When the clerk first took over administration of the program, these activities took a great deal of his time, particularly with many conferences being continued or rescheduled. Now, through deputy clerks at each court location, the clerk has some assistance administering the program. The deputy in charge at each location arranges for rooms in which mediation sessions can be held, and a deputy clerk in Elkins maintains a database of information about cases in the settlement week program and notifies mediators of cases assigned to them.

The primary responsibility of judges under the program is to identify cases on their dockets that are ready for referral to settlement week and to provide the names of those cases to the deputy clerks so that the mediation sessions can be scheduled.

Maintaining a Roster of Neutrals

When the court first established the settlement week program, it recruited respected members of the bar for its roster of mediators, worked with the West Virginia University School of Law and private consultants to provide training for the mediators, and received the imprimatur of the West Virginia Bar Association through its grant of CLE credit for the mediator training. The court continues to rely on roster created at that time, as well as additional mediators who have been trained through the law school and other programs outside of the court, and therefore has not found it necessary to provide additional training. Consistent with the history of the settlement week program, mediators are volunteers who are not paid by the court or the parties.

Forms Used by the Settlement Week System

Forms used by the court relating to the settlement week system include a form order scheduling a case for settlement week; a notice re-scheduling a mediation; a notice of additional mediation; a form mediation statement; a Settlement Week Non-Appearance Report, on which a mediator reports to the court that a scheduled mediation did not occur and indicates why; and a Settlement Week Conference Report, on which a mediator reports that a settlement week conference occurred and indicates whether the case settled, whether additional mediation will take place, or whether the mediator thinks a certain step should be taken by the court (e.g., a status conference or settlement conference) to enable the case to proceed. Copies of these forms can be found at Appendix F.

The Budget for Settlement Week

According to the clerk office, the budget amounts attributable to settlement week for FY96 include $3,000 in staff time; $1,150 for materials; and $2,000 for staff travel among the divisions to administer settlement weeks.[195] Since the beginning of the demonstration period, there have been no expenses for training or any other items other than staff time and travel. On a per case basis, the cost of maintaining the program for the past four years has been roughly $45 per case that participates in the settlement week program.[196]

5. The Settlement Week Program in Practice

The December 1991 general order authorizing the settlement week program (see section B.3) established the broad outlines of the program. In this section we consider how settlement week is carried out in practice—in particular how cases are referred, the timing and number of referrals, client attendance, the use of mediation statements, and the nature of the sessions themselves.

Referral of Cases to the Settlement Week Program

The advisory group's plan, as authorized by the December 1991 court order, provides that "all civil cases in which discovery is completed, except for Type I civil cases, and those cases exempted pursuant to the provisions hereof, will be referred to a 'Settlement Week Conference.'" The court has not implemented the tracking of cases into Type I and Type II tracks, but it nonetheless exempts from settlement week cases that would have been Type I cases, such as prisoner petitions and social security cases.

Within the remaining case types, selection of specific cases for settlement week is done by the judges. The judges reported that, with a few exceptions, virtually all eligible civil cases go through at least one settlement week mediation conference. One or both attorneys often ask to have the case put on the settlement week docket, they said, and cases without a request are frequently assigned as well.

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[195] Letter from C. Wimer to D. Stienstra, August 19, 1996, on file at the Federal Judicial Center.

[196] This figure was calculated by multiplying the FY96 program cost by five and then dividing by the number of cases that have been referred to settlement week during the past five years.

One judge emphasized that the selection of cases for referral to settlement week must be done carefully "so you don't waste the mediator's time, because they're giving up a day of income."

Types of cases exempted by some judges include cases in which dispositive motions are pending and cases with sophisticated litigants and complex questions of law. Although the judges did not identify nature of suit as one of the criteria they use, the outcome of their referral process is that torts cases are slightly more likely to be referred to settlement week, while contract, civil rights, and labor cases are slightly less likely to be referred.[197]

During the years of the demonstration program, the court has held ten settlement weeks, with another currently in the planning stages. For the first time, in 1995 the court held the three annual settlement weeks specified by its CJRA plan. Table 100 shows the number of cases referred to each of the settlement weeks and reveals that the number has fluctuated from year to year but overall a substantial number of cases have been referred to settlement week. These referrals represent 692 individual cases.

Table 100
Number of Settlement Weeks and Number of Cases Referred to Each, 1992-1996[198]
Northern District of West Virginia

Settlement Week	No. of Cases Referred	Settlement Week	No. of Cases Referred
1992 Summer	130	1995 Spring	52
		Summer	61
1993 Spring	129	Fall	51
Fall	114		
		1996 Spring	56
1994 Spring	88	Summer	52
Fall	54	Fall	53
		Total	840

[197] Of tort cases, 54% were referred to settlement week, while of contract cases 40% were, of civil rights cases 39% were, and of labor cases 44% were. We report differences only where a Chi-square analysis showed the difference to be significant at $p < .05$ or less.

[198] The number of cases referred to each settlement week includes all cases referred to that settlement week, including those referred for a second or third time: 517 cases were referred only once, 101 cases twice, sixteen cases three times, and five cases four times. Altogether, 639 individual cases have been referred during the demonstration period. Data derived from files maintained by the court.

It is difficult to calculate what percentage of the eligible caseload these cases represent, since eligibility itself varies from judge to judge (see below). Our attorney survey data suggest that 41% of cases that reach issue ultimately are referred to settlement week. The referral rate of those in which discovery has been completed or in which trial is scheduled—the eligibility criteria used by two of the judges—would be considerably higher.[199]

The attorney survey data also show that of the cases that were referred, 85% participated in a settlement week mediation session. Those that did not generally terminated through settlement, a ruling on a dispositive motion, or remand before the settlement week conference was held.

Timing of Referrals to Settlement Week

The advisory group's plan contemplated that cases would be referred to settlement week after completion of discovery, but in practice there is some variation among judges in the stage at which they refer cases to settlement week. One judge refers cases as early as possible after the complaint and answer are filed and some limited discovery has been conducted. Another judge waits until discovery is over to refer cases, and the third judge refers only cases that have been set for trial, so that parties have had a chance to become educated about the case. All judges occasionally have cases that become ready for mediation between scheduled settlement weeks. In these situations, they attempt to arrange a mediation with one of the court's attorney mediators and do not require the case to wait until the next scheduled settlement week.

Number of Mediation Conferences Held in Settlement Week Cases

Sixty-six percent of attorneys we surveyed indicated their case had been involved in only one settlement week conference. Almost one-third (30%) said their case had had two settlement week conferences, and 4% said their case had been in three or more settlement week conferences.

Client Attendance

Clients are required to attend settlement week sessions, and judges and court staff indicated that very few exceptions are made to this requirement. This is consistent with results from the attorney survey, in which 99% of attorneys whose cases participated in settlement week indicated their client(s) had attended the settlement week session in person or by telephone, with a great majority (92%) reporting the attendance was in person.

Use of a Mediation Statement

Although neither the advisory group's plan nor the local rule governing the settlement week program require preparation of a mediation statement, two of the court's judges require that parties prepare a statement prior to a settlement week conference. The statement provides a synopsis of the case, the parties' settlement posture, and is provided to the mediator and the assigned judge.

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[199] Examination of the stage at which referred and non-referred cases terminated showed that higher proportions of non-referred cases were terminated very early. The numbers of cases were too small, however, to permit a comparison that might show a statistically significant difference.

Description of Settlement Week Sessions

During our visit to the court we attended fifteen settlement week sessions, before eight different mediators. We also interviewed the mediators to determine, among other things, how typical the sessions were that we observed. Recognizing that the sessions we attended were not necessarily representative of the settlement week sessions in general, we describe briefly in this section the general process of the settlement week mediations.

All of the mediation sessions were held in the courthouse, normally in the jury room or a conference room. Clients for both sides were generally, but not always, present, and sometimes their presence was by telephone rather than in person.

All party representatives and attorneys were generally together in one room at the start of the meeting. The sessions started with the mediator giving a description of how the session would proceed, explaining what his or her role was, and emphasizing the confidentiality of the mediation proceedings. For example, one mediator pointed out that if the case did not settle in mediation and instead continued a normal litigation course, it would be "as if this session never happened." Another explained that s/he would destroy her/his notes from the session if the case continued in litigation. For cases that had had a previous mediation session, the mediator's introductory comments were much briefer.

The mediator's opening remarks were generally followed by brief opening statements by the parties' attorneys, usually focusing on the strengths of their respective cases. The mediator then held a series of separate caucuses with each party, beginning with the plaintiff. At these caucuses, the mediator discussed the strengths and weaknesses of the party's case, including offering his or her own opinion of what the strengths and weaknesses were (e.g., "I think one strength of your case is the damages aspect"; "the plaintiff is salt-of-the-earth— a jury will believe her from Day 1"; "you have a lot of cards in terms of the law"). The mediator generally tried to move parties quickly to generate a specific dollar figure for a settlement demand or offer that the mediator could bring to the other side.

Most mediations involved one or two separate caucuses with each side, and then the parties were brought back together with the mediator in one room. One or two cases were close to settlement at this point. Other cases, particularly those in which very little discovery had been completed, did not appear ready for settlement discussions, and this was acknowledged by the mediator and attorneys. In those cases, the parties—with the mediator's assistance—discussed what should happen next in the case, such as further exchange of specific information or the setting of deadlines for discovery or for the filing of dispositive motions. The sessions lasted between one and two hours.

C. The Impact of the Court's Demonstration Program

When the court first implemented settlement week in 1987, the program was designed to resolve a backlog of civil cases. In the early 1990s, in response to the Civil Justice Reform Act

goals of cost and delay reduction, the court and advisory group sought to expand the program and thereby encourage more parties to meet and talk about their case so it could settle early. The advisory group also cited the more general purpose of facilitating the settlement process and settlement discussions. As we consider whether these goals have been met, it is important to keep in mind that "early" is a relative term. The fact that cases subject to settlement week have generally completed discovery means that, while settlements resulting from the program might be "early" relative to when they would otherwise have occurred, they are not necessarily at a very early stage in the pretrial process.

In reporting on this court we are, for three reasons, especially limited in the conclusions we can draw about the effects of the demonstration program. First, because a substantially similar form of settlement week was adopted several years before the demonstration period began, it is difficult to ascertain the point at which one would expect to see any effects of the demonstration program on the court's caseload, including time to disposition. Second, the relatively small number of civil cases in the court means that, even though we received a high response rate to our attorney survey, we often do not have a sufficient number of responses to compare settlement week cases and non-settlement week cases on a variety of case and attorney characteristics.

And third, even where we have a sufficient number of responses, we must proceed cautiously in comparing the outcomes of cases referred to settlement week with cases not referred because they are not comparable groups. Those that were referred, for example, were selected because of an expectation that they would be assisted by settlement week or because they had reached a certain stage in the litigation, whereas non-referred cases either were not expected to benefit or had not yet reached eligibility, making the two groups far from comparable.

Subject to these caveats, we will discuss our findings in some detail in the next several sections. First, we summarize our principal findings:

- The judges uniformly agreed that the settlement week program is achieving its purpose of bringing about earlier resolution of cases through settlement. Features of the program they identified as important to achieving this goal include: (1) requiring party attendance at mediation sessions; (2) the involvement of well-trained attorneys as mediators; and (3) the informal, non-binding nature of the program.

- No attorneys thought their settlement week session was held too late in the case; most (76%) thought it was held at an appropriate time, while 24% thought it was held too early. Virtually all of those who said it was held too early indicated that either discovery was not completed at the time of the conference or the court had not yet ruled on potentially dispositive motions.

- Thirty-nine percent of attorneys said their entire case settled as a result of the settlement week process, while 17% said a part of the case settled as a result, and 44% said settlement week did not contribute to a settlement in the case.

- Nearly half of the attorneys—46%—who participated in settlement week said it lowered disposition time, while 41% said it had no effect on disposition time, and 14% said it increased disposition time.

- About half of the attorneys whose cases went through settlement week said it decreased costs in their case, while about a third said it had no effect on costs and about a fifth said it increased costs. Attorney estimates of costs savings ranged from $300 to $100,000, with the median (midpoint) estimate being $10,000. These client savings were realized at a cost to the court of about $45 per case.

- Attorneys whose cases had settled through settlement week were significantly more likely than attorneys whose cases had not settled to say the process decreased litigation time and cost.

- Aspects of the settlement week conference rated most helpful by attorneys were, in order, that it (1) moved parties toward settlement; (2) encouraged parties to be more realistic; (3) allowed clients to be more involved in their case; (4) allowed parties to "tell their story"; and (5) improved communication between parties.

- The great majority of attorneys (over 80%) thought the program did not have an effect on the amount of formal discovery or the number of motions, but most of those who did report an effect said discovery and motions were lowered by the program.

- Both attorneys who participated in settlement week and those who did not were satisfied with the outcome of their case and thought it was fair.

- Caseload statistics do not provide any conclusive information about the effect of settlement week on the condition of the court's caseload, although when the program was first used in 1987 and 1988 it may have helped the court terminate a large number of older cases.

The remainder of section C discusses these and related findings and brings into the picture subtleties we cannot capture in the brief summary above.

1. The Judges' Evaluation of Settlement Week's Effects

The Benefits of Settlement Week and Features Critical to Achieving its Benefits

The judges uniformly agree that settlement week is achieving its goal of encouraging early resolution of cases through settlement. In addition, as one judge said, the existence of the program shows litigants "that the court cares about them—it's not the judge hectoring them at the last minute; the parties are impressed by the mediators' skill and the time they take."

Features of the program identified by judges as important to achieving its goals include: (1) requiring party attendance at mediation sessions; (2) the involvement of well-trained attorneys as

mediators; and (3) the informal, non-binding nature of the program. In addition to these features of the program, one judge emphasized that the key to a successful settlement week mediation is preparation by the attorneys; for this reason, that judge and another district judge require parties to prepare mediation statements prior to settlement week.

Concerns About Settlement Week

One aspect of the settlement week program about which there is some question in the court is the confidentiality provision. Under the current program, mediators are required to keep the substance of settlement conferences entirely confidential; they do not report anything to the court or assigned judge about the conference except (1) that the conference was held; (2) whether settlement occurred; (3) whether further mediation is planned; and (4) whether the mediator thinks the case might benefit from a status or settlement conference with the judge or should continue through the normal pretrial processes. One judge referred to this as "one of the most valuable features of the program," and another indicated that the trust between the parties and the attorney neutral is a very important feature. At the same time, some judges think it would be very useful for judges to know more about what occurred at a mediation session because that session often changes the course of the case.

There is also some disagreement about the time at which cases should be referred to settlement week. One judge often refers cases before all discovery has been completed, while two others do not agree with this approach and believe parties need to be well-educated about their cases, having substantially completed discovery, for the mediation session to be productive.

Overall, the judges indicated general satisfaction with how the program is currently working. One said the panel of mediators should be expanded and that there should be greater recognition for mediators. This judge and a second judge also suggested that mediators be permitted to provide additional information to the court about the mediation sessions.

Recommendations to Other Courts

Though they agree that the small, collegial nature of the bar makes the settlement week program especially suitable in the Northern District of West Virginia, all the judges said they would recommend the program to other courts as well. They emphasized the importance of involving attorneys in the program from the outset and particularly of having a court that stands behind the program. As one judge said, it "really weakens a program if word gets out that one or two judges don't support it." The judges also emphasized the importance of a good clerk's office that is committed to the program.

2. The Attorneys' Evaluation of Settlement Week's Effects

To determine the impact of settlement week on cases litigated under its rules, we asked attorneys who had participated in settlement week for their assessment of the program. Questionnaires sent to the attorneys focused on the program's impact on time and cost in a particular case they had litigated

in the district, but also asked the attorneys a number of additional questions about their satisfaction with the court.

In addition, because many of the attorneys who responded said their case had not participated in settlement week, we conducted analyses to determine if their overall responses about time, cost, and satisfaction differed from attorneys whose cases had participated in settlement week. Although we mention some differences in response between these groups, it is important to keep in mind that the groups are not directly comparable because there are systematic reasons—e.g., stage of case at termination, case type—why some cases were not referred to settlement week and others were. In addition, as mentioned earlier, the small number of cases surveyed impairs our ability to determine whether there are statistically significant differences in responses along a number of dimensions. Finally, the effects discussed below are based on attorneys' subjective evaluations of the settlement week program, which may not necessarily reflect its actual impact.

Timing of the Referral to Settlement Week Sessions

As mentioned earlier, judges vary somewhat with respect to the stage at which they refer cases to settlement week conferences. As Table 101 shows, most attorneys—three-quarters of those who responded—think the timing of the referral occurred at a useful time. No attorneys thought the session was held too late, and 24% thought the session was held too early to be useful.

Table 101
Attorney Views of the Timing of the First (or Only) Settlement Week Conference
Northern District of West Virginia

Rating of the Timing of the First (or only) Settlement Week Conference	% of Respondents Who Selected Response (N=73)
Too early to be useful	24.0
At a useful time in the life of the case	76.0
Too late to be useful	0.0

The small number of respondents did not permit us to determine whether these responses varied significantly according to the judge assigned to the case. Comments provided by attorneys indicated, however, that in virtually all cases for which attorneys believed the conference was held too early, either discovery was not complete or potentially dispositive motions had not been ruled on.

While these comments identify barriers to settlement in some cases, they alone do not suggest that as a general rule cases should be referred to settlement week only after discovery has been completed or dispositive motions decided. To reach such a conclusion, we would need to know that most attorneys who found the timing useful had completed discovery and had no pending dispositive

motions. Our data suggest this may be the case with regard to discovery—i.e., 87% of the attorneys who said discovery was "substantially complete" also said the settlement week conference occurred at a useful time in the life of the case, while 13% of them said the conference was too early. In contrast, 42% of attorneys who said discovery was "not substantially complete" or had not yet begun said the conference was too early, while 58% of them said the timing was useful. It appears, then, that the timing of useful settlement week conferences is linked to completion of discovery, but it is interesting to note even so that 58% of the attorneys who had not completed discovery still thought the conference came at a useful time.

Program Effects on Settlement and Disposition Time

The advisory group and court hoped to reduce time to disposition by requiring parties to discuss settlement earlier than they otherwise would have. To what extent, then, does the program bring about settlements in cases assigned to it, either at the time of the settlement week conference or later? Table 102 shows attorneys' reports of whether their case, or any part of it, settled "as a direct result of the settlement week process."

Table 102
Attorney Views of the Effect of Settlement Week on Settlement of Their Case
Northern District of West Virginia

Rating of the Effect of Settlement Week on Settlement	% of Respondents Who Selected Response (N=72)
No contribution to settlement	44.0
Entire case settled as a result of settlement week	39.0
Part of the case settled as a result of settlement week	17.0

Slightly more than half of the attorneys whose cases participated in settlement week reported that all or part of their case settled as a result of the settlement week process. On the other hand, close to half reported that settlement week made no contribution to settling their case. The discussion above of the relationship between discovery and the timing of the settlement week conference suggests the status of discovery or the timing of the conference might be factors in whether a case settles, but we did not find this to be the case. The relationships were in the right direction but did not reach statistical significance.

Whether settlement week leads to settlement or another form of disposition, does that disposition come earlier than it would have without settlement week? As Table 103 (next page) shows, when we asked attorneys who participated in settlement week whether, compared to resolving the case without settlement week, the process had increased or decreased the time to disposition, we found that almost half (46%) thought the process had decreased disposition time. Attorneys whose cases had settled, either in whole or in part, because of settlement week were

especially likely to say the process decreased time compared to attorneys whose cases had not settled.[200]

Table 103
Attorney Views of the Effect of Settlement Week on the Timeliness of Their Case
Northern District of West Virginia

Rating of the Effect of the Settlement Week Process on the Time to Disposition	% of Respondents Who Selected Response (N=74)
Increased (somewhat or greatly)	14.0
No effect	41.0
Decreased (somewhat or greatly)	46.0

Specifically, the largest proportion of those who said settlement week decreased litigation time were attorneys whose cases had settled through settlement week—70% of these attorneys reported a decrease in time compared to 19% of the attorneys whose cases had not settled. The attorneys whose cases had not settled were, in contrast, more likely to report that settlement week had no effect on disposition time—72% reported this outcome compared to 15% of the settlement week attorneys. It is interesting to note here that a substantial portion of the attorneys who reported that settlement week did not settle their case—19%—nonetheless reported reduced disposition times. It is also important to note that 15% of the attorneys who thought their cases settled because of settlement week nonetheless reported that disposition time was increased by settlement week. We do not know the cause of this increase, but one possibility is that these cases were ready for settlement in advance of the next settlement week but waited until settlement week for serious negotiations to take place.

While half of the attorneys reported that settlement week had a positive effect on disposition time, Table 103 also shows that a sizable minority reported an increase in time. Unfortunately, we did not have a sufficient number of responses to determine whether those who reported increased time differed in some systematic way, such as attorney or case characteristics, from those who reported a decrease in time or no effect. We did have sufficient cases to examine whether the status of discovery was linked to ratings of settlement week's effect on disposition time, but found no relationship. That is, while incomplete discovery may prompt some attorneys to feel that the settlement week conference was held too early, they did not appear to experience a delay in disposition time because of the untimely referral.

Although a substantial portion of the settlement week attorneys reported a time savings, when we examined how all attorneys—those who participated in a settlement week session and those who

[200] It would be better to examine program impact by looking at actual disposition time, but the settlement week and non-settlement week cases are different groups of cases and do not permit comparison.

were never referred to settlement week—rated the time to disposition in their cases, we found that the great majority of attorneys in both groups thought their cases moved along at an appropriate pace (see Table 104). Although settlement week attorneys were more likely to say so than non-settlement week attorneys, we cannot for two reasons attribute any significance to these results. First, though statistically significant, the Chi-square analysis rests on too few cases to be reliable.[201] And, second, the two groups of cases—those who participated in settlement week and those who did not—are not directly comparable.

Table 104
Attorney Ratings of the Timeliness of Their Case
Northern District of West Virginia

Rating of Time from Filing to Disposition	% of Respondents Who Selected Each Response		
	Settlement Week (N=74)	Non-Settlement Week (N=125)	All (N=199)
Case was moved along too slowly	8.0	10.0	10.0
Case was moved along at appropriate pace	85.0	74.0	78.0
Case was moved along too fast	4.0	2.0	3.0
No opinion	1.0	14.0	9.0

Absent further analyses using more cases and more directly comparable groups, these findings suggest that both sets of cases proceeded in a manner acceptable to most attorneys, the first to a disposition that came after settlement week and the second to a disposition that did not involve settlement week.

At the same time, the survey responses show that about half the attorneys who participated in settlement week believed it had a positive effect in their case. These attorneys reported that the time to disposition had been reduced, typically through settlement of the case. For most other cases, settlement week appears to have no effect—and infrequently an ill effect—on disposition time.

Program Effects on Litigation Cost

The court and advisory group hoped that as a result of earlier settlement, parties would realize a savings in litigation costs. Table 105 (next page) shows that half of the attorneys who had been to

[201] A reliable analysis requires that no more than 20% of the cells in the Chi-square table have fewer than five cases. In our analysis, nearly 40% had fewer than five cases.

settlement week reported that the process decreased costs in their case, while one-third said it had no effect on costs and about a fifth said it increased costs.[202]

Table 105
Attorney Views of the Effect of Settlement Week on the Cost of Their Case
Northern District of West Virginia

Rating of the Effect of the Settlement Week Process on Cost	% of Respondents Who Selected Response (N=72)
Increased the cost	17.0
No effect	33.0
Decreased the cost	50.0

Further analysis showed that 85% of attorneys who reported that their cases settled in part or in whole as a result of the settlement week process indicated that the program decreased costs, while only 6% of attorneys who said their cases did not settle as a result of settlement week said the process decreased costs. Conversely, 35% of those who said settlement week did not contribute to settlement reported that the program increased costs, while one attorney who said the case settled as a result of settlement week reported increased costs. These findings suggest that in cases for which the program achieved its goal of settling a case, the costs for parties in the case are perceived to be lowered, whereas costs may be increased by participation in settlement week in some cases that do not settle as a result of the process. When costs are increased, the increase does not appear to be due to incomplete discovery or a too-early settlement week conference.

When attorneys reported that the settlement week program saved litigation costs, they estimated by how much their client's costs were decreased by settlement week. Estimates ranged from $300 to $100,000, with the median (midpoint) estimate being $10,000. At a cost, then, of about $45 per case, the settlement week program appears to be delivering substantial savings in client costs.

In contrast, attorneys who reported that the program increased costs did not report nearly as great an effect. Their estimates of the amount by which costs were increased by settlement week ranged from $200 to $15,000, with a median reported increase of $1,000. In addition, more than half of the attorneys who reported increased costs due to settlement week said they considered this increase in costs worthwhile.

Overall, then, attorneys in a substantial proportion of cases reported that the settlement week program saved their clients litigation costs—often thousands of dollars. This effect was particularly apparent in cases attorneys said had settled as a result of the program.

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[202] We asked attorneys from settlement week cases to consider what their client's total litigation costs would have been if the case had not been assigned to settlement week and, compared to that, to report whether participation in settlement week had increased, decreased, or had no effect on the costs of the case.

Although a substantial proportion of the attorneys who participated in settlement week reported savings in litigation costs, when we look at all attorneys' ratings of their litigation costs, we see, as we did for their ratings of litigation time, that well over a majority of attorneys in both groups—i.e., those who participated in a settlement week session and those not referred to settlement week—reported that the cost of their case was about right (see Table 106). Settlement week attorneys, however, were more likely to say the cost was too high. Although this finding was statistically significant, the lack of comparability between the two groups makes it difficult to attribute any significance to the difference. Settlement week cases may, for example, be the more complex or intractable cases (most have reached the later stages of litigation), which may be associated with higher—or too high—costs independently of the referral to settlement week.

Table 106
Attorney Ratings of Cost of Case From Filing to Disposition
Northern District of West Virginia

Rating of the Cost From Filing to Disposition	% of Respondents Who Selected Response (N=215)		
	Settlement Week (N=74)	Non-Settlement Week (N=124)	All (N=198)
Cost was higher than it should have been	22.0	11.0	15.0
Cost was about right	70.0	68.0	69.0
Cost was lower than it should have been	7.0	7.0	7.0
No opinion	1.0	15.0	10.0

As we saw above, however, a sizable minority of attorneys who participated in settlement week—17%—did feel that it increased their litigation costs. This effect was most likely when the settlement week process did not result in settlement.

Program Effects on Motions and Discovery

Although the settlement week referral is made fairly late in many cases—i.e., after discovery in the case of two of the judges—we asked the attorneys who participated in settlement week whether the process increased or decreased the amount of discovery they took or the number of motions filed. As Table 107 (next page) shows, most attorneys did not think the settlement week program had any effect on the amount of formal discovery in their case or on the number of motions filed. Those who did think there was an effect generally said the effect was to lower the amount of discovery and the number of motions.

Table 107
Attorney Ratings of Effect of Settlement Week on Motions and Discovery
Northern District of West Virginia

Effect on Amount of Formal Discovery	Percent Selecting the Response (N=74)	Effect on the Number of Motions	Percent Selecting the Response (N=74)
Increased	1.0	Increased	1.0
No effect	80.0	No effect	81.0
Decreased	19.0	Decreased	18.0

Ways in Which Settlement Week Facilitates Settlement Discussions

The discussion above has focused on settlement week's effect on the three main goals cited by the court and advisory group—i.e., reduction of litigation time, reduction of litigation costs, and settlement of cases. The primary mechanism for achieving these goals is the mediation session that occurs during settlement week. The advisory group hoped this session would facilitate settlement discussions. Table 108 (next page) reports the attorneys' assessments of the extent to which it did.

As the table shows, more than half of the responding attorneys indicated that the program was moderately or very helpful in several ways, including: (1) moving the parties toward settlement; (2) encouraging parties to be more realistic about their respective positions; (3) allowing clients to be more involved in the resolution of the case than they otherwise would have been; (4) giving one or more parties an opportunity to "tell their story"; and (5) improving communication between the different sides in the litigation. Thus, the program was thought useful in several more subtle ways in addition to reducing time and costs in some cases. Settlement week was viewed as least helpful in moving the parties to enter stipulations and assisting parties with planning the case schedule, activities that in many cases may have occurred well before settlement week was held.

Also important in moving the case toward settlement was the presence of the clients. Nearly all attorneys reported that their client was present, in most cases in person. Seventy percent of these attorneys said the client's presence "helped the resolution of this case," while the other 30% said it had no effect. None said their presence hindered resolution of the case.

Table 108
Attorney Ratings of Ways in Which the Settlement Week Process was Helpful
Northern District of West Virginia

Way in Which Process Was Helpful	% of Attorneys Selecting Response (N=73)			
	Very Helpful	Moderately Helpful	Slightly Helpful	Of No Help At All
Moving the parties toward settlement	34.0	30.0	14.0	22.0
Encouraging the parties to be more realistic about their respective positions	26.0	38.0	22.0	14.0
Allowing the clients to become more involved in the resolution of this case than they would have been	25.0	32.0	24.0	19.0
Giving the parties an opportunity to "tell their story."	23.0	33.0	30.0	14.0
Improving communication between the different sides	22.0	36.0	27.0	15.0
Providing a neutral evaluation of the case	18.0	25.0	36.0	22.0
Allowing me to identify the strengths and weaknesses of *my client's* case	15.0	23.0	38.0	23.0
Allowing the parties to explore solutions that they would not likely have gotten through trial or motions	11.0	17.0	31.0	42.0
Allowing me to identify the strengths and weaknesses of the *other side's* case	10.0	30.0	40.0	21.0
Clarifying or narrowing the issues in the case	10.0	29.0	30.0	32.0
Preserving a relationship between the parties	9.0	13.0	32.0	47.0
Moving the parties toward entering stipulations and/or eliminating certain issues in this case.	1.0	13.0	24.0	63.0
Assisting the parties with planning the case schedule, discovery, or motions	0.0	15.0	18.0	67.0

Satisfaction with Settlement Week

While settlement week's effects on litigation time, cost, and settlement are important considerations, it is important to know as well whether attorneys are satisfied with the process and find it fair.

When asked to weigh the costs of settlement week against its benefits, 76% of the seventy-four attorneys responding indicated that the benefits outweighed the costs, while 24% said they did not. When asked to explain their response, those who found the process beneficial reported that the case settled or moved toward settlement or that the face-to-face meeting of the parties was very useful for getting the parties to engage in settlement discussions, while those who found that the costs outweighed the benefits most often reported that the process was a waste of time because one of the parties had no intention of settling the case.

The attorneys in settlement week cases also rated how satisfied they were with the settlement week process in their case and how fair to their clients they thought the procedures used during settlement week were. Table 109 shows that by far the greatest percentage of attorneys were satisfied with the settlement week process and even more thought it was fair—80% and 89%, respectively. A higher proportion of attorneys who reported their cases settled as a result of the process reported being satisfied with it than attorneys whose cases did not settle (90% vs. 74%, respectively), but we did not have a sufficient number of cases to determine if this difference was statistically significant.

Table 109
Attorney Satisfaction With Settlement Week Process
Northern District of West Virginia

Satisfaction With Process	Percent Selecting the Response (N=74)	Fairness of Process	Percent Selecting the Response (N=73)
Very satisfied	43.0	Very fair	67.0
Somewhat satisfied	37.0	Somewhat fair	22.0
Somewhat dissatisfied	15.0	Somewhat unfair	7.0
Very dissatisfied	5.0	Very unfair	4.0

It is apparent from Table 109 that the great majority of attorneys who participated in settlement week were satisfied with the process and thought it fair. Attorneys' written comments underscored this finding. Several of the themes from those comments—e.g., that settlement week saves costs and that it aids settlement—are reflected in the following comment: "I think the settlement week is a positive and much needed aid to the litigation process. It helps push the parties to resolve their differences quickly and without the added expense of time and attorney fees needed to prepare for trial. By the time settlement conferences are scheduled, discovery has been completed and each party is fully aware of their strengths and weaknesses. Do not eliminate this procedure from the court system. We desperately need it."

Although most comments were positive, a number of attorneys also pointed out problems with the program or made suggestions for improvement. In addition to those noted above regarding

timing and the status of discovery, two additional areas of concern for some attorneys were the quality of the mediators and the failure of some parties to negotiate in good faith. Both concerns are captured in the following comment: "The only criticism I have is that for a mediation settlement to work there has to be accountability. If one or both of the parties fails to participate in good faith then the party participating in good faith stands to have his bargaining position compromised without benefit. The mediators have to be more mindful of their responsibilities and not ask but demand good faith bargaining." Another attorney noted that the mediators "lack the will to cause the parties to identify the real issues and do less posturing. They have also been too willing to let the meeting terminate even when the parties appear close."

These comments, well telling, must be kept in perspective. As Table 109 shows, the great majority of the attorneys were satisfied with their experience in the settlement week program. The comments help us understand why they were and why a sizable minority were not.

Satisfaction with Case Outcome and the Court's Case Management

Whether or not their case participated in settlement week, attorneys were asked several questions about their overall satisfaction with the outcome of their case and the court procedures used to manage it. As shown in Table 110, most attorneys (78%) were satisfied with the outcome of their case and a slightly higher proportion (83%) thought the outcome was fair.

Table 110
Attorney Satisfaction With Case Outcome
Northern District of West Virginia

Satisfaction With Outcome	Percent Selecting the Response (N=214)	Fairness of Outcome	Percent Selecting the Response (N=210)
Very satisfied	54.0	Very fair	56.0
Somewhat satisfied	24.0	Somewhat fair	27.0
Some dissatisfied	12.0	Somewhat unfair	9.0
Very dissatisfied	10.0	Very unfair	9.0

Further analysis revealed that a slightly higher proportion of attorneys from settlement week cases reported being satisfied with the outcome compared to attorneys whose cases did not go through settlement week (82% vs. 76%, respectively), and a smaller proportion of settlement week attorneys reported being very dissatisfied (3% vs. 14%). This relationship did not hold for ratings of the fairness of case outcome. Again, we must note that the two groups of cases are not directly comparable. We cannot infer, for example, that had the non-settlement week cases proceeded to settlement week they would have been more satisfied—or that settlement week cases would have been less satisfied had they not gone to settlement week.

While some attorneys were not happy with their case outcome, as might be expected, this view did not necessarily control their perception of how well their case was managed. As we see from Table 111, an even greater number of attorneys reported satisfaction with the court's management of their case and said it was fair—88% and 86%, respectively—with about 60% of them alone saying they were very satisfied. These ratings did not differ for attorneys who had participated in settlement week and those who had not.

Table 111
Attorney Satisfaction With the Court's Management of Their Case
Northern District of West Virginia

Satisfaction With Management	Percent Selecting the Response (N=214)	Fairness of Management	Percent Selecting the Response (N=212)
Very satisfied	58.0	Very fair	61.0
Somewhat satisfied	30.0	Somewhat fair	25.0
Some dissatisfied	8.0	Somewhat unfair	10.0
Very dissatisfied	5.0	Very unfair	5.0

It appears, then, that attorneys in this court are generally satisfied with how the court handles their cases, whatever their path to disposition is. At the same time, about half of the attorneys whose cases were referred to settlement week thought the program provided useful assistance—assistance, for example, in moving the case toward settlement, in making the parties more realistic, and in lowering litigation costs. Further, the great majority of those who participate in settlement week are satisfied with that process and find it fair.

3. Caseload Indicators of Settlement Week's Effect

Another way to look at the impact of the settlement week program is to look at the state of the court's civil caseload since implementation of the demonstration program. There are a host of reasons, however, why such an analysis is not likely to be a good indicator of settlement week's effects.

First, it is hard to establish precisely when we should start seeing an effect if there is one. Settlement weeks were held on occasion before the demonstration period began and until recently were not held as frequently as the court's plan anticipated. Without a starting point, we cannot determine where to begin measuring the effects.

Second, the court's criminal caseload and number of judges on the bench may have effects on the numbers of civil cases terminated, independently of the settlement week program. Before the

demonstration period began, the criminal caseload was unusually high for this court, but it reached an even higher level during the first year of the demonstration period, then fell off to much lower levels. At the beginning of the demonstration period, the court gained a judgeship, but it has also suffered from an extended vacancy and the effects of a judge's illness.

Third, the Civil Justice Reform Act has required courts to publicly report, by judge name and case name, motions and cases left undecided for more than six months and cases pending for more than three years. This, too, has probably had an effect on the condition of the caseload.

In other words, if change is seen in the indicators of caseload health, we will very likely not be able to untangle the several possible explanations for such a change. With those very substantial caveats, let us consider Figure 9, which shows several caseload trends for the portion of the caseload eligible for settlement week.

The figure shows that in FY88 the court disposed of substantially more cases than were filed. Further, these cases were older cases, as shown by the high median and mean ages at disposition. While we cannot say for sure what led to the termination of so many older cases, it is plausible that the settlement weeks used in 1987 and 1988 may have contributed to these terminations, along with the substantial use of visiting judges at that time.

Subsequently, the mean age of pending and terminated cases continued to fall but probably because of the rise in filings, which lowered the age of the court's pool of cases by bringing many young cases into it. With the drop in filings in 1994 we see the mean age of pending cases and median age of terminated cases rise because fewer young cases are being added to the pool, leaving an older population of cases.

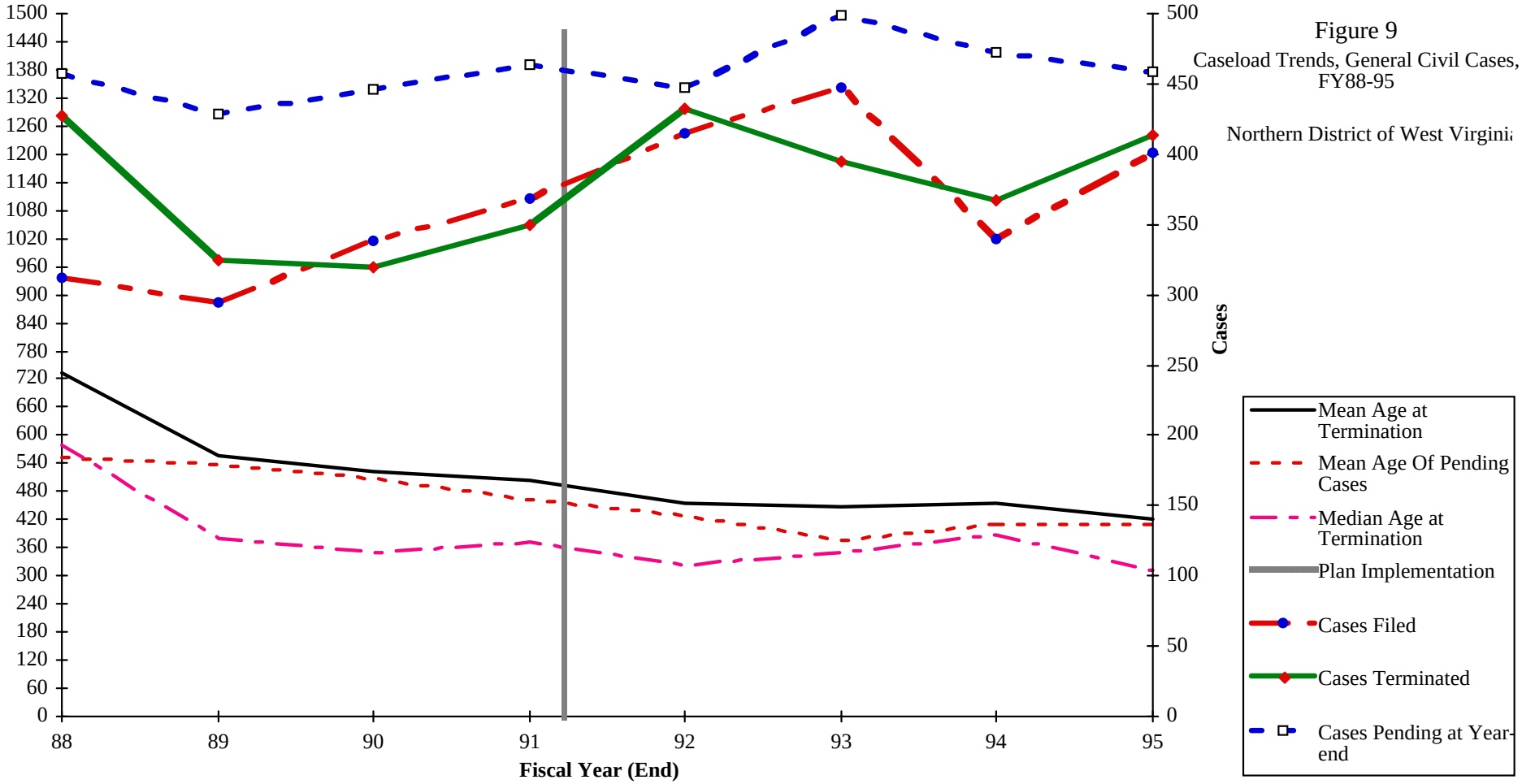
Figure 9 shows, too, that as the filings rose between FY89 and FY92, the court did a pretty good job of keeping up with them, assisted perhaps by settlement week and perhaps by the lower number of criminal felony cases relative to the filings in the 1980s. The drop in terminations in 1993 may reflect the judicial illness, while the rise in terminations from FY94 to FY95 is probably due to the drop in filings, giving the judges a chance to catch up with the caseload.

At the end of the most recent fiscal year, i.e., four years after the start of the demonstration period, the court's median disposition time was lower than it was at the beginning of the time period—about ten months today versus twelve months four years ago. Altogether, however, this examination of the court's caseload trends shows that many factors affect the condition of the caseload, making it difficult to demonstrate an independent effect from settlement week. It is possible that the program helped the court reduce the number of older pending cases when it was first used in 1987 and 1988 and helped the court stay abreast of its rising caseload in the early 1990's, but any such conclusion is speculative in light of the several other possible explanations.

Figure 9

Caseload Trends, General Civil Cases, FY88-95

Northern District of West Virginia



Appendix A

Research and Data Collection Methods

Research and Data Collection Methods

In keeping with the statutory charge, this study of the CJRA demonstration districts has two broad purposes. The first is determined by the word "demonstration," which confers a responsibility to show how these programs work. The second is implicit in the statute: to assess whether these programs reduce cost and delay. These two purposes provide guidance for designing a study of the demonstration programs.

The first component of the study in these courts was collection of information that would permit a comprehensive description of the programs and the process of implementing and maintaining them. Thus, we examined such topics as the decisions made by the advisory groups and courts when designing their programs; the problems they encountered, if any, in implementing them; the development of local rules and forms; and the programs' budgets and staffing requirements.

To carry out this component of the study, we interviewed the district and magistrate judges, court staff, and advisory group members; routinely talked with court staff to monitor changes made in the programs; collected rules, forms, and other relevant documents; and examined, in the DCM courts, the process of assigning and tracking cases, including the roles of court staff and use of automation. These steps were carried out primarily long-distance, although two trips were made to each court, the first before implementation of the programs to learn about the program design process and the second about a year after implementation to learn about the districts' early experiences with their programs. During the second trips to Missouri Western and West Virginia Northern we also observed a number of mediation sessions.

Descriptions of the courts' programs and the implementation process are presented in section B of each of Chapters I-VI.

The second component of the study was collection of information to assess the programs' effectiveness in reducing cost and delay and their success in achieving other goals the courts articulated. To this end, we interviewed the district and magistrate judges, surveyed attorneys who practiced in each district, and examined trends in such caseload measures as median time to disposition. The sections below describe how these steps were carried out.

The analyses of program impact on litigation timeliness and cost are presented in section C of each of Chapters I-VI.

Interviews

In each district we interviewed members of the advisory group, court staff, and judges within the first year of program implementation and then interviewed the judges again after they had had several years of experience with the program. Table A.1 (next page) shows

how many persons were interviewed and when the interviews were conducted. In each court, we made certain we interviewed key members of the advisory group, the chief judge, the clerk of court, and staff with specific responsibilities for the demonstration programs. In each court there were also some persons we did not interview, such as senior judges with very limited caseloads and newly-appointed judges with little experience with the demonstration programs. Altogether, we conducted 159 interviews these five districts.

Table A.1
Interview Subjects and Time Frames by District

District	Interview Time Frame	Persons Interviewed
CA-N[1]	June 1993	Three key advisory group members, including the chair Five court staff, including the clerk and ADR staff Ten of thirteen active judges Four of eight senior judges All seven full-time magistrate judges
	May and June 1996	Eleven of fourteen active judges Eight of ten full-time magistrate judges
MI-W	May 1993	Three key advisory group members, including the chair Six court staff, including the clerk and DCM coordinator All five active district judges All four magistrate judges
	April and May 1996	All five active judges All four magistrate judges
MO-W	May 1993	Three key advisory group members, including the chair Five court staff, including the clerk and EAP staff All five active judges Two of three senior judges Three of five magistrate judges
	April and May 1996	All four active judges Three of five senior judges Four of five magistrate judges

[1] Interviews in this district covered both the case management and ADR programs.

Table A.1, Con'd
Interview Subjects and Time Frames by District

OH-N	June 1993	Five key advisory group members, including the chair Three court staff, including the clerk and DCM coordinator All seven active judges Two of four senior judges All five magistrate judges
	April and May 1996	Eleven of twelve active judges Two of five senior judges All seven magistrate judges
WV-N	March 1993	Advisory group chair Five attorneys who serve as mediators Clerk of court Chief judge (the other judge was unavailable) The single full-time magistrate judge
	April and May 1996	Both active judges, including the chief judge One senior judge The single full-time magistrate judge

The initial interviews, which were in most instances conducted in person, collected information about the purpose of the demonstration programs, the process of implementing them, and the courts' early experiences with them. The second set of interviews, which were conducted by telephone, explored the judges' experiences with and evaluations of the programs after they had been in operation for several years. The judges were asked in particular to describe how they use the procedures adopted under their demonstration program, to assess the program's impact on the cases before them, and to describe the program's effect on the court. All interviews were conducted using standardized interview protocols.[2]

Questionnaires to Attorneys and ADR Neutrals

Our assessment of the demonstration programs' effects rests largely on data collected through questionnaires to attorneys and, to a more limited extent, neutrals who conducted

[2] Interview protocols are on file at the Federal Judicial Center.

ADR sessions.[3] In each district, we worked with the court to develop the questionnaires so that questions of importance to the courts could be answered as well.

We did not independently measure whether certain activities, such as a case management conference, occurred in each case or what effect its occurrence or non-occurrence had. Nor, in the case management programs, did we ask attorneys to report how many hours they spent or the costs their clients incurred in pursuing their case, because preliminary research indicated attorneys would be unwilling to give us specific cost information and that precise time estimates from closed cases were likely to be unreliable. Thus, our measures of program impact on litigation time and cost are dependent on the respondents' experience and their subsequent global estimates of program impact.

In Missouri Western, however, where the court established its program as a true experiment with random assignment of cases to experimental and control groups, an important part of our assessment is based on analysis of actual measures of case disposition time. We were fortunate in this district to have a well-designed and executed experimental program that permitted comparison between cases subject to the demonstration program and cases not subject to the program. We lack such comparison groups in the other districts.

We did not survey litigants, because their names and addresses must be obtained from their attorneys, and in pretests of the questionnaires we found that only a small percentage of attorneys provided that information. Coupled with the typically low response rate on litigant surveys, we decided not to collect data that would not provide a sound basis for generalizations.

Because of differences in the samples and questionnaires, the case management and ADR studies are discussed separately below. Several points are common to all districts, however. First, in most districts the questionnaires were sent in 1995 and 1996, after the bench and bar had had several years of experience with the demonstration programs. (In Missouri Western, the principal questionnaire used in our analyses was sent to cases as they terminated over the duration of the demonstration period.) We chose to survey the bar after the demonstration programs had matured to avoid responses prompted solely by the newness of these programs or by temporary start-up problems.

Second, the questionnaires asked attorneys about their experiences with the court's case management procedures as they had experienced these procedures in a *specific* case filed and terminated in the district. Thus, the samples were drawn from listings of cases, not attorneys. With this approach, we hoped to obtain attorney assessments that were based on actual experience rather than on anecdote or recall of one's best or worst experience.

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[3] In courts where cases with pro se litigants were eligible for the demonstration program, these cases are included in the sample. A small number of questionnaires were returned by these litigants.

For each case in the sample (except in Missouri Western), the questionnaire was sent to an attorney on the plaintiff's side and an attorney on the defendant's side—or to the pro se litigant when the party was self-represented.[4] Where the lead attorney was not specified on the docket, the first-listed attorney was selected. The questionnaire asked those who received it in error—i.e., those who were not the lead attorney—to forward the questionnaire to the appropriate attorney or return it to the Center. In some cases, we were not able to identify an attorney for both sides because the docket was incomplete, an answer had not been filed, or an entity instead of a person was named (e.g., the state attorney general's office). In these circumstances, we tried to identify a representative for the party but in any event retained the case in the sample.

Because the samples were drawn from cases, a number of attorneys in each district received questionnaires for more than one case. Although one might expect this additional burden to deter some attorneys from responding, the response rate was similar for attorneys who received multiple questionnaires and attorneys who received only one (63% and 65%, respectively).

In each district we followed the Center's standard practice for mailing questionnaires: an initial mailing, a postcard reminder/thankyou sent to all recipients two to three weeks after the initial mailing, and a second copy of the questionnaire sent to all those who had not responded two to three weeks after the postcard.

Samples and Questionnaires in the Case Management Programs

Nature of the Questionnaires

The case management questionnaires asked respondents, among other things, to estimate the impact of the demonstration program on the time and cost expended in their case. Separate questionnaires were designed for each district. Respondents were presented with a list of case management procedures adopted by the court and asked whether each procedure had been used in their case. If it had, they were asked to estimate whether the procedure "moved the case along," "slowed the case down," or "had no effect." Likewise, they were asked whether each procedure "decreased the cost of this case," "increased the cost of this case," or "had no effect." The questionnaire also asked respondents to give an overall rating of the program's effectiveness.

To assess the programs' effects on satisfaction, respondents were asked how satisfied they were with the outcome of their case and how fair the court's handling of it was. Additional questions obtained information about attorney and case characteristics that could arguably affect the time or cost of the case, such as the amount of discovery in the case and the number of years the attorney had been in practice.

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[4] Each court provided the attorney names and addresses for the sample cases. As explained below, in Missouri Western the questionnaire was sent to the population of attorneys who participated in the ADR sessions.

Although the list of specific case management procedures presented to the respondents varied from district to district, the questionnaires were similar in most respects. An example questionnaire is included at the end of this appendix.[5]

Nature of the Samples

The population of cases from which each sample was drawn included only cases that had been filed since the demonstration program began, cases in which issue was joined or a judge had had some involvement,[6] and cases that were eligible for the demonstration program.[7] The samples were randomly drawn from cases terminated in 1995, with two adjustments. First, we adjusted the samples to correct for bias that might be introduced by sampling from terminated cases, since a termination cohort over-represents cases with short disposition times.[8] The adjustment produced a sample of cases that spanned the full range of case disposition times, permitting us to see the effects, if any, in the courts' longer cases as well as in shorter cases.[9] Second, because prisoner petitions make up a large portion of the civil docket in Michigan Western, we drew two separate samples in that district, a small sample from the prisoner caseload and a larger sample from the remaining civil caseload. (Statistics discussed in the report are adjusted accordingly.)

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[5] Because the case management questionnaires for Michigan Western, Ohio Northern, and California Northern are similar in most respects, in the interests of reducing the number of pages, only one is included here. All questionnaires are on file at the Federal Judicial Center.

[6] Issue is joined when the defendant files an answer in response to the complaint. In addition to this criterion, we also included cases whose disposition code indicated there had been judge involvement in the case, even if issue had not been joined. Information about each case filed and terminated is maintained by each court and by the Administrative Office of the U.S. Courts. We relied on files obtained from the Administrative Office.

[7] In Michigan Western and Ohio Northern, the demonstration program applied to all civil casetypes, including prisoner petitions and other administrative-type cases. In California Northern, the demonstration program did not apply to the following casetypes: bankruptcy appeals; review of administrative cases; prisoner civil rights and habeas corpus cases; student loan and other debt collection cases; actions filed by a pro se plaintiff; actions to enforce or register judgments; cases reinstated, reopened, or remanded from appellate courts; actions for forfeiture or statutory penalty; condemnation actions; federal tax suits; actions to enforce or quash a summons or subpoena; and bankruptcy actions in which the reference to the bankruptcy court has been withdrawn.

[8] We selected a stratified random sample, in which the guide for stratification was the time from filing to termination for cases filed during the first year of the demonstration program. For cases meeting our sample criteria (at issue and/or judge involvement, case type was eligible for the demonstration program), we determined the percentage of cases that had terminated in 90-day intervals, starting at 0-90 days, and used that percentage to determine the number of cases from each time-to-disposition group that should be included in the sample. For example, if 10% of cases filed in the program's first year terminated in 91-180 days, we selected cases such that 10% of our 1995 survey sample terminated in 91-180 days.

[9] Nonetheless, the very longest cases, accounting for 3-7% of the caseload in these courts, are not represented in the sample because they were still pending.

In each district, we drew a sufficient number of cases to provide the statistical power necessary for the analyses we contemplated. For Michigan Western and Ohio Northern, for example, where we anticipated analyses by track, we drew a larger number of cases than for California Northern. The questionnaire was mailed out in two separate waves in each district, the first covering cases terminated in the first six months of 1995 and the second covering cases terminated in the second six months of 1995.[10]

Table A. 2 summarizes the nature of the samples for each case management program, including the number of cases in each sample and the response rates.

Table A.2
Time Frame of Sample, Number of Questionnaires Sent, and Response Rates, By District

District	Sample Time Frame	# Cases in Sample	# Q'naires Sent	Response Rate	% Respondents Who Are Plaintiffs	Defendants
CA-N	Cases filed since 7/1/92, terminated in 1995, issue joined and/or some judge involvement	396	723	64.0	54.0	46.0
MI-W	Cases filed since 9/1/92, terminated in 1995, issue joined and/or some judge involvement	493	876	66.0	52.0	48.0
OH-N	Cases filed since 1/1/92, terminated in 1995, issue joined and/or some judge involvement	543	946	66.0	51.0	49.0

Response rates were very similar across the three districts, with two-thirds of the recipients returning usable questionnaires. (A slightly higher percentage returned questionnaires, but a small number of questionnaires were discarded because they were incomplete or indecipherable). The returned questionnaires were well balanced between plaintiffs' and defense attorneys. With a two-thirds response rate and responses that over-represent neither one side nor the other, we have some confidence that we can generalize from the questionnaires that were returned.[11]

[10] In Michigan Western, questionnaires were mailed in November 1995 and July 1996. In Ohio Northern, they were mailed in September 1995 and June 1996. And in California Northern, they were mailed in September 1995 and April 1996.

[11] Although there is no specific response rate that guarantees representativeness, the higher the response rate the more confident one can be that the responses received are representative. At lower response rates, the researcher bears the burden in particular of showing that the responses are not unbalanced in ways that are important to the findings—e.g., that roughly equal numbers of plaintiffs' and defense attorneys responded. A response rate below 50% generally suggests that great caution be taken in making generalizations.

Samples and Questionnaires in the ADR Programs

In the ADR programs, the questionnaires differed for each district, while having a common focus: Does ADR reduce litigation time or cost? Does it assist parties in other ways, such as narrowing issues or gaining a better understanding of the opponent? Do attorneys find ADR a satisfactory and fair process? Within this general inquiry, we focused on other matters of specific interest in each court.

The population of cases from which each sample was drawn included only cases that had been filed since the demonstration program began, cases that were eligible for the demonstration program, and cases in which issue was joined or a judge had had some involvement.[12] Beyond this, the samples differed from district to district and are therefore discussed separately.

Western District of Missouri

The Western District of Missouri designed its demonstration program—the Early Assessment Program (EAP)—as a true experiment, in which cases of the type eligible for the program are randomly assigned to one of three groups: a group required to participate in the court's ADR process (the experimental group), a group not permitted to participate in the process (the control group), and a group given discretion to decide whether or not to participate (the volunteer group).[13] This design, if executed faithfully, ensures that each group will be composed of equivalent cases and thus permits comparison between cases subject to the court's new ADR procedures and those not subject to the procedures. The court was rigorous in both its assignment of cases to groups and in not permitting cases to switch from one group to another, giving us confidence that the groups are made up of comparable cases and that any differences observed in the litigation time or costs between the groups may be attributed to the demonstration program. (See Chapter V, section B.4 for more information about assignment of cases to groups.)

The first of the two questionnaires used in this district was sent to attorneys in a random sample of cases drawn from civil cases terminated in 1995, filed since the demonstration period began, eligible for the program, and in which issue was joined or a judge had some involvement. Included in the sample were cases from each of the three groups, the experimental, volunteer, and control groups. The purpose of the questionnaire was to ask attorneys for their assessment of the court's management of their case and the effects of that management on litigation time and cost. Because the sample included attorneys whose cases had been subject to the court's Early Assessment Program and attorneys whose cases had not been, our intention was to assess whether the two groups

[12] See *supra*, note 6.

[13] See Chapter V, section B.3 for a description of the Early Assessment Program. Cases not eligible for the EAP program are multi-district cases, social security appeals, bankruptcy appeals, habeas corpus actions, prisoner pro se cases and other pro se cases where appointment of counsel is pending, class actions, and student loan cases.

evaluated the court's practices differently. Subsequently, however, we have concluded that the sample was flawed, and we have not relied on the data collected through this questionnaire.[14]

We have, instead, relied substantially on the second questionnaire used in this district, although it has the drawback of representing only the views of attorneys who participated in an Early Assessment Program session. This is a particular shortcoming with regard to estimates of the cost of litigation, since we have estimates only for cases subject to the EAP and not for cases that did not participate in the process.

The questionnaire we relied on, which we developed jointly with the court, has been sent, upon case termination, to all attorneys who have participated in EAP sessions since the program's inception.[15] Respondents return the questionnaires to the court, which sends copies to the Center. The questionnaire seeks the attorneys' opinions on the effects of the EAP session on the time and cost of litigation, as well as on a number of other case dynamics. (A copy is included at the end of this appendix.)

The data for the present study come from the population of cases in which EAP sessions were held and the case had terminated between January 1, 1992, the program's inception, and December 31, 1995. As shown in Table A.3 (page A-12), during that time questionnaires were sent to 1781 attorneys, representing 772 cases. For some cases, questionnaires were sent to more than one attorney for each side because there were multiple parties or because more than one attorney attended the EAP session for a single party. Most of our analyses are based on the individual respondent, but where appropriate—e.g., estimates of cost per party—the analysis is by party instead of by respondent. The overall response rate of 74%, quite well balanced between plaintiff's and defendant's attorneys, gives us confidence that the responses are representative.

Northern District of West Virginia

The demonstration program in the Northern District of West Virginia—the Settlement Week Program—applies to all eligible civil cases.[16] Selection of cases for participation in settlement week is made by the judges on a case-by-case basis, not through random

[14] In the Early Assessment Program, cases subject to the program are likely to participate in an early assessment (or mediation) session before issue is joined or a judge has become involved in the case. In restricting the sample to cases in which issue was joined or there had been judge involvement, we potentially diminished the effect of the EAP by eliminating from the sample cases that terminated very early.

[15] When the court designed the EAP, the judges included in the general order authorizing the program a provision for routine monitoring of its effects. The court's interests and ours converged in development of a questionnaire sent to all attorneys who participate in an EAP session.

[16] See Chapter VI, section B.3 for a description of the settlement week program. Cases not eligible for settlement week are student loan, veterans benefits, and social security cases; habeas corpus and prisoner conditions-of-confinement cases; bankruptcy appeals; land condemnation cases; and asbestos product liability cases.

assignment as in Missouri Western.[17] In this district, our intention was to seek attorney opinion in general about the effect of the court's case management on litigation time and costs and also to obtain an assessment of settlement week from attorneys who had been through that process (a copy of the questionnaire is included at the end of this appendix). Thus, the sample was drawn from the court's general civil cases, rather than from settlement week cases only, and a single questionnaire was developed to survey both attorneys who participated in settlement week and those who did not.

Because selection of cases for settlement week lies within the judges' discretion (see Chapter VI, sections B.3 and B.5 for a description of case selection), the sample of settlement week cases and the sample of non-settlement week cases do not constitute comparable groups and were not drawn for the purpose of making comparisons. Differences between the groups are noted in the report, but with caveats.

The sample in this district is constrained by two conditions. First, the district is small and the population of eligible cases is likewise small. Second, the court asked us to survey as few cases as possible. These conditions, in addition to our decision to draw a sample from the general civil caseload, resulted in a sample with a fairly small number of settlement week cases, which meant that for some analyses we did not have sufficient cases to determine whether the findings were statistically significant (specific instances are noted in the report).

As in the case management districts, the sample in this district was adjusted to correct for bias that might be introduced by using a termination cohort.[18] Altogether, as shown in Table A.3, questionnaires were sent to 282 attorneys in 143 cases. Questionnaires were mailed in two separate waves, the first covering cases terminated in the first six months of 1995 and the second covering cases terminated in the second six months of 1995.[19] The response rate was high—77%—and the responses were almost equally balanced between plaintiff's and defendant's attorneys, giving us considerable assurance that the responses are representative.

Northern District of California

The Northern District of California has several ADR programs, two of which are new programs adopted under the CJRA.[20] The court, however, considered each of its ADR

[17] We were not able to persuade the court to assign cases randomly for the duration of this project. Because the program dated to 1987 and had become part of the district's culture, the court was concerned about withdrawing the settlement week opportunity from cases that would otherwise have participated in it.

[18] See *supra*, note 8.

[19] Questionnaires were mailed in October 1995 and May 1996.

[20] See Chapter IV, section B.3 for a description of California Northern's several ADR programs.

programs to be part of the demonstration project, and thus we included in our study cases subject to each of the ADR processes.

Our greatest difficulty in selecting a sample was in identifying from the court's docket which cases had been referred to ADR and which had not. Docketing of ADR referrals has not been consistent until recently, which results in different counts of cases depending on the criteria one uses to search the docket. Based on all possible ways of docketing the ADR referrals, we worked with the court to identify an appropriate population from which to draw a sample of cases referred to ADR.

The sample was drawn from ADR-eligible cases filed since the demonstration period began on July 1, 1993 and in which the ADR process had been completed in 1995.[21] We had a particular interest in the court's multi-option and mediation programs, the new procedures established under the CJRA, and therefore included in the sample all cases subject to these two programs while selecting a sample of cases from the population subject to the court's longstanding arbitration and early neutral evaluation programs. Because of the nature of the sample, it is important to distinguish whether the findings apply to all cases or a segment of the ADR caseload. Thus, for each analysis we examine whether the responses vary by ADR type and by whether the case was subject to the multi-option program.

Because the court's programs differ in the method of referral to ADR—in the arbitration program, e.g., referral is mandatory for certain casetypes, whereas the multi-option program gives to parties discretion to select from an array of ADR options—one focus of the questionnaire was the consequence of and attorney opinion about different types of referrals. Thus, the population from which the sample was drawn included all cases referred to ADR, not just cases in which an ADR session had been held. As a consequence, the 45% of our respondents who had not participated in an ADR session completed only a very small portion of the questionnaire. Most analyses rely on the respondents who had participated in an ADR session.[22]

Overall, the questionnaire was sent, in July 1996, to 793 attorneys representing 413 cases. As shown in Table A.3, 54% of the recipients returned the questionnaire, the lowest response rate in our study and one that suggests some caution in generalizing from the findings.[23] The even balance of the responses between plaintiff's and defendant's attorneys provides some assurance, however, that the sample is representative.

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[21] Eligibility for ADR in California Northern depends on the type of case, type of ADR program, and judge to whom the case is assigned. See Chapter IV, section B.3.

[22] Because the court had established several ADR options and hoped to determine which ones worked best for which types of cases, we discussed with the court random assignment of cases to ADR processes for the duration of this project. For a number of reasons, however, including the fact that the arbitration and early neutral evaluation programs were well-established, the court declined to use random assignment.

[23] Two factors may explain the lower response rate: (1) The questionnaires were not sent until well after the ADR events occurred in these cases, and attorneys may not have been able to

For each case in which an ADR session was held, we also sent a questionnaire to the neutral who conducted the ADR session, including magistrate judges when that was the method of ADR used. Of the 413 cases in our sample, neutrals were identified for 195 of them. A third of these neutrals—67%—returned the questionnaire, as shown in Table A.3.[24]

Table A.3
Time Frame of Sample, Number of Questionnaires Sent, and Response Rates, By District

District	Sample Time Frame	# Cases in Sample	# Q'naires Sent	% Q'naires Returned	% Who Are Pl'tiffs	% Who Are Def'dants
CA-N	Cases filed since 7/1/93, referred to ADR, and completing the ADR process in 1995	413	793 attorneys 195 neutrals	54.0 67.0	50.0	50.0
M0-W[25]	Cases filed since 1/1/92, participated in an EAP session, and terminated by 12/31/95	772	1781	74.0	45.0	55.0
WV-N	Cases filed since 1/1/92, terminated in 1995, issue joined and/or some judge involvement	143	282	77.0	51.0	49.0

Nature of the Analysis

From the questionnaire data in each of the five districts, we extracted basic descriptive information about attorneys' and neutrals' assessments of the case management or ADR procedure used in their case. We then examined, using a Chi-square test, whether these perceptions of program effectiveness varied by certain attorney or case characteristics, using $p \leq .05$ as the level of statistical significance.[26] Our data and analytical approach permit us to describe the phenomena under study—i.e., to describe the respondents' evaluations of the demonstration programs and associations between respondents' evaluations and other case characteristics—but do not permit causal inferences about these programs. It is fair to say, for example, that "65% of the attorneys believe the ADR procedure reduces litigation costs" but not that "the ADR procedure reduces litigation costs."

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remember the events. (2) Attorneys in cases referred to ADR but who had not participated in an ADR session may have thought they did not need to complete the questionnaire.

[24] The California Northern questionnaires are included at the end of this appendix.

[25] Questionnaires were sent to the population of cases, rather than a sample, and to all attorneys who participated in an EAP session, not just to one representative per side.

[26] In each district, we do not necessarily present results for all items on the questionnaires, since some were extraneous to the discussion or provided redundant information.

Caseload Analysis

In addition to collecting information from judges and attorneys, we examined caseload data to ascertain any effects of the case management and ADR programs on the overall condition of each court's civil caseload. The analysis differed for Missouri Western because of opportunities afforded by the experimental nature of the court's program.

Michigan Western, Ohio Northern, California Northern, and West Virginia Northern

For the fiscal years 1988 to 1995—a period both preceding and following implementation of the demonstration programs—we measured the following indicators of the caseloads in Michigan Western, Ohio Northern, California Northern, and West Virginia Northern:

- number of cases filed
- number of cases terminated
- number of cases pending at year end
- mean age of pending cases
- mean age of terminated cases
- median age of terminated cases

The purpose of this analysis was to determine whether any changes occurred in these courts' caseloads following implementation of the demonstration programs. Theoretically, for example, given the programs' goal of reducing litigation time, we might see reductions in the age of pending and terminated cases. As we discuss in the report, a number of other factors may also explain changes in caseload trends, so our analysis is suggestive only.

Data for this analysis were extracted from electronic files provided by the Administrative Office of the U.S. Courts, which report the filing and termination dates for each civil case. The number of cases filed, terminated, and pending are simply counts of cases for each court for each year. Mean age of pending and terminated cases is the average age of all pending and terminated cases, also measured for each fiscal year. The median age of terminated cases is the age of the mid-point case—i.e., half the cases terminated in a given year were older and half were younger than this case. These measures were graphed to permit examination of trends in the courts' caseloads, with separate graphs prepared for the general civil caseload and for the administrative caseload.[27] The graphs are discussed in Chapters I-VI.

[27] The administrative caseload includes student loan, veterans' benefit, social security, prisoner, bankruptcy, land condemnation, and asbestos cases. The general civil caseload includes the remaining types of cases: contract, personal injury, civil rights, patent, copyright, ERISA, labor, tax, and securities cases, as well as other actions brought under federal statutes. In Michigan Western and Ohio Northern, the administrative caseload is included in the demonstration programs.

Missouri Western

In Missouri Western we also examined caseload data, using data extracted from the Administrative Office data files, as well as information provided by the court about the group assignment of each case—i.e., whether the case was required to participate in the Early Assessment Program, could volunteer to participate (and whether it had), or was prohibited from participating. We then examined the median age at disposition of cases assigned to each of the three groups, to determine what effect the Early Assessment Program had on case disposition time.

Because a substantial proportion of the cases filed during the study period (1/1/92 - 8/31/96) remained pending at the end of that period, we could not in the conventional fashion compute mean or median times to disposition. Computations based only on terminated cases would be distorted downward because the terminated cases include disproportionately few of the cases reaching advanced ages. This problem, called censoring of the data, was overcome by using life table methods, long standard in actuarial work and more recently in general statistics, where it is called survival analysis. This analysis includes pending cases and estimates their expected age at termination.

The essence of the method is to compute from the sample the survival rates for cases at each age: the survival rate for cases at age nine months is the number of cases reaching age ten months divided by the number reaching nine months and observed for at least ten months. It is then a fairly straightforward matter to determine the mean and median ages that would result if these survival rates continued to apply to cases still to be disposed of. In the graphs discussed in Chapter V, the median age at disposition is based on a survival analysis of the cases assigned to each of the three groups in this district.

Endnote

Except for the findings we report about caseload trends and the analysis of age at disposition in Missouri Western, both of which are based on filing and termination dates, most other measures of program impact reflect attorneys' and judges' subjective evaluations of the programs. While their beliefs about the demonstration programs' value are important factors in weighing program impact, their perceptions should not be taken as conclusive evidence of actual program impact. Only the findings regarding age at disposition in Missouri Western provide such evidence.

Evaluation of Federal Court Case Management Practices
United States District Court for the Western District of Michigan

Questionnaire for Attorneys in Closed Cases

Purpose

Case records in the Western District of Michigan show that you represented a party in the case identified above. This questionnaire seeks your views about the court's management of this case, the timeliness with which it was resolved, and the reasonableness of its litigation costs. We appreciate your taking a few minutes to complete the questionnaire. Please answer all questions with reference to **this case only**.

Who Should Complete the Questionnaire

Please have this questionnaire completed by the primary attorney (or attorneys) from your firm or organization who represented your client or clients in this case. If that is someone other than yourself, please pass the questionnaire along to the appropriate attorney. If the attorney who handled this case is no longer with your firm or office, please pass the questionnaire on to that attorney or let us know the attorney is no longer available. We are sending a similar questionnaire to attorneys on the opposing side.

Confidentiality

All information that would permit identification of this case, the lawyers, or the parties is strictly confidential. Findings will be reported in the aggregate so no individual person or case can be identified. The code number on the back of the questionnaire will be used only to link information from this questionnaire to information we have about the case from court records and to follow up with those who do not respond. This number is known only to the researchers involved in the project.

Returning the Questionnaire

Please return the questionnaire in the enclosed envelope addressed to The CJRA Demonstration Project/MI-W, The Federal Judicial Center, One Columbus Circle, N.E., Washington, D.C. 20002.

If You Have Questions, Please Call One of the Project Coordinators:

Donna Stienstra	Molly Johnson
(202) 273-4070, Ext. 356	(202) 273-4086, Ext. 380

PART 1: CHARACTERISTICS OF THIS CASE

Before turning to the court's management of this case, we would like to know a little about the case itself.

1. Please indicate which type of client you represented.

Please check all that apply.

___1 Myself

___2 A business or corporation

___3 Federal, state, or local government

___4 An individual or individuals -----> How many individuals? _____

___5 Other. *Please specify type.* _____

2. What was at stake in this case?

Please check all that apply.

___1 Money

___2 Injunctive relief

___3 A long-standing relationship between parties

___4 Possibility of future litigation based on similar claims

___5 Possibility of legal precedent of significant consequence

___6 Desire to vindicate rights a party felt had been violated

___7 Other. *Please specify.* _____

3. What was the nature of the federal court outcome in this case?

Please check all that apply.

___1 My client won a monetary judgment or settlement.

___2 My client won on a non-monetary claim or issue.

___3 My client lost a monetary judgment or settlement.

___4 My client lost on a non-monetary claim or issue.

4. How would you rank this case, relative to other civil cases in this district, in terms of the following characteristics?

Please circle one number on each line.	Very High	High	Medium	Low	Very Low	None
a. Complexity of legal issues	1	2	3	4	5	6
b. Complexity of factual issues	1	2	3	4	5	6
c. Procedural complexity	1	2	3	4	5	6
d. Amount of formal discovery	1	2	3	4	5	6
e. Amount of informal discovery exchange or disclosure	1	2	3	4	5	6
f. Unnecessary or abusive discovery	1	2	3	4	5	6
g. Disputes over discovery	1	2	3	4	5	6
h. Contentiousness of relationship between parties	1	2	3	4	5	6
i. Contentiousness of relationship between attorneys	1	2	3	4	5	6
j. Degree to which parties agreed on the **issues** in the case after responsive pleadings were filed	1	2	3	4	5	6
k. Degree to which parties agreed on the **value** of the case after responsive pleadings filed	1	2	3	4	5	6
l. After responsive pleadings were filed, likelihood the case would go to trial	1	2	3	4	5	6
m. Monetary stakes involved	1	2	3	4	5	6
n. Significance of non-monetary stakes involved	1	2	3	4	5	6

5. **If there was formal discovery in this case,** please answer the next two questions. If there was no formal discovery, please go to Question 6.

5.a. Approximately how many depositions were taken in this case **on behalf of your client or clients**?

Please check one.

___1 Zero

___2 1-4

___3 5-8

___4 9-15

___5 16 or more

-----> Approximately how many of these were depositions of expert witnesses?

5.b. Approximately how many interrogatories were served in this case **on behalf of your client or clients**? *Please count individual questions and subparts as separate interrogatories.*

Please check one.
- ___1 Zero
- ___2 1-20
- ___3 21-30
- ___4 31-50
- ___5 51 or more

6. How was the federal court outcome of this case determined?

Please check all that apply.
- ___1 By trial decision
- ___2 By judgment on a motion
- ___3 By remand or transfer to state court or elsewhere
- ___4 By involuntary dismissal
- ___5 By settlement agreement among the parties
- ___6 By another method. *Please describe.* _____

7. **If this case settled,** what caused it to settle—e.g., an action or procedure of the court, such as ADR or a ruling on a motion; a characteristic of the case, such as clear liability; a characteristic of a party, such as a pressing need for money?

PART 2: THE TIME AND COST OF LITIGATING THIS CASE

8. How would you rate the amount of time it took for this case to move from filing to disposition in this court?

Please check one.
- ___1 This case was moved along too slowly.
- ___2 This case was moved along at an appropriate pace.
- ___3 This case was moved along too fast.
- ___4 No opinion.

9. How would you rate the cost **to your client** of litigating this case from filing to disposition in this court?

Please check one.

___1 The cost of litigating this case was higher than it should have been.

___2 The cost of litigating this case was about right.

___3 The cost of litigating this case was lower than it should have been.

___4 No opinion.

10. On September 1, 1992, the court implemented its Differentiated Case Management Program (DCM), in which most cases are assigned to one of the court's six case management tracks: voluntary expedited, expedited, standard, complex, highly complex, and administrative. Some of the requirements of the DCM program are listed below and on the next page, along with several other aspects of the court's case management practices. For each, please indicate your assessment of its effect on the **time and cost** of this case. If **absence** of the procedure affected time or cost, circle "0" to indicate it did not occur and then note its effect on time and cost. Also circle "0" if the procedure did not apply in this case.

		Effect on litigation time			**Effect on litigation cost**		
Components of DCM Program	Did not occur/Does not apply	Moved this case along	Slowed this case down	No effect	Lowered cost of this case	Increased cost of this case	No effect
Assignment of case to one of the court's case management tracks	0	1	2	3	1	2	3
Early case management conference with judge	0	1	2	3	1	2	3
Joint case management report, prepared and filed by counsel prior to case management conference	0	1	2	3	1	2	3
Scheduling order issued by judge	0	1	2	3	1	2	3
Numerical limits on interrogatories	0	1	2	3	1	2	3
Numerical limits on depositions	0	1	2	3	1	2	3
Time limits on discovery	0	1	2	3	1	2	3
Judge's handling of motions	0	1	2	3	1	2	3
Judge's trial scheduling practices	0	1	2	3	1	2	3
Standardization of court forms and orders	0	1	2	3	1	2	3

Components of DCM Program	Did not occur/Does not apply	Effect on litigation time: Moved this case along	Effect on litigation time: Slowed this case down	Effect on litigation time: No effect	Effect on litigation cost: Lowered cost of this case	Effect on litigation cost: Increased cost of this case	Effect on litigation cost: No effect
Attendance at settlement conferences of representatives with authority to bind parties	0	1	2	3	1	2	3
More contact with judges and/or magistrate judges	0	1	2	3	1	2	3
Other Case Management							
Paperwork required by the court or judge	0	1	2	3	1	2	3
Parties ordered to disclose discovery material without waiting for formal request	0	1	2	3	1	2	3
Court or judge's ADR requirements	0	1	2	3	1	2	3
Use of telephone, rather than in-person meeting, for court conferences	0	1	2	3	1	2	3

11. The overall effect of the Differentiated Case Management (DCM) Program on litigation timeliness and cost may be different from the effect of each of its individual components. Overall, what was the effect of the DCM Program on

1. the timeliness of this case?

___1 Expedited the case
___2 Hindered the case
___3 Had no effect on the time it took to litigate this case

2. the cost of this case?

___1 Decreased the cost
___2 Increased the cost
___3 Had no effect on the cost ßof this case

12. How appropriate, in your view, was the track assignment, or absence of a track assignment, in this case?

Please check one.

___1 The case was not assigned to a track and should have been.
___2 The case was not assigned to a track and that was appropriate for this case.
___3 The case was assigned to an appropriate track.
___4 The case was assigned to an inappropriate track. *Please explain below why it was inappropriate.*

13. Overall, do you think the Differentiated Case Management Program provides an effective case management system or not?

Please check one. ___1 Yes, it is an effective system. ----> *Please explain below.*

___2 No, it is not an effective system.

14. Other factors may have influenced the timeliness and cost of litigation in this case—e.g., other requirements of the court or of the judge assigned this case; the nature of the court's caseload or of this case; or practices of the attorneys or parties involved in this case. Please describe any other factors that explain the pace and the cost of the litigation of this case in this court. Include factors that helped as well as those that hindered the progress of the case.

PART 3: ALTERNATIVE DISPUTE RESOLUTION IN THIS COURT

This court provides several forms of alternative dispute resolution (ADR), including arbitration, Michigan Mediation, early neutral evaluation, settlement conferences, and summary jury trials.

15. Regardless of whether or not an ADR session actually took place in this case, was the case **referred** to any form of ADR, either by stipulation or choice of the parties or by order of the court?

Please check one.

___1 No, this case was not referred to ADR. ----> *Please go to Question 20, page 8.*

___2 Yes, this case was referred to ADR. ----> *Please continue with the next question.*

16. Please check each type of ADR to which this case was referred and the method by which it was referred.

Type of ADR Procedure	1 Parties stipulated to or chose to use this form of ADR	2 Court ordered parties to use this form of ADR	3 Judge and parties agreed on this form of ADR
___1 Court's nonbinding arbitration program	[ ]	[ ]	[ ]
___2 Court's Michigan Mediation program	[ ]	[ ]	[ ]
___3 Court's early neutral evaluation program	[ ]	[ ]	[ ]
___4 Settlement conference with a district judge	[ ]	[ ]	[ ]
___5 Settlement conference with a magistrate judge	[ ]	[ ]	[ ]
___6 Settlement discussions with a special master	[ ]	[ ]	[ ]
___7 Summary jury trial	[ ]	[ ]	[ ]
___8 Private (non-court based) ADR	[ ]	[ ]	[ ]
___9 Other: _____	[ ]	[ ]	[ ]

17. Did any ADR activities actually take place in this case—e.g., preparation for an ADR session, attendance at an ADR session, discussion with the court's ADR personnel, etc.?

Please check one.

___1 Yes, one or more ADR activities did take place in this case.

___2 No, no ADR activities took place in this case. -----> *Please check one response below.*

___1 Case settled before any ADR activities occurred.

___2 Other. *Please describe below.*

18. Did this case or any part of it settle as a direct result of referral to or participation in an ADR process?

Please check one.

___1 No, ADR did not contribute to a settlement in this case.

___2 Yes, the **entire** case settled as a result of ADR.

___3 Yes, **a part** of the case settled as a result of ADR.

19. What is your overall view of the referral to ADR in this case?

Please check all that apply.

___1 ADR was unnecessary in this case.

___2 ADR was harmful in this case. -----> *Please explain below.*

___3 ADR was helpful in this case.

___4 A different form of ADR would have been more appropriate in this case.

20. **If this case was not referred to ADR,** what do you think should have been done in this case regarding ADR?

Please check one.

___1 This case did not need an ADR procedure.

___2 This case would have benefited from an ADR procedure. *Please specify which one(s).*

_____

PART 4: SATISFACTION AND FAIRNESS

21. Overall, how **satisfied** are you with the **outcome** of this case for your client or clients?

Please check one.

___1 Very satisfied

___2 Somewhat satisfied

___3 Somewhat dissatisfied

___4 Very dissatisfied

22. How **fair** do you think the **outcome** of this case was for your client or clients?

Please check one.

___1 Very fair

___2 Somewhat fair

___3 Somewhat unfair

___4 Very unfair

23. How **satisfied** are you with the **court's management of this case** for your client or clients?

Please check one.

___1 Very satisfied
___2 Somewhat satisfied
___3 Somewhat dissatisfied
___4 Very dissatisfied

24. How **fair** do you think the **court's management of this case** was for your client or clients?

Please check one.

___1 Very fair
___2 Somewhat fair
___3 Somewhat unfair
___4 Very unfair

25. Overall, how **satisfied** are you with how this case **progressed** through this court?

Please check one.

___1 Very satisfied
___2 Somewhat satisfied
___3 Somewhat dissatisfied
___4 Very dissatisfied

PART 5: ATTORNEY INFORMATION

Answers to the following questions will help us determine if the court's case management practices have different effects for different attorneys or types of practice.

26. How many years have you practiced law? _____ years

27. What percentage of your work hours has been devoted to federal district court **civil** litigation during the past five years (or, if less than five years, during the time you have been in practice)?

_____ % of my work hours over the last five years

28. In approximately how many civil cases have you been involved in the Western District of Michigan, including this one?

_____ civil cases

29. Which of the following best describes your practice setting?

Please check one.

___1 Sole practitioner
___2 Private law firm of 2-25 attorneys
___3 Private law firm of >25 attorneys
___4 Federal, state, or local government
___5 Corporate or other in-house counsel
___6 Legal aid or legal services organization
___7 Other. *Please specify.* _____

PART 6: COMPARISON OF PAST AND PRESENT CIVIL CASE MANAGEMENT PRACTICES

30. Did you handle any civil cases in the federal court in the Western District of Michigan prior to September 1, 1992, the date on which the court implemented its Differentiated Case Management Program?

Please check one.

___1 No. -----> *Please go to Question 34.*
___2 Yes. -----> *Please continue with the next question.*

31. Approximately how many civil cases did you handle in this court prior to September 1, 1992? _____ cases

32. Please compare the court's case management procedures prior to January 1, 1992—that is, before the Differentiated Case Management Program was implemented—to the procedures now used under the Differentiated Case Management Program.

Under the court's prior case management procedures

Please circle one number on each line.	**Much higher**	**Higher**	**About the same**	**Lower**	**Much lower**	**I can't say**
a. **total attorney time in this case would have been**	1	2	3	4	5	6
b. **total costs of litigating this case would have been**	1	2	3	4	5	6
c. **time from filing to disposition in this case would have been**	1	2	3	4	5	6

33. How different are the court's case management practices under the Differentiated Case Management (DCM) Program compared to the court's case management practices before implementation of the DCM Program?

Please check one.

___1 There is no difference at all.

___2 There is some difference.

___3 There is a substantial difference.

___4 There is a very great difference.

___5 I can't say.

34. Please use the space below for any additional comments you have about the case management system of this court or about the timeliness, cost, and management of this case. Specific suggestions for improvement are also welcome. Please attach additional pages if necessary.

THANK YOU.

Please return the questionnaire in the enclosed envelope. If you have questions, call Donna Stienstra at (202) 273-4070 or Molly Johnson at (202) 273-4086.

Follow-Up Code	Log In	First Data Entry	Second Data Entry

United States District Court for the Northern District of California

Questionnaire for Attorneys in Cases Referred to Alternative Dispute Resolution

Our records show that you represented a party in an alternative dispute resolution process in the above-captioned case. We would appreciate your taking a few minutes to fill out this questionnaire, which asks about your experiences with the ADR process to which this case was referred. Please answer all questions with reference to **this case only.**

Who Should Complete the Questionnaire

Please have this questionnaire completed by the primary attorney(s) from your firm or organization who represented your client or clients in the ADR proceedings in this case. If that is someone other than yourself, please pass the questionnaire along to the appropriate attorney. If the attorney who handled this case is no longer with your firm, please send the questionnaire to that attorney or let us know that attorney is not available. We are sending a similar questionnaire to attorneys and clients on all sides.

Confidentiality

The completed questionnaires are available only to researchers at the Federal Judicial Center, who will report only aggregated findings. All information that would permit identification of this case, the lawyers, or the parties is strictly confidential. The code number on the back of the questionnaire, which is known only to the researchers at the Center, is used solely to follow up with those who do not respond and to link information from this questionnaire to information about the case from court records. To provide feedback to neutrals so they can improve their performance where necessary, the ADR Director and Deputy Director would like to share with them the attorneys' evaluations of their performance, which the Center will provide to the Director in **aggregate** form. If you prefer that your evaluation of the neutral not be reported to the neutral, even aggregated with the responses of other attorneys, please check the box to the right.

Please do not include my responses in the report to the neutral. [ ]

Completing and Returning the Questionnaire

Please use the enclosed envelope to return the questionnaire within the next three weeks to The CJRA Demonstration Project/CA-N, The Federal Judicial Center, One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions about the questionnaire, please call one of the project coordinators:

Donna Stienstra
(202) 273-4070, Ext. 356

Molly Johnson
(202) 273-4086, Ext. 380

ADR USE IN THIS CASE

1. The court's records show that this case was **referred** to the ADR process identified on the preceding page. Did an ADR **session**—for example, an early neutral evaluation (ENE) conference or a mediation session—actually take place?

Please check one.

[ ]1 No, but I had one or more conversations with an ADR neutral. ----> Please continue at Q. 2.

[ ]2 No, and I had no contact with an ADR neutral. ----> Please continue at Q. 2.

[ ]3 Yes, I did participate in an ADR session. ----> Please skip to Q. 3.

2. Why, even though this case was referred to this ADR process, did no ADR session occur in this case?

Check all that apply.

[ ]1 This case was resolved or moved to another court before any ADR activities occurred.

[ ]2 The parties persuaded the judge and/or court staff that ADR was inappropriate for this case. ----> Please skip to Q. 22, page 6. and continue.

[ ]3 The possibility of an ADR session motivated the parties to settle before the session.

[ ]4 Other. Please explain:

THE ADR PROCESS IN THIS CASE

3. The remainder of this questionnaire asks about your experience in the ADR process identified on the preceding page. If our information is incorrect and you are answering about your experience in a different ADR process, please identify that process.

_____

4. With respect to the timing of the initial (or only) ADR session in this case, do you think it was held

Please check one.

[ ]1 Much too early.

[ ]2 Somewhat too early.

[ ]3 At about the right time.

[ ]4 Somewhat too late.

[ ]5 Much too late.

If you thought the session was held too early or too late, please explain below why the timing was inappropriate.

5. Please indicate how helpful the ADR process was in each of the following ways. If a statement does not apply in this case or the ADR process you used, mark column 5.

	1 Very helpful	2 Moderately helpful	3 Slightly helpful	4 Of no help at all	5 Not applicable
Please check one response for each statement.					
5a. Clarifying or narrowing liability issues in the case.	[ ]	[ ]	[ ]	[ ]	[ ]
5b. Clarifying or narrowing monetary differences in the case.	[ ]	[ ]	[ ]	[ ]	[ ]
5c. Allowing me to identify the strengths and weaknesses of **my client's** case.	[ ]	[ ]	[ ]	[ ]	[ ]
5d. Allowing me to identify the strengths and weaknesses of the **other side's** case.	[ ]	[ ]	[ ]	[ ]	[ ]
5e. Encouraging the parties to be more realistic about their respective positions.	[ ]	[ ]	[ ]	[ ]	[ ]
5f. Improving communication between the different sides in this case.	[ ]	[ ]	[ ]	[ ]	[ ]
5g. Giving one or more parties an opportunity to "tell their story."	[ ]	[ ]	[ ]	[ ]	[ ]
5h. Preserving a relationship between the parties.	[ ]	[ ]	[ ]	[ ]	[ ]
5i. Allowing the parties to explore solutions that would not be likely through trial or motions.	[ ]	[ ]	[ ]	[ ]	[ ]
5j. Moving the parties toward settlement.	[ ]	[ ]	[ ]	[ ]	[ ]
5k. Allowing the clients to become more involved in the resolution of this case.	[ ]	[ ]	[ ]	[ ]	[ ]
5l. Assisting the parties with planning the case schedule, discovery, or motions.	[ ]	[ ]	[ ]	[ ]	[ ]
5m. Providing a neutral evaluation of the case.	[ ]	[ ]	[ ]	[ ]	[ ]
5n. Moving the parties toward entering stipulations and/or eliminating certain issues in the case.	[ ]	[ ]	[ ]	[ ]	[ ]

6. Compared to resolving this case without use of ADR, did this ADR process increase or decrease any of the following?

	1 Increased greatly	2 Increased somewhat	3 No effect	4 Decreased somewhat	5 Decreased greatly	6 I can't say
Please check one response for each statement.						
6a. The amount of formal discovery.	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
6b. The number of motions filed.	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
6c. The cost to resolve the case.	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
6d. The time to resolve the case.	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

7. Was your client present at any of the ADR sessions?

Please check one.			*Please check one.*
[ ]1	Yes, in person. And the presence of my client	------>	[ ]1 made the session more useful.
[ ]2	Yes, by phone. And the presence of my client	------>	[ ]2 had no effect on the usefulness of the session.
[ ]3	No. And the absence of my client	------>	[ ]3 made the session less useful.

8. Did this case or any part of it settle as a direct result of this ADR process?

Please check one.

[ ]1 Yes, the **entire** case settled as a result of ADR.
[ ]2 Yes, a **part** of the case settled as a result of ADR.
[ ]3 No, ADR did not contribute to a settlement in this case.

THE ADR NEUTRAL IN THIS CASE

9. For each item below, please place a checkmark at the point on the scale that best reflects your view about the neutral.

9a. With respect to helping the parties settle the case, the neutral:

Applied too much pressure	___ 1	___ 2	___ 3	___ 4	___ 5	Wasn't sufficiently forceful	[ ] Not applicable

9b. With respect to getting the sides to engage in a meaningful discussion of the issues, the neutral was:

Very effective	___ 1	___ 2	___ 3	___ 4	___ 5	Very counter-productive	[ ] Not applicable

9c. The neutral was:

A good listener	___ 1	___ 2	___ 3	___ 4	___ 5	A poor listener

9d. The neutral's treatment of the parties was:

Very fair	___ 1	___ 2	___ 3	___ 4	___ 5	Very Biased

9e. The level of trust you had in the neutral was:

Very High	___ 1	___ 2	___ 3	___ 4	___ 5	Very Low

9f. Overall, the neutral was:

Excellent	___ 1	___ 2	___ 3	___ 4	___ 5	Terrible

10. Did the neutral have an appropriate level of expertise in the subject matter of this case?

Please check one.

[ ]1 Subject matter expertise was not needed for this case.
[ ]2 No, the neutral **did not** have an appropriate level of subject matter expertise.
[ ]3 Yes, the neutral **did** have an appropriate level of subject matter expertise.

11. If you wish, please provide any other comments you have about the neutral in this case:

COSTS OF ALTERNATIVE DISPUTE RESOLUTION

12. How many face-to-face ADR sessions were held in this case? _____ sessions

13. Approximately how many hours altogether did you spend in face-to-face sessions and telephone conferences in this case? _____ hours

14. How much, if anything, did your client pay the neutral in this case? $ _____

15. Apart from the fee paid to the neutral, how much did the ADR session(s), including preparation, cost your client? Please include in your estimate all out-of-pocket costs and attorneys' fees. $ _____

16. The court's ADR rules require that early neutral evaluators and mediators charge no fee for the first four hours spent in the EI or mediation session, then permit the neutral to bill at a rate of $150 per hour after that. If your case was referred to mediation ENE, did you stop earlier than you might have because otherwise you would have had to pay the neutral?

Please check one.

[ ]1 Yes.
[ ]2 No.
[ ]3 Rule did not apply to this case.

17. Please consider what your client's **total litigation costs** through settlement, judgment, or other disposition **would have been** if this case **had not been assigned** to ADR. Include attorneys' fees and other expenses, but exclude any judgment or settlement you paid. Compared to those costs, what effect do you think participation in this process will have—or, if your case has terminated, what effect do you think it did have—on your client's total litigation costs?

Please check one.

[ ]1 The ADR process will have [has had] **no effect** on my client's costs.

[ ]2 The ADR process will **decrease** [decreased] my client's costs. ----> By approximately:

$_____

[ ]3 The ADR process will **increase** [increased] my client's costs. ----> By approximately:

$_____

I consider this increase in cost: [ ]1 Worthwhile

[ ]2 Not worthwhile

OVERALL IMPRESSIONS OF THIS ADR PROCESS IN THIS CASE

18. Overall, how satisfied were you with the **outcome** of this ADR process?

Please check one.

[ ]1 Very satisfied.
[ ]2 Somewhat satisfied.
[ ]3 Somewhat dissatisfied.
[ ]4 Very dissatisfied.

19. In your view, how fair were the **procedures** used in this ADR process?

Please check one.

[ ]1 Very fair.
[ ]2 Somewhat fair.
[ ]3 Somewhat unfair.
[ ]4 Very unfair.

20. In the future, would you volunteer an appropriate case for this particular ADR process?

Please check one.

[ ]1 Yes.
[ ]2 No.

21. Overall, did the benefits of being involved in this ADR process outweigh the costs?

Please check one.

[ ]1 Yes. ----> Please explain below what aspect of the process made it beneficial.
[ ]2 No. ----> Please explain below what aspect of the process made it not beneficial.

METHOD BY WHICH THIS ADR PROCESS WAS CHOSEN

22. How was this case referred to this particular ADR process?

Please check one.

[ ]1 It was referred to this process because all parties chose it.

[ ]2 It was referred to this process after some but not all parties chose it.

[ ]3 The judge, not the parties, chose this ADR process.

[ ]4 The case was automatically referred to this ADR process at the time of filing.

[ ]5 Other. -----> Please explain. _____

23. **IF YOUR PARTY DID NOT CHOOSE THIS ADR PROCESS,** please skip to Q 24.

IF YOUR PARTY DID CHOOSE THIS ADR PROCESS, please indicate how important each of the following factors was for you in choosing this particular process.

Please check one response for each statement.	1 Very Important Factor	2 Somewhat Important Factor	3 Somewhat Unimportant Factor	4 Not at all a Factor
23a. We wanted to reduce litigation costs in the case.	[ ]	[ ]	[ ]	[ ]
23b. We wanted to resolve the case more quickly.	[ ]	[ ]	[ ]	[ ]
23c. The ADR process would permit more flexibility in finding a solution than the regular litigation process would.	[ ]	[ ]	[ ]	[ ]
23d. We wanted to preserve ongoing relationships between parties.	[ ]	[ ]	[ ]	[ ]
23e. We wanted to maximize client involvement in resolving the case.	[ ]	[ ]	[ ]	[ ]
23f. We wanted to preserve confidentiality.	[ ]	[ ]	[ ]	[ ]
23g. We wanted help with narrowing or clarifying the issues in dispute.	[ ]	[ ]	[ ]	[ ]
23h. We wanted someone to facilitate settlement discussions.	[ ]	[ ]	[ ]	[ ]
23i. We wanted an expert prediction of the likely outcome of the case.	[ ]	[ ]	[ ]	[ ]
23j. We wanted a judge's opinion of the case before proceeding to trial.	[ ]	[ ]	[ ]	[ ]
23k. We wanted help with planning discovery and/or motions.	[ ]	[ ]	[ ]	[ ]
23l. The ADR Director or Deputy Director suggested this process.	[ ]	[ ]	[ ]	[ ]
23m. This process was the least burdensome of the ADR options.	[ ]	[ ]	[ ]	[ ]
23n. The judge encouraged us to use this process.	[ ]	[ ]	[ ]	[ ]
23o. We felt we had to choose something so chose this one.	[ ]	[ ]	[ ]	[ ]
23p. We wanted to avoid having the judge select a process for the case.	[ ]	[ ]	[ ]	[ ]
23q. This was the only process the other side would agree to.	[ ]	[ ]	[ ]	[ ]
23r. Other. _____	[ ]	[ ]	[ ]	[ ]

24. Please indicate which of the following statements best reflects your view of the appropriateness of this particular ADR process for your case.

Please check one.

[ ]1 No ADR process would have been appropriate for this case.

[ ]2 This particular ADR process **was not** appropriate for this case. ----> Please explain below.

[ ]3 This particular ADR process **was** appropriate for this case.

25. Which of the following would be your preference for assigning cases to ADR in this district?

Please check one.

[ ]1 The court should offer ADR with no presumption of use and complete party discretion.

[ ]2 There should be a presumption that ADR will be used, but the parties should be able to opt out freely.

[ ]3 There should be a presumption that ADR will be used, but the parties should be able to opt out only with the consent of the judge.

[ ]4 The case should be ordered to ADR if any one party requests ADR.

[ ]5 Each case should be automatically assigned to a specific ADR procedure regardless of party preferences.

[ ]6 Other. Please describe:

THE ADR MULTI-OPTION PROGRAM

Some cases are subject to the court's ADR Multi-Option Program, which provides counsel the assistance of the court's ADR Director and Deputy Director.

26. Was an ADR telephone conference held in this case with the Director or Deputy Director of the court's ADR program?

Please check one.

[ ]1 No, there was no ADR telephone conference. ----> Skip to Q. 28.

[ ]2 Yes, there was an ADR telephone conference. ----> Continue at Q. 27.

27. Did the ADR telephone conference have any of the following effects?

		1 Very Much	2 Somewhat	3 A Little	4 Not At A
27a.	Helped me decide which ADR process to select.	[ ]	[ ]	[ ]	[ ]
27b.	Provided me with helpful information about the available ADR processes.	[ ]	[ ]	[ ]	[ ]
27c.	Prompted counsel to stipulate to an ADR process.	[ ]	[ ]	[ ]	[ ]
27d.	Persuaded me that ADR could be useful for this case.	[ ]	[ ]	[ ]	[ ]
27e.	Persuaded me that ADR would not be useful for this case.	[ ]	[ ]	[ ]	[ ]
27f.	Assisted in clarifying the issues in the case.	[ ]	[ ]	[ ]	[ ]
27g.	Assisted in planning discovery.	[ ]	[ ]	[ ]	[ ]
27h.	Unduly pressured one or more sides into choosing an ADR process.	[ ]	[ ]	[ ]	[ ]

Please provide any other comments you have about the ADR telephone conference in this case:

RESPONDENT INFORMATION

28. Prior to this case, have you ever participated as counsel in mediation, early neutral evaluation, or arbitration, either in this court in another court, or in the private sector?

Check all that apply.

[ ]1 No.

[ ]2 Yes, in this court. ----------> Approximately how many cases? _____

[ ]3 Yes, elsewhere. ----------> Approximately how many cases? _____

[ ]4 I can't recall.

29. Have you served as an arbitrator, mediator, or ENE neutral in court-based or private ADR programs?

Please check one.

[ ]1 No.

[ ]2 Yes. ----------> In approximately how many cases? _____

30. TODAY'S DATE: _____

31. We welcome any other comments or suggestions you have about the court's ADR programs. Please use the space below or append your comments.

THANK YOU.

Please return this questionnaire in the enclosed envelope. If you have any questions, you may call Donna Stienstra (202-273-4070) or Molly Johnson (202-273-4086).

Alternative Dispute Resolution in the Northern District of California

A Survey of Attorneys

Follow-up code	Log In	First Data Entry	Second Data Entry

United States District Court for the Northern District of California

Questionnaire for Neutrals in Cases Referred to Alternative Dispute Resolution

Our records show that you served as the neutral (mediator, arbitrator, ENE evaluator, settlement judge) in an alternative dispute resolution process in the above-captioned case. We would appreciate your taking a few minutes to fill out this questionnaire, which asks about your experiences with the ADR process to which this case was referred. Please answer all questions with reference to **this case only.**

Who Should Complete the Questionnaire

This questionnaire should be completed by the neutral to whom this case was referred. If that is someone other than yourself, please return the questionnaire and tell us that you are not the correct recipient. If you served as one of three arbitrators, your co-arbitrators will receive separate questionnaires. We are sending a similar questionnaire to the attorneys and clients in this case.

Confidentiality

The completed questionnaires are available only to researchers at the Federal Judicial Center, who will report only aggregated findings. All information that would permit identification of this case, the lawyers, the parties, or the neutrals is strictly confidential. The code number on the back of the questionnaire, which is known only to the researchers at the Center, is used solely to follow up with those who do not respond and to link information from this questionnaire to information about the case from court records.

Completing and Returning the Questionnaire

Please use the enclosed envelope to return the questionnaire within the next three weeks to The CJRA Demonstration Project/CA-N, The Federal Judicial Center, One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions about the questionnaire, please call one of the project coordinators:

Donna Stienstra
(202) 273-4070, Ext. 356

Molly Johnson
(202) 273-4086, Ext. 380

ADR USE IN THIS CASE

1. The court's records show that this case was **referred** to the ADR process identified on the preceding page. Was an ADR **session**—that is, an ENE conference, arbitration hearing, mediation session, or settlement conference—actually held?

Please check one.

[ ]1 No, but I had one or more conversations with the parties. ----> Please continue at Q. 2.

[ ]2 No, and I had no contact with the parties. ----> Please continue at Q. 2.

[ ]3 Yes, an ADR session was held. ----> Please skip to Q. 3.

2. Why, even though this case was referred to this ADR process, did no ADR session occur in this case?

Check all that apply.

[ ]1 The case was resolved or moved to another court before any ADR activities occurred.

[ ]2 The parties persuaded the judge and/or court staff that ADR was inappropriate for this case. ----> Please skip to Q. 21, page 6.

[ ]3 As a result of conversations with the neutral(s), the case did not proceed to an ADR session.

[ ]4 Other. Please explain:

THE ADR PROCESS IN THIS CASE

3. The remainder of this questionnaire asks about your experience in the ADR process identified on the preceding page. If our information is incorrect and you are answering about your experience in a different ADR process, please identify that process.

_____

4. With respect to the timing of the initial (or only) ADR session in this case, do you think it was held

Please check one.

[ ]1 Much too early.

[ ]2 Somewhat too early.

[ ]3 At about the right time.

[ ]4 Somewhat too late.

[ ]5 Much too late.

If you thought the session was held too early or too late, please explain below why the timing was inappropriate:

5. Were clients present at any of the ADR sessions?

Please check one.		*Please check one.*
[ ]1 Yes, in person. And the presence of the clients	------>	[ ]1 made the session more useful.
[ ]2 Yes, by phone. And the presence of the clients	------>	[ ]2 had no effect on the usefulness of the session.
[ ]3 No. And the absence of the clients	------>	[ ]3 made the session less useful.

6. Were the parties adequately prepared for the ADR session?

Please check one.

[ ]1 All parties were adequately prepared.

[ ]2 Some but not all parties were adequately prepared.

[ ]3 None of the parties was adequately prepared.

7. Did one or more sides seem reluctant to be in the ADR process?

Please check one.		*Please check one.*
[ ]1 Yes, and I	------->	[ ]1 think that lessened the effectiveness of the ADR process.
[ ]2 No, and I	------->	[ ]2 think that had no effect on the effectiveness of the ADR process.
		[ ]3 think that increased the effectiveness of the ADR process.
		[ ]4 don't know what effect that had.

8. Compared to resolving this case without use of ADR, do you think this ADR process increased or decreased any of the following?

Please check one response for each statement.	1 Increased greatly	2 Increased somewhat	3 No effect	4 Decreased somewhat	5 Decreased greatly	6 I can't say
8a. The amount of formal discovery.	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
8b. The number of motions filed.	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
8c. The cost to resolve the case.	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
8d. The time to resolve the case.	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

9. Please indicate how helpful the ADR process was in each of the following ways. If a statement does not apply in this case or the ADR process you used, mark column 5.

		1 Very helpful	2 Moderately helpful	3 Slightly helpful	4 Of no help at all	5 Not applicable
Please check one response for each statement.						
9a.	Clarifying or narrowing liability issues in the case.	[ ]	[ ]	[ ]	[ ]	[ ]
9b.	Clarifying or narrowing monetary differences in the case.	[ ]	[ ]	[ ]	[ ]	[ ]
9c.	Allowing the parties to identify the strengths and weaknesses of each other's case.	[ ]	[ ]	[ ]	[ ]	[ ]
9d.	Encouraging the parties to be more realistic about their respective positions.	[ ]	[ ]	[ ]	[ ]	[ ]
9e.	Improving communication between the different sides in the case.	[ ]	[ ]	[ ]	[ ]	[ ]
9f.	Giving one or more parties an opportunity to "tell their story."	[ ]	[ ]	[ ]	[ ]	[ ]
9g.	Preserving a relationship between the parties.	[ ]	[ ]	[ ]	[ ]	[ ]
9h.	Allowing the parties to explore solutions they would not likely have gotten through trial or motions.	[ ]	[ ]	[ ]	[ ]	[ ]
9i.	Moving the parties toward settlement.	[ ]	[ ]	[ ]	[ ]	[ ]
9j	Assisting the parties with planning the case schedule, discovery, or motions.	[ ]	[ ]	[ ]	[ ]	[ ]
9k.	Providing a neutral evaluation of the case.	[ ]	[ ]	[ ]	[ ]	[ ]
9l.	Moving the parties toward entering stipulations and/or eliminating certain issues in the case.	[ ]	[ ]	[ ]	[ ]	[ ]

10. Did this case or any part of it settle as a direct result of this ADR process?

Please check one.

[ ]1 Yes, the **entire** case settled as a result of ADR..

[ ]2 Yes, a **part** of the case settled as a result of ADR.

[ ]3 No, ADR did not contribute to a settlement in this case.

[ ]4 I don't know.

11. Please indicate which of the following statements best reflects your view of the appropriateness of this particular ADR process for this case.

Please check one.

[ ]1 No ADR process would have been appropriate for this case.

[ ]2 This particular ADR process **was not** appropriate for this case. ----> Please explain below.

[ ]3 This particular ADR process **was** appropriate for this case.

12. Overall, how helpful or detrimental do you believe the ADR session was in assisting the parties in this case?

Please check one.

[ ]1 Very helpful.

[ ]2 Somewhat helpful.

[ ]3 It had little impact on the case.

[ ]4 Somewhat detrimental.

[ ]5 Very detrimental.

[ ]6 I can't say.

ADMINISTRATION AND COSTS OF THE ADR PROCESS IN THIS CASE

13. Was this case an appropriate one for you, or should it not have been assigned to you?

Please check one.

[ ]1 This was an appropriate case for me.

[ ]2 This case should not have been assigned to me. -----> Please explain below.

14. Do you feel you had an appropriate level of expertise in the subject matter of this case?

Please check one.

[ ]1 Subject matter expertise was not needed for this case.

[ ]2 No, I **did not** have an appropriate level of subject matter expertise.

[ ]3 Yes, I **did** have an appropriate level of subject matter expertise.

15. Did you receive adequate guidance from ADR program staff about preparing for and conducting the ADR session?

Please check one.

[ ]1 Yes.

[ ]2 No. -----> Please explain below.

16. How many face-to-face ADR sessions were held in this case? _____ sessions

17. Approximately how many hours altogether did you spend in face-to-face sessions and telephone conferences in this case? _____ hours

18. Approximately how many hours did you spend preparing for sessions and telephone conferences? _____ hours

19. The court's ADR rules require that neutrals charge no fee for the first four hours spent in an early neutral evaluation or mediatio session, then permit the neutral to bill at a rate of $150 per hour after that. If you conducted a mediation or early neutr evaluation session in this case and the parties did not settle and did not go beyond four hours, did they stop because otherwis they would have had to pay the fee?

Please check one.

[ ]1 Yes.

[ ]2 No.

[ ]3 I did not ask to be paid.

[ ]4 Rule did not apply to this case.

20. If you received payment for your ADR service, how much did you receive? From the court: $ _____

From the parties: $ _____

FUTURE OF THE COURT'S ADR PROGRAMS

21. Which of the following would be your preference for assigning cases to an ADR process in this district?

Please check one.

[ ]1 The court should offer ADR with no presumption of use and complete party discretion.

[ ]2 There should be a presumption that ADR will be used, but the parties should be able to opt out freely.

[ ]3 There should be a presumption that ADR will be used, but the parties should be able to opt out only with the consent of the judge.

[ ]4 The case should be ordered to ADR if any one party requests ADR.

[ ]5 Each case should be automatically assigned to a specific ADR procedure regardless of party preferences.

[ ]6 Other. Please describe:

RESPONDENT INFORMATION

22. Prior to this case, have you ever conducted a session using this form of ADR in either a court-connected program or in the private sector?

Please check one.

[ ]1 No.

[ ]2 Yes. ----------> Approximately how many cases? _____

23. Have you served as an ADR neutral in any other form of ADR in either a court-connected program or in the private sector?

Please check one.

[ ]1 No.

[ ]2 Yes. ----------> Approximately how many cases? _____

24. In the future, would you be willing to serve again as a neutral in this ADR process?

Please check one.

[ ]1 Yes.

[ ]2 No.

25. TODAY'S DATE: _____

26. We welcome any other comments or suggestions you have about the court's ADR programs in general. Please use the space on the reverse or append your comments.

Please write any additional comments here or append them.

THANK YOU.

Please return this questionnaire in the enclosed envelope. If you have any questions, you may call Donna Stienstra (202-273-4070) or Molly Johnson (202-273-4086).

Follow-up code	Log In	First Data Entry	Second Data Entry

Early Assessment Program

United States District Court for the Western District of Missouri
Western Division

Questionnaire for Attorneys

RE:_____

v. _____

Docket Number: _____ Party You Represented: _____

You recently represented a client in the Early Assessment Program of the United States District Court for the Western District of Missouri. The Early Assessment Program was established as an experimental demonstration program under the Civil Justice Reform Act of 1990. To determine whether it is useful to litigants and their attorneys, and how it might be improved, we are seeking the views of all attorneys who have participated in the demonstration program. This questionnaire asks about your experience in the case identified above.

Researchers in the Clerk's Office and at the Federal Judicial Center who are involved in evaluating the program will see your responses, but will report only aggregated information. The questionnaire has an identification number on the last page so that we may check your name off the mailing list when your questionnaire is returned. The Program Administrator is interested in looking at responses so he can obtain ideas about how to improve the program, but will not see your responses if you indicate that you want them kept confidential from him. **Please indicate your preference by checking the appropriate box after the following statement.**

My responses to this questionnaire are to be kept confidential from the Program Administrator (Kent Snapp).	[ ] Yes [ ] No

In all events your individual responses will not be known to the Court, the attorneys, or the parties.

When the above-captioned case has been closed, you will be receiving a separate questionnaire from the Federal Judicial Center in Washington, D.C., which is the research and education agency of the federal judiciary. The Center's questionnaire is part of its statutorily required evaluation of the demonstration program. Your cooperation in filling out and returning both questionnaires is greatly appreciated. We understand that you are very busy, but because you are one of only a small number of attorneys who have participated in the Early Assessment Program, your responses are an invaluable source of information about the operation of the Program.

Please take ten minutes of your time to complete this questionnaire and return it at your earliest convenience in the enclosed envelope addressed to Ms. Deborah Bell, Management Analyst, United States Courthouse, 811 Grand Avenue, Room 707, Kansas City, Missouri 64106. If you have any questions, you should feel free to write Ms. Bell or to call her at (816) 426-3060.

Thank you for your assistance.

Sincerely,

R.F. Connor
U.S. District Clerk
Western District of Missouri

Please answer all questions with reference to the captioned case only.

1. Thinking back to the time when you found out that this case was assigned to the Early Assessment Program, what expectations did you have about how participation in the Program would affect this case? In particular, how did you think involvement in the Program would affect:

Please check one response for each question.	1 Increase	2 No effect	3 Decrease
1a. The likelihood that this case would go to trial?	[ ]	[ ]	[ ]
1b. Your client's costs in this case?	[ ]	[ ]	[ ]
1c. The amount of time you would be required to spend on this case?	[ ]	[ ]	[ ]

2. Overall, how helpful or detrimental was the Early Assessment Program in moving this case toward resolution?

Please check one response.

[ ] 1 Very helpful.
[ ] 2 Somewhat helpful.
[ ] 3 It had no effect on the case.
[ ] 4 Somewhat detrimental.
[ ] 5 Very detrimental.

3. These questions ask about the first (or only) early assessment meeting in this case.

3a. Was the first early assessment meeting scheduled promptly?

Please check one response.

[ ] 1 Yes.
[ ] 2 No.

3b. Which, if any, of the following activities had you (or another attorney from your office) engaged in prior to the first (or only) early assessment meeting in this case?

Please check each response that applies.

[ ] 1 Discussed case with client on telephone.
[ ] 2 Discussed case with client in person.
[ ] 3 Discussed case with opposing attorney on telephone.
[ ] 4 Discussed case with opposing attorney in person.
[ ] 5 Researched legal issues relevant to case.
[ ] 6 Made or received discovery requests.
[ ] 7 Made or received a settlement demand or offer.
[ ] 8 Other. ----------> *Please specify:*

4. Below are several questions about the administration of the Early Assessment Program in this case. When answering, please include all meetings you have had with the Program Administrator.

Please check one response for each question.		1 Yes	2 No
4a.	Did you receive adequate information about the time and location of the assessment meeting(s)?	[ ]	[ ]
4b.	Were you adequately informed about the purpose of the meeting(s) and your responsibilities regarding it (them)?	[ ]	[ ]
4c.	Were your scheduling constraints, if any, reasonably taken into account?	[ ]	[ ]
4d.	Was the staff for the Early Assessment Program helpful?	[ ]	[ ]
4e.	Would you have preferred to participate in selecting the person who conducted the early assessment meeting(s)?	[ ]	[ ]
4f.	Would your client have paid a fee for the early assessment meeting(s)?	[ ]	[ ]

5. Was your client present at any of the early assessment meetings?

Please check one.				*Please check one.*	
[ ] 1	Yes.	And the presence of my client	——>	[ ] 1	helped the resolution of this case.
[ ] 2	No.	And the absence of my client	——>	[ ] 2	had no effect on the resolution of this case.
				[ ] 3	hindered the resolution of this case.

If you wish, please indicate any comments you have about the presence or absence of your client at the early assessment meetings in this case.

6. Please indicate whether the Early Assessment Program was helpful or detrimental in this case in each of the following ways.

Please check one response for each statement.

		1 Very Helpful	2 Somewhat Helpful	3 No Effect	4 Somewhat Detrimental	5 Very Detrimental
6a.	Enabling you to meet and talk with the opposing attorney.	[ ]	[ ]	[ ]	[ ]	[ ]
6b.	Encouraging earlier discovery.	[ ]	[ ]	[ ]	[ ]	[ ]
6c.	Prompting early definition of the issues.	[ ]	[ ]	[ ]	[ ]	[ ]
6d.	Allowing you to better understand and evaluate the other side's position.	[ ]	[ ]	[ ]	[ ]	[ ]
6e.	Providing an opportunity to evaluate the other side's attorney.	[ ]	[ ]	[ ]	[ ]	[ ]
6f.	Improving communications between the attorneys in this case.	[ ]	[ ]	[ ]	[ ]	[ ]
6g.	Encouraging the parties to consider methods other than litigation to resolve their dispute.	[ ]	[ ]	[ ]	[ ]	[ ]
6h.	Allowing you to identify the strengths and weaknesses of your client's case.	[ ]	[ ]	[ ]	[ ]	[ ]
6i.	Improving relations between the parties in this case.	[ ]	[ ]	[ ]	[ ]	[ ]
6j.	Encouraging the parties to be more realistic about their respective positions in this case.	[ ]	[ ]	[ ]	[ ]	[ ]
6k.	Allowing the parties to become more involved in the resolution of this case than they otherwise would have been.	[ ]	[ ]	[ ]	[ ]	[ ]
6l.	Improving communications between the parties in this case.	[ ]	[ ]	[ ]	[ ]	[ ]
6m.	Reducing the costs to resolve this case.	[ ]	[ ]	[ ]	[ ]	[ ]

If you wish, please list any other ways in which the Early Assessment Program was helpful or detrimental in t case.

7. For each statement below, please indicate whether you agree or disagree.

Please check one response for each statement.	1 Strongly Agree	2 Agree	3 Neither Agree Nor Disagree	4 Disagree	5 Strongly Disagree
7a. The early assessment process began too early in this case.	[ ]	[ ]	[ ]	[ ]	[ ]
7b. The Administrator was effective in getting the parties to engage in meaningful discussion of the case.	[ ]	[ ]	[ ]	[ ]	[ ]
7c. The Administrator was not a good listener.	[ ]	[ ]	[ ]	[ ]	[ ]
7d. The Administrator was well prepared to discuss the case with the parties.	[ ]	[ ]	[ ]	[ ]	[ ]
7e. The Administrator adequately described dispute resolution alternatives to the parties.	[ ]	[ ]	[ ]	[ ]	[ ]
7f. The Administrator treated all parties fairly.	[ ]	[ ]	[ ]	[ ]	[ ]
7g. The Administrator put too much pressure on the parties to settle this case.	[ ]	[ ]	[ ]	[ ]	[ ]
7h. The Administrator made a realistic assessment of your case.	[ ]	[ ]	[ ]	[ ]	[ ]
7i. The opposing attorney was not well prepared for the early assessment meeting(s).	[ ]	[ ]	[ ]	[ ]	[ ]
7j. Some parties did not participate in good faith in the early assessment meeting(s).	[ ]	[ ]	[ ]	[ ]	[ ]
7k. The opposing party was represented at the early assessment meeting(s) by someone with settlement authority.	[ ]	[ ]	[ ]	[ ]	[ ]
7l. The early assessment meeting(s) in this case would have been more effective if a judge had presided.	[ ]	[ ]	[ ]	[ ]	[ ]
7m. The early assessment meeting(s) would have been more effective if they had been conducted by someone with specialized expertise in the subject matter of the case.	[ ]	[ ]	[ ]	[ ]	[ ]
7n. The Early Assessment Program helped each side focus on the facts and law at an earlier time.	[ ]	[ ]	[ ]	[ ]	[ ]
7o. The Early Assessment Program helped the parties determine whether this case could be resolved through a method other than formal litigation.	[ ]	[ ]	[ ]	[ ]	[ ]

8. The questions below ask about your and your client's overall impressions of the Early Assessment Program in this case.

8a. Overall, did the benefits of being involved in the Early Assessment Program outweigh the costs?

Please check one.
[ ] 1 Yes.
[ ] 2 No.

8b. Overall, how satisfied was your client with the Early Assessment Program in this case?

Please check one.
[ ] 1 Very satisfied.
[ ] 2 Somewhat satisfied.
[ ] 3 Neither satisfied nor dissatisfied.
[ ] 4 Somewhat dissatisfied.
[ ] 5 Very dissatisfied.
[ ] 6 I can't say.

8c. In your view, how fair to your client were the early assessment procedures used in this case?

Please check one.
[ ] 1 Very fair.
[ ] 2 Somewhat fair.
[ ] 3 Neither fair nor unfair.
[ ] 4 Somewhat unfair.
[ ] 5 Very unfair.

8d. Did your client like being involved in the Early Assessment Program?

Please check one.
[ ] 1 Yes.
[ ] 2 No.
[ ] 3 Not applicable.
[ ] 4 I can't say.

9. Would you volunteer an appropriate case for the Early Assessment Program?
[ ] 1 Yes.
[ ] 2 No.

10. In your opinion, should the Early Assessment Program be continued?
[ ] 1 Yes.
[ ] 2 No.

11. Please consider for a moment what your client's <u>total litigation costs</u> through settlement, judgment, or other disposition (including attorneys' fees and expenses) would have been if this case had <u>not been assigned</u> to the Early Assessment Program. Compared to those costs, what effect do you think participation in the Program will have--or, if your case has terminated, what effect do you think it had--on your client's total litigation costs

Please check one.

[ ] 1 The Program will have [has had] <u>no effect</u> on my client's costs.

[ ] 2 The Program will <u>decrease</u> [decreased] my client's costs. --------> By how much? (please estimate): $_____

[ ] 3 The Program will <u>increase</u> [increased] my client's costs. --------> By how much? (please estimate): $_____

I consider this increase in cost a: [ ] 1 Necessary increase
[ ] 2 Unnecessary increase

12. Please estimate the total litigation costs (including attorneys' fees) incurred by your client to date in this case: $_____

13. Today's date: ____/____/____ ----------> PLEASE GO ON TO THE LAST QUESTION.

14. We welcome any comments or observations you may have about the Early Assessment Program or its application to this case. We also welcome any suggestions you may have about how the Program could be more helpful to you or your clients. Please attach additional sheets if necessary.

THANK YOU.

Please return this questionnaire in the enclosed envelope to Deborah Bell. If you have any questions, you may call Ms. Bell at (816) 426-3060.

[ ]	[ ]	[ ]	[ ]
follow-up code	logging	first data entry	second data entry

Evaluation of Federal Court Case Management Practices
United States District Court for the Northern District of West Virginia

Questionnaire for Attorneys in Closed Cases

Purpose

Case records in the Northern District of West Virginia show that you represented a party in the case identified above. This questionnaire seeks your views about the court's management of this case, including any participation in the settlement week program, the pace with which it was resolved, and the reasonableness of its litigation costs. We appreciate your taking a few minutes to complete the questionnaire. Please answer all questions with reference to **this case only**.

Who Should Complete the Questionnaire

Please have this questionnaire completed by the primary attorney (or attorneys) from your firm or organization who represented your client or clients in this case. If that is someone other than yourself, please pass the questionnaire along to the appropriate attorney. If the attorney who handled this case is no longer with your firm or office, please pass the questionnaire on to that attorney, if appropriate, or let us know that the attorney is no longer available. We are sending a similar questionnaire to attorneys on the opposing side.

Confidentiality

All information that would permit identification of this case, the lawyers, or the parties is strictly confidential. Findings will be reported in the aggregate so no individual person or case can be identified. The code number on the back of the questionnaire will be used only to link information from this questionnaire to information we have about the case from court records and to follow up with those who do not respond. This number is known only to the researchers involved in the project.

Returning the Questionnaire

Please return the questionnaire in the enclosed envelope addressed to The Federal Judicial Center, One Columbus Circle, N.E., Washington, D.C. 20002.

If You Have Questions, Please Call One of the Project Coordinators:

Donna Stienstra
(202) 273-4070, Ext. 356

Molly Johnson
(202) 273-4086, Ext. 380

PART 1: CHARACTERISTICS OF THIS CASE

Before turning to the court's management of this case, we would like to know a little about the case itself.

1. Please indicate which type of client you represented.

Please check all that apply.

___1 Myself

___2 A business or corporation

___3 Federal, state, or local government

___4 An individual or individuals ---> How many individuals? _____

___5 Other. *Please specify type:* _____

2. What was at stake in this case?

Please check all that apply.

___1 Money

___2 Injunctive relief

___3 A long-standing relationship between parties

___4 Possibility of future litigation based on similar claims

___5 Possibility of legal precedent of significant consequence

___6 Desire to vindicate rights a party felt had been violated

___7 Other. *Please specify:* _____

3. What was the nature of the federal court outcome in this case?

Please check all that apply.

___1 My client won a monetary judgment or settlement.

___2 My client won on a non-monetary claim or issue.

___3 My client lost a monetary judgment or settlement.

___4 My client lost on a non-monetary claim or issue.

4. How would you rank this case, relative to other civil cases in this district, in terms of the following characteristics?

Please circle one number on each line.	Very High	High	Medium	Low	Very Low	None
a. Complexity of legal issues	1	2	3	4	5	6
b. Complexity of factual issues	1	2	3	4	5	6
c. Procedural complexity	1	2	3	4	5	6
d. Amount of formal discovery	1	2	3	4	5	6
e. Amount of informal discovery exchange or disclosure	1	2	3	4	5	6
f. Unnecessary or abusive discovery	1	2	3	4	5	6
g. Disputes over discovery	1	2	3	4	5	6
h. Contentiousness of relationship between parties	1	2	3	4	5	6
i. Contentiousness of relationship between attorneys	1	2	3	4	5	6
j. Degree to which parties agreed on the **issues** in the case after responsive pleadings were filed	1	2	3	4	5	6
k. Degree to which parties agreed on the **value** of the case after responsive pleadings filed	1	2	3	4	5	6
l. After responsive pleadings were filed, likelihood the case would go to trial	1	2	3	4	5	6
m. Monetary stakes involved	1	2	3	4	5	6
n. Significance of non-monetary stakes involved	1	2	3	4	5	6

5. **If there was formal discovery in this case,** please answer the next two questions. If there was no formal discovery, please go to Question 6.

5a. Approximately how many depositions were taken in this case **on behalf of your client or clients**?

Please check one.

___1 Zero

___2 1-4 -----> Approximately how many of these were depositions of expert witnesses?

___3 5-8

___4 9-15

___5 16 or more

5b. Approximately how many interrogatories were served in this case **on behalf of your client or clients**? *Please count individual questions and subparts as separate interrogatories.*

Please check one.
___1 Zero
___2 1-20
___3 21-30
___4 31-50
___5 51 or more

6. Did the parties in this case exchange any information or documents without specific requests from the other side?

Please check one.
___1 No.
___2 Yes, by court or judge order.
___3 Yes, without court involvement.

7. How was the federal court outcome of this case determined?

Please check all that apply.

___1 By trial decision
___2 By judgment on a motion
___3 By remand or transfer to state court or elsewhere
___4 By involuntary dismissal
___5 By settlement agreement among the parties
___6 By another method. *Please describe:* _____

PART 2: THE TIME AND COST OF LITIGATING THIS CASE

8. How would you rate the amount of time it took for this case to move from filing to disposition in this court?

Please check one.
___1 This case was moved along too slowly.
___2 This case was moved along at an appropriate pace.
___3 This case was moved along too fast.
___4 No opinion.

9. How would you rate the cost **to your client** of litigating this case from filing to disposition in this court?

*Please check one.*___1 The cost of litigating this case was higher than it should have been.

___2 The cost of litigating this case was about right.

___3 The cost of litigating this case was lower than it should have been.

___4 No opinion.

10. A number of factors may have influenced the pace and cost of litigation in this case—e.g., requirements of the court or of the judge assigned this case; the nature of the court's caseload or of this case; or practices of the attorneys or parties involved in this case. Please describe any factors that explain the pace and the cost of the litigation of this case in this court. Include factors that helped as well as those that hindered the progress of the case.

PART 3: THE SETTLEMENT WEEK AND ADR PROGRAMS IN THIS COURT

As part of its Civil Justice Reform Act plan adopted in December 1991, the court formally implemented a "settlement week" program, in which non-exempted civil cases are referred to a mediation session with an attorney mediator during regularly scheduled settlement weeks. The questions below ask about the extent to which this case was referred to or participated in settlement week conferences.

Referral to Settlement Week

11. Regardless of whether a settlement week conference actually took place, was this case ever *referred* to a settlement week conference with an attorney mediator?

*Please check one.*___1 No. ---> Go to Question 25 on page 8.

___2 Yes. ---> Continue with the next question.

12. After referral, did this case ever participate in a settlement week conference?

*Please check one.*___1 No. ---> Go to Question 24 on page 8.

___2 Yes. ---> Continue with the next question.

Settlement Week Conference(s)

13. What had occurred in this case at the time the settlement week conference was held?

Please check all that apply.

___1 Discovery had not yet begun.
___2 Discovery had begun but was not substantially completed.
___3 Discovery was substantially completed.
___4 The parties had engaged in settlement discussions.
___5 One or more dispositive motions had been filed.
___6 The judge had ruled on one or more dispositive motions.

14. With respect to the timing of the first (or only) settlement week conference in this case, do you think it was held:

Please check one.

___1 Much too early to be useful.
___2 Somewhat too early to be useful.
___3 At a useful time in the life of the case.
___4 Somewhat too late to be useful.
___5 Much too late to be useful.

If you thought the first settlement week conference was held too early or too late, please explain why.

15. Overall, how many settlement week conferences were held in this case? _____ conferences

16. Please check each statement below that describes your client's presence or absence at the settlement week conference(s).

Please check all that apply.

___1 My client was present in person at at least one settlement week conference.
___2 My client was present by telephone at at least one settlement week conference.
___3 My client was absent from at least one settlement week conference.

16a. Please indicate, as appropriate, the overall effect of your client's presence or absence at the conference(s).

My client's presence

___1 helped the resolution of this case.
___2 had no effect on the resolution of this case.
___3 hindered the resolution of this case.

My client's absence

___1 helped the resolution of this case.
___2 had no effect on the resolution of this case.
___3 hindered the resolution of this case.

Effects of Settlement Week

17. Did this case or any part of it settle as a direct result of the settlement week process?

Please check one.

___1 No, settlement week did not contribute to a settlement in this case. ---> Go to Question 18.

___2 Yes, the **entire** case settled as a result of settlement week.

___3 Yes, **a part** of the case settled as a result of settlement week.

17a. What aspect of the settlement week process led to settlement of this case or a part of it?

18. Please indicate how helpful the settlement week process was in each of the following ways:

Please check one response for each statement.	1 Very helpful	2 Moderately helpful	3 Slightly helpful	4 Of no help at all
a. Clarifying or narrowing the issues in the case	[ ]	[ ]	[ ]	[ ]
b. Allowing me to identify the strengths and weaknesses of my client's case	[ ]	[ ]	[ ]	[ ]
c. Allowing me to identify the strengths and weaknesses of the other side's case	[ ]	[ ]	[ ]	[ ]
d. Encouraging the parties to be more realistic about their respective positions	[ ]	[ ]	[ ]	[ ]
e. Improving communication between the different sides in this litigation	[ ]	[ ]	[ ]	[ ]
f. Giving one or more parties an opportunity to "tell their story"	[ ]	[ ]	[ ]	[ ]
g. Preserving a relationship between the parties	[ ]	[ ]	[ ]	[ ]
h. Allowing the parties to explore solutions that they would not likely have gotten through trial or motions	[ ]	[ ]	[ ]	[ ]
i. Moving the parties toward settlement	[ ]	[ ]	[ ]	[ ]
j. Allowing the clients to become more involved in the resolution of this case than they otherwise would have been	[ ]	[ ]	[ ]	[ ]
k. Assisting the parties with planning the case schedule, discovery, or motions	[ ]	[ ]	[ ]	[ ]
l. Providing a neutral evaluation of the case	[ ]	[ ]	[ ]	[ ]
m. Moving the parties toward entering stipulations and/or eliminating certain issues in the case	[ ]	[ ]	[ ]	[ ]

19. Compared to resolving this case without settlement week, did the settlement week process increase or decrease any of the following?

Please check one response for each statement.	1 Increased greatly	2 Increased somewhat	3 No effect	4 Decreased somewhat	5 Decreased greatly
a. The amount of formal discovery	[ ]	[ ]	[ ]	[ ]	[ ]
b. The number of motions filed	[ ]	[ ]	[ ]	[ ]	[ ]
c. The cost to resolve the case	[ ]	[ ]	[ ]	[ ]	[ ]
d. The time to disposition	[ ]	[ ]	[ ]	[ ]	[ ]

20. Overall, did the benefits of being involved in settlement week outweigh the costs?

Please check one.

___1 Yes. ---> What aspect of settlement week, in particular, made it beneficial?

___2 No. ---> What aspect of settlement week, in particular, made it not beneficial?

21. Overall, how **satisfied** were you with the settlement week process in this case?

Please check one.

___1 Very satisfied

___2 Somewhat satisfied

___3 Somewhat dissatisfied

___4 Very dissatisfied

22. In your view, how **fair** to your client were the procedures used in the settlement week process?

Please check one.

___1 Very fair

___2 Somewhat fair

___3 Somewhat unfair

___4 Very unfair

23. Please consider what your client's total litigation costs through settlement, judgment, or other disposition would have been if this case had not been assigned to settlement week. Include attorneys' fees and other expenses, but exclude any judgment or settlement you paid. Compared to those costs, what effect do you think participation in settlement week will have--or, if your case has terminated, what effect do you think it did have--on your client's total litigation costs?

Please check one.

___1 Settlement week will have [has had] no effect on my client's costs.

___2 Settlement week will decrease [decreased] my client's costs. ----> By approximately:

$_____

___3 Settlement week will increase [increased] my client's costs. ----> By approximately:

$_____

I consider this increase in cost: ___1 Worthwhile

___2 Not worthwhile

PLEASE SKIP TO QUESTION 25.

ADR Other Than Settlement Week

24. Why did no settlement week conference take place even though this case was referred for a settlement week conference?

Please check one.

___1 The case settled because of the referral to settlement week.

___2 The case settled for reasons unrelated to the settlement week referral.

___3 One or more parties persuaded the judge that the case should be exempted from participation in any form of alternative dispute resolution.

___4 The parties agreed, with court approval, to participate in a form of alternative dispute resolution other than settlement week.

___5 Other. ---> *Please explain.*

25. **If this case participated in an alternative dispute resolution process other than or in addition to a settlement week conference,** please indicate what other form(s) of ADR this case participated in:

Check all that apply.

___1 Arbitration

___2 Summary jury trial

___3 Mini-trial

___4 Settlement conference with a magistrate judge

___5 Settlement conference with a district judge

___6 Private (non-court based) ADR

___7 Other. *Specify:* _____

___8 Not applicable ---> Skip to Question 26.

25a. What was the effect of ADR—other than settlement week—in this case?

Check all that apply.

___1 ADR was unnecessary in this case.

___2 ADR was harmful in this case. -----> Please explain below and

___3 ADR was helpful in this case. then go to Question 26.

___4 A different form of ADR would have been more appropriate in this case.

PART 4: OVERALL SATISFACTION WITH COURT PROCEDURES IN THIS CASE

26. Overall, how **satisfied** are you with the **outcome** of this case for your client or clients?

Please check one.

___1 Very satisfied

___2 Somewhat satisfied

___3 Somewhat dissatisfied

___4 Very dissatisfied

27. How **fair** do you think the **outcome** of this case was for your client or clients?

Please check one.

___1 Very fair

___2 Somewhat fair

___3 Somewhat unfair

___4 Very unfair

28. Considering all of the court's management of this case, not only settlement week, how **satisfied** are you with the **court management of this case** for your client or clients?

Please check one.

___1 Very satisfied

___2 Somewhat satisfied

___3 Somewhat dissatisfied

___4 Very dissatisfied

29. How **fair** do you think the **court's management of this case** was for your client or clients?

Please check one.

___1 Very fair
___2 Somewhat fair
___3 Somewhat unfair
___4 Very unfair

30. Overall, how **satisfied** are you with how this case **progressed** through this court?

Please check one.

___1 Very satisfied
___2 Somewhat satisfied
___3 Somewhat dissatisfied
___4 Very dissatisfied

PART 5: ATTORNEY INFORMATION

Answers to the following questions will help us determine if the court's case management practices have different effects for different attorneys or types of practice.

31. How many years have you practiced law? _____ years

32. What percentage of your work hours has been devoted to federal district court **civil** litigation during the past five years (or, if less than five years, during the time you have been in practice)?

_____ % of my work hours over the last five years

33. In approximately how many civil cases have you been involved in the Northern District of West Virginia, including this one?

_____ civil cases

34. Which of the following best describes your practice setting?

Please check one.

___1 Sole practitioner
___2 Private law firm of 2-25 attorneys
___3 Private law firm of >25 attorneys
___4 Federal, state, or local government
___5 Corporate or other in-house counsel
___6 Legal aid or legal services organization
___7 Other. *Please specify:* _____

35. Please use the space below for any additional comments you have about the case management system of this court, about the settlement week program, or about the pace, cost, and management of this case. Specific suggestions for improvement are also welcome. Please attach additional pages if necessary.

THANK YOU.

Please return the questionnaire in the enclosed envelope. If you have questions, call Donna Stienstra at (202) 273-4070 or Molly Johnson at (202) 273-4086.

Follow-up Code	Log In

Appendix B

Western District of Michigan

Case Management Forms

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

**,

Plaintiff, Case No. **

v. **

**,

Defendant.

NOTICE OF ASSIGNMENT TO NON-DCM TRACK

Pursuant to the Civil Justice Reform Act of 1990, 28 U.S.C. 471 et seq. and the differentiated case management plan adopted by this court, all civil litigation in this district will be assigned to one of six case management tracks or randomly assigned to a seventh, Non-DCM Track. This notice is to inform you that your case has been selected for the Non-DCM Track.

Judicial involvement in your case will be minimal. The court will not be directly involved in supervising or managing the case. You soon will receive a case management order containing a deadline for filing motions, instructions and a date for final pretrial conference, and instructions and date for trial. The court will consider other matters only called to it's attention, including requests for a Rule 16 Scheduling Conference, a settlement conference, or other judicial involvement.

If at any time you believe your case is not suited for the Non-DCM track, you may file a motion for removal and serve it upon all other parties to the litigation. The motion will be granted only if a party demonstrates to the court that it is being

denied its right to a just, speedy, or reasonably inexpensive determination of its action as a result of being placed on the Non-DCM track. Alternatively, a party may demonstrate that the case is a highly complex matter such that it will have a disposition time of over 24 months, it has numerous parties, and/or it is a class action lawsuit. The judicial officer assigned to the case will make the final determination.

The case manager/courtroom deputy of the judicial officer assigned to the case should be contacted if questions or problems arise regarding the Non-DCM track or other case management issues.

Clerk of the Court

Dated: _____ By: _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

**,

Plaintiff, Case No. **

v. Hon. **

**,

Defendant.
_____/

ORDER SETTING RULE 16 SCHEDULING CONFERENCE

IT IS HEREBY ORDERED:

1. Rule 16 Scheduling Conference: A scheduling conference pursuant to Fed. R. Civ. P. 16 is hereby scheduled for **, before **.

2. Matters to be Considered at the Scheduling Conference: The purpose of the scheduling conference is to review the joint status report and to explore methods of expediting the disposition of the action by: establishing early and ongoing case management; discouraging wasteful pretrial activities; facilitating the settlement of a case; establishing an early, firm trial date; and improving the quality of the trial through thorough preparation.

3. Differentiated Case Management: This case will be managed by the Court pursuant to the Differentiated Case Management Plan adopted by the Western District. The purpose of the plan is to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes. At the Rule 16 Conference, this case will be assigned to an

appropriate scheduling track. All dates recommended by the parties in the joint status report must correspond to the deadlines established for the track proposed by the parties.

4. Meeting of Parties and Preparation of Joint Status Report: At least seven days before the Rule 16 conference, counsel (or unrepresented parties) shall meet to discuss the following: the nature and basis of the parties' claims and defenses, the possibilities for a prompt settlement or resolution of the case, the formulation of a discovery plan, and the other topics listed below. Plaintiff shall be responsible for scheduling the meeting, which may be conducted in person or by telephone. After the meeting, the parties shall prepare a joint status report which must be filed three (3) business days prior to the conference in the following form:

> A Rule 16 Scheduling Conference is scheduled for the _____ day of _____, 199___. Appearing for the parties as counsel will be:
>
> - (List the counsel who will attend the scheduling conference. Counsel for all parties must attend. Parties not represented by counsel must appear in person. Parties who are represented are encouraged, but not required, to attend).
>
> 1. Jurisdiction: The basis for the Court's jurisdiction is:
>
> (Set forth a statement of the basis for the Court's jurisdiction. Indicate all objections.)
>
> 2. Jury or Non-Jury: This case is to be tried [before a jury] [by the Court as trier of law and fact].
>
> 3. Judicial Availability: The parties [agree] [do not agree] to have their case tried by a magistrate judge if the case proceeds to trial.
>
> 4. Geographic Transfer: The parties are advised of the possibility, pursuant to W.D. Mich. L.R. 6(h), of a transfer of the action to a judge located in a different city, on the basis of the convenience of counsel, the parties, or witnesses. Reassignment of the action shall be at the discretion of the court and shall require the consent of all parties and of both the transferor and transferee judge. The parties shall indicate whether a transfer for geographic convenience is warranted in this case.

5. Statement of the Case: This case involves:

(Set forth a brief description of the claims and defenses, sufficient to acquaint the Court with the general nature of the case, as well as the factual and legal issues requiring judicial resolution.)

6. Pendent State Claims: This case [does] [does not] include pendent state claims.

(If pendent state claims are presented, include a statement describing such claims, and all objections to the Court retaining the pendent claims.).

7. Joinder of Parties and Amendment of Pleadings: The parties expect to file all motions for joinder of parties to this action and to file all motions to amend the pleadings by _____.

8. Disclosures and Exchanges:

(i) Whether Fed. R. Civ. P. 26(a)(1) disclosures are desirable and, if so, the date(s) by which the parties expect to be able to furnish these initial disclosures.

(ii) The plaintiff expects to be able to furnish the names of the plaintiff's known witnesses, including all experts, to the defendant by _____. The defendant expects to be able to furnish the names of the defendant's known witnesses, including all experts, to the plaintiff by _____.

(iii) In this case, it would [would not] be advisable to exchange written expert witness reports as contemplated by Fed. R. Civ. P. 26(a)(2). Reports, if required, should be exchanged according to the following schedule:

(iv) The parties have agreed to make available the following documents without the need of a formal request for production:

From plaintiff to defendant by ____[date]____:
(Describe documents)

From defendant to plaintiff by ____[date]____:
(Describe documents)

-OR-

The parties are unable to agree on voluntary production at this time.

9. Discovery: The parties believe that all discovery proceedings can be completed by _____. The parties recommend the following discovery plan:

(As required by Fed. R. Civ. P. 26(f), set forth proposed plan of discovery, including subjects on which discovery may be needed and whether discovery should be conducted in phases or be limited to or focused on certain issues. Also set forth any recommendations as to limitations on discovery. Limitations may include the number of depositions and interrogatories, time limits on depositions, or limitations on the scope of discovery pending resolution of dispositive motions or alternative dispute resolution proceedings.)

10. Motions: The parties anticipate that all dispositive motions will be filed by _____. The parties acknowledge that it is the policy of this Court to prohibit the consideration of non-dispositive discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion.

11. Alternative Dispute Resolution: The parties recommend that this case be submitted to the following method(s) of alternative dispute resolution:

(Set forth each party's position with respect to the preferred method, if any, of alternative dispute resolution. Methods used in this district include, but are not limited to, voluntary facilitative mediation (see attachments), early neutral evaluation, Michigan mediation (see MCR 2.403 and L.R. 42), arbitration, summary jury trial, summary bench trial, and appointment of a special master.)

12. Length of Trial: Counsel estimate the trial will last approximately _____ days.

13. Prospects of Settlement: The status of settlement negotiations is:

(Indicate persons present during negotiations, progress toward settlement, and issues that are obstacles to settlement.)

14. Track Assignment: The parties recommend that this matter be assigned to the _____ track. (Track(s) are delineated in the Differentiated Case Management Plan used in this district. See attached DCM information sheet.)

(Set forth any special characteristics that may warrant extended discovery, accelerated disposition by motion, or other factors relevant to track assignment.)

The joint status report shall be approved and signed by all counsel of record and by any party who represents him or herself. The report shall be filed with the Clerk of the Court, **.

5. Order of Referral: United States Magistrate Judge **, of **, telephone number **, is designated to assist in the processing of this case, and is invested by the powers conferred under 28 U.S.C. Section 636(b)(1)(A).

6. Case Manager: Any question concerning this Order or the scheduling conference should be directed to **, Case Manager for **, at **.

Dated: _____

_____
**
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

IMPORTANT DIFFERENTIATED CASE MANAGEMENT INFORMATION
PLEASE READ BOTH SIDES - DO NOT DISCARD

Notice Re: Amendments to Federal Rules of Civil Procedure
Effective December 1, 1993

On December 1, 1993, amendments to the Federal Rules of Civil Procedure became effective. The court has determined that the automatic operation of certain of these rules could be inconsistent with the court's Civil Justice Expense and Delay Reduction Plan. The court has therefore suspended or modified by order (Administrative Order 93-125), as expressly allowed by the amendments, the following:

A. The planning meeting required by Fed. R. Civ. P. 26(f) shall take place in the manner and at the time directed by the order setting the Rule 16 conference. The report filed with the court as a result of the planning meeting shall contain the information required by that order. Cases assigned to the non-DCM track are exempted from the meeting requirement of Fed. R. Civ. P. 26(f), unless otherwise ordered by the court.

B. The Rule 16 scheduling conference shall be conducted within the time prescribed by the court's Civil Justice Plan, as modified, notwithstanding the provisions of Fed. R. Civ. P. 16(b).

C. No civil case pending in this district shall be subject to the automatic stay of the commencement of discovery imposed by Fed. R. Civ. P. 26(d).

D. The provisions of Fed. R. Civ. P. 26(a)(1) concerning initial disclosures shall not apply to any case brought in this district, except that the disclosures required therein may be directed by the court by order entered in a particular case.

E. In cases assigned to a track, the provisions of Fed. R. Civ. P. 26(a)(2) concerning the disclosure of expert testimony are modified as follows. The names, addresses, and qualifications of expert witnesses expected to testify at trial shall be disclosed as provided in the case management order. The expert's written report contemplated by Fed. R. Civ. P. 26(a)(2), if required by the court, shall be disclosed at the time provided in the case management order. In cases assigned to the non-DCM track, the exchange of written experts' reports contemplated by Fed. R. Civ. P. 26(a)(2) shall not be made, unless specified by the court.

F. The pretrial disclosures required by Fed. R. Civ. P. 26(a)(3) shall be made in the final pretrial order. The time for making objections shall be as established by the case management order. All other provisions of Fed. R. Civ. P. 26(a)(3) concerning objections and waiver of objections are hereby preserved.

G. The limitations on the number of permissible interrogatories established in Fed. R. Civ. P. 33(a) and the number of permissible depositions established in Fed. R. Civ. P. 30(a)(2)(A) and 31(a)(2)(A) are hereby suspended for all cases assigned to a track. In such cases, discovery limitations will be established by the court at the case management conference and set forth in a case management order. The discovery limitations contained in the Federal Rules of Civil Procedure shall not apply to cases assigned to the non-DCM track.

Administrative Order 93-125 shall remain in effect until rescinded, modified or superseded by local rule or further order. The full text of Administrative Order 93-125 is available [illegible]

IMPORTANT DIFFERENTIATED CASE MANAGEMENT INFORMATION
PLEASE READ BOTH SIDES - DO NOT DISCARD

'ursuant to 28 U.S.C. 471 et seq., the United States District Court for the Western District of Michigan has develop ystem of differentiated case management (DCM) which provides for the assignment of all civil cases to an appropriate p rack. Litigants are permitted to indicate their preference of track selection at the Rule 16 Scheduling Conference, altho udicial officer assigned to the case will make the final determination. Discovery limitations listed below are suggested g he amount of discovery will be determined at the Rule 16 Scheduling Conference and cannot be amended without prior f the court.

he following criteria are factors you may wish to consider prior to indicating your track preference.

I Voluntary Expedited - disposition will occur in less than 9 months from the date the complaint is filed.

- assignment is voluntary, parties must waive their right to trial by an Article III judge
- few parties, few disputed issues, relatively low monetary sums
- mutual prediscovery disclosure of relevant information will be required
- discovery deadline 90 days after Rule 16 scheduling conference, 2 depositions, 15 interrogatories per par

II Expedited - disposition will occur no later than 9 - 12 months from the date the complaint is filed.

- few parties, few disputed factual or legal issues
- parties encouraged to waive their right to trial by an Article III judge
- mutual prediscovery disclosure of relevant information is encouraged
- selective use of alternative dispute resolution methods
- discovery deadline 120 days after Rule 16 scheduling conference, 4 depositions, 20 interrogatories per p

III Standard - disposition will occur no later than 12 - 15 months from the date the complaint is filed.

- multiple parties, third party claims, a number of disputed factual or legal issues
- mutual prediscovery disclosure of relevant information is encouraged
- order phasing discovery may be directed if dispositive issues are raised
- alternative dispute resolution methods will be utilized regularly
- discovery deadline 180 days after Rule 16 scheduling conference, 8 depositions, 30 interrogatories per p

IV Complex - disposition will occur no later than 15 - 24 months from the date the complaint is filed.

- numerous parties, complicated factual or legal issues
- periodic Rule 16 scheduling conferences may be necessary
- cases scheduled for trial beyond eighteen months must be certified by a judicial officer
- alternative dispute resolution methods will be utilized regularly
- discovery deadline 270 days after Rule 16 scheduling conference, 15 depositions, 50 interrogatories per

V Highly Complex - disposition likely will occur over 24 months from the date the complaint is filed.

- numerous parties or class action lawsuits, periodic Rule 16 scheduling conferences
- no case will be assigned to this track without certification by a judicial officer
- alternative dispute resolution methods very often utilized
- discovery guidelines and limitations are at the discretion of the court

VI Administrative

- assignment to this track will be made by the clerk's office upon review of the initial pleadings
- social security, habeas corpus, bankruptcy appeals, administrative appeals, and 42 U.S.C. 1983 actions by prisoners, generally will be included on this track
- civil rights actions assigned to this track are limited to 15 interrogatories and requests for production categories of documents per party unless modified by the court upon filing a motion for good cause

VII Non-DCM

- 10% of all civil cases, except Administrative Track cases, will be selected randomly for this track
- judicial involvement will be minimal
- requests for additional case management must be made by motion
- parties may be placed on another track upon filing a motion and approval by the court -

IMPORTANT INFORMATION REGARDING VOLUNTARY FACILITATIVE MEDIATION - DO NOT DISCARD

GENERAL

On July 7, 1995, the judges of this court approved the use of Voluntary Facilitative Mediation. As distinguished from Michigan mediation (Local Rule 42), facilitative mediation is a flexible, non-binding process in which an impartial third party facilitates negotiations among the parties to help them reach settlement. The mediator, who may meet jointly or separately with the parties, serves as a facilitator only and does not attempt to evaluate or place a monetary value on the dispute, nor decide issues or make findings of fact. The mediator will act as a catalyst for dispute resolution by asking questions, defining issues, opening channels of communication and assisting in the generation of alternative settlement proposals and solutions. All civil cases except prisoner civil rights complaints, habeas corpus, social security and §2255 motions are eligible for facilitative mediation.

A list of mediators who have been certified by the court is attached. All mediators are required to successfully complete an extensive training program either sponsored or approved by the court and to co-mediate at least one case. If the district or magistrate judge is satisfied that all parties voluntarily selected facilitative mediation, he will incorporate their selection in the case management order, instructing the parties to notify the ADR clerk within ten (10) calendar days of the name of the jointly selected mediator. Any case referred to facilitative mediation continues to be subject to management by the judge to whom it is assigned. Unless otherwise ordered, parties are not precluded from filing pretrial motions or pursuing discovery.

PROCEDURES

Within ten (10) calendar days of the case management order, the parties jointly choose one mediator from the list of court certified mediators. Plaintiff is responsible for notifying the ADR clerk of the name of the selected mediator. If the parties are unable to reach agreement, they notify the ADR clerk who selects a mediator for them. The ADR clerk notifies the mediator of his or her selection, and requests a check for potential conflicts of interest. If a conflict is found to exist, the mediator notifies the ADR clerk, who either selects an alternate mediator or requests the parties make a new selection. Once a mediator's selection is finalized, the ADR clerk notifies the judge assigned to the case, who issues an order of referral for facilitative mediation.

Within 14 days after the issuance of the order of referral for facilitative mediation, the mediator consults with the parties and sets a time and place for the mediation session. The session should be held within 60 days after the mediator is selected. The mediator will send a notice of hearing as soon as practicable. Parties or individuals with settlement authority are required to attend the session.

Not less than seven (7) calendar days prior to the scheduled mediation session, each party provides the mediator with a concise memorandum, no more than ten (10) double-spaced pages in length, setting forth the party's position concerning the issues to be resolved through mediation, including issues relative to both liability and damages. The mediator may circulate the parties' memoranda. The format for the session is developed by the parties and the mediator. It may involve one or more sessions and may continue for as long as the parties agree it is productive.

At the close of the mediation session, if settlement is reached, the mediator helps the parties draft a settlement agreement along with a stipulation and proposed order to dismiss, which is then filed with the court. If settlement is not reached, the parties have seven (7) calendar days to inform the mediator whether they desire to continue the mediation process. Within ten (10) calendar days of the session, the mediator files a brief report with the ADR clerk and provides copies to all parties. The report indicates only who participated in the mediation session and whether settlement was reached.

KEY PROGRAM FEATURES

Information disclosed during any mediation session may not be disclosed to any other party without consent of the disclosing party. All mediation proceedings are considered to be compromise negotiations within the meaning of Federal Rule of Evidence 408. The court assesses a fee of $50.00 (fifty dollars) per referral, of which $25.00 (twenty-five dollars) is paid by the plaintiff(s) and $25.00 (twenty-five dollars) is paid by the defendant(s). The monies are deposited into the Voluntary Facilitative Mediation Training Fund. In the instance of a *pro bono* mediation, the assessment is waived. Mediators are paid their normal hourly rate divided equally among the parties. The mediator is responsible for billing the parties. In the event of a noncompliance, the mediator may petition the district or magistrate judge for an order directing payment of his or her fees.

The facilitative mediation program is administered by the clerk's office. In an effort to gather information about the efficacy of the program, the clerk's office may develop questionnaires for participants, counsel and mediators to be completed and returned at the close of the mediation process. Responses will be kept confidential and not divulged to the court, attorneys or parties. Only aggregate information will be reported.

SUMMARY

The facilitative mediation program is completely voluntary. No one will compel the parties to use this process. Litigants are encouraged however, to participate in facilitative mediation early in litigation, soon after the initial scheduling conference, in order to help reduce the expense and delay of traditional litigation. Other federal courts that have used this type of program report as much as an 80 percent success rate in settling cases.

If you have questions about Voluntary Facilitative Mediation or any other method of alternative dispute resolution, you may contact the ADR Clerk at the Grand Rapids Clerk's Office, (616) 456-2381.

U.S. District Court for the Western District of Michigan
Voluntary Facilitative Mediation - Certified Mediators

Charles F. Ammeson, Troff Petzke & Ammeson, 811 Ship Street, P.O. Box 67, St. Joseph, MI 49085, (616) 983-0161, Fax: (616) 983-0166. Areas of Practice: Personal injury/tort, Employment and Real Estate. Hourly rate: $130/hr.

Michael W. Betz, Roberts Betz & Bloss, P.C., 555 Riverfront Plaza Bldg., 55 Campau, N.W., Grand Rapids, MI 49503, (616) 235-9955, Fax: (616) 235-0404. Areas of Practice: Torts, Commercial Litigation, and Insurance Law. Hourly rate: $150/hr.

Stephen C. Bransdorfer, Bransdorfer & Bransdorfer, P.C., Suite 305, Ledyard Bldg., 125 Ottawa Ave., N.W., Grand Rapids, MI 49503, (616) 458-4004, Fax: (616) 458-4422. Areas of Practice: Torts, Contract/Commercial, and Environmental Litigation. Hourly rate: $190/hr.

Roger M. Clark, Warner Norcross & Judd, LLP, Suite 900, 111 Lyon St., N.W., Grand Rapids, MI 49503, (616) 752-2109, Fax: (616) 752-2500. Areas of Practice: Business and Commercial Litigation, including Environmental. Hourly rate: $200/hr.

John L. Cote', Willingham & Cote', Suite 500 University Place, 333 Albert Ave., East Lansing, MI 48826, (517) 351-6200, Fax: (517) 351-1195. Areas of Practice: Admiralty, Torts, Commercial Liability. Hourly rate: $175/hr.

Mary E. Delehanty, Gemrich, Moser, Bowser & Lohmann, 222 S. Westnedge Ave., Kalamazoo, MI 49007, (616) 382-1030, Fax: (616) 382-0703. Areas of Practice: Employment and Labor Relations. Hourly rate: $150/hr.

Stephen M. Denenfeld, Lewis & Allen, P.C., Suite 800, 136 E. Michigan Ave., Kalamazoo, MI 49007, (616) 388-7600, Fax: (616) 349-8831. Areas of Practice: Business/Commercial Law, Civil Litigation, and Employment Relations. Hourly rate: $150/hr.

Frederick D. Dilley, Boyden, Waddell, Timmons & Dilley, 5000 Riverfront Plaza Bldg., 55 Campau, N.W., Grand Rapids, MI 49503, (616) 235-2300, Fax: (616) 459-0137. Areas of Practice: General Civil Litigation, Personal Injury, and Environmental Law. Hourly rate: $180/hr.

Stuart J. Dunnings, Jr., Dunnings & Frawley, P.C., 530 S. Pine, Lansing, MI 48933-2299, (517) 487-8222, Fax: (517) 487-2026. Areas of Practice: Employment and Labor Law, Personal Injury, and Civil Rights. Hourly rate: $200/hr.

Pamela Chapman Enslen, Miller, Canfield, Paddock & Stone, 444 W. Michigan Ave., Kalamazoo, MI 49007, (616) 381-7030, Fax: (616) 382-0244. Areas of Practice: Employment, Commercial, and Civil Rights. Hourly rate: $175/hr.

Richard A. Glaser, Dickinson, Wright, Suite 900, 200 Ottawa Ave., N.W., Grand Rapids, MI 49503, (616) 458-1300, Fax: (616) 458-6753. Areas of Practice: Complex Civil and Commercial Litigation, Professional Liability, and Products Liability. Hourly rate: $190/hr.

Amy J. Glass, Michigan Mediation & Arbitration Services, Suite 445, 229 E. Michigan Ave., Kalamazoo, MI 49007, (616) 342-9046, Fax: (616) 349-1417. Areas of Practice: Employment, Negligence/Tort, and Business/Commercial Law. Hourly rate: $130/hr or $900 *per diem*.

Henry L. Guikema, Guikema & Hulbert, P.C., Suite 430, 125 Ottawa, N.W., Grand Rapids, MI 49503, (616) 235-2601, Fax: (616) 458-7548. Areas of Practice: Employment Litigation, Business Disputes, and Building Construction Litigation. Hourly rate: $165/hr.

Dale Ann Iverson, Smith, Haughey, Rice & Roegge, 200 Calder Plaza Bldg., 250 Monroe Ave., Grand Rapids, MI 49503, (616) 458-3232, Fax: (616) 774-2461. Areas of Practice: General Civil Litigation and Products Liability. Hourly rate: $150/hr.

Paul E. Jensen, Jensen & Stuart, Suite 300, 20 N. Monroe Center, Grand Rapids, MI 49503, (616) 454-7444, Fax: (616) 454-7873. Areas of Practice: Professional Malpractice, Employment/ERISA, and Products Liability. Hourly rate: $175/hr.

Thomas F. Koernke, Boyden, Waddell, Timmons & Dilley, 5000 Riverfront Plaza Bldg., 55 Campau, N.W., Grand Rapids, MI 49503, (616) 235-2300, Fax: (616) 459-0137. Areas of Practice: Contract Disputes, Construction, Corporate Shareholder Disputes. Hourly rate: $180/hr.

Richard C. Kraus, Fadut, Story & Kraus, P.C., 4572 S. Hagadorn Rd., East Lansing, MI 48823, (517) 351-3700, Fax: (517) 332-4122. Areas of Practice: Commercial, Health Care, and Constitutional Claims. Hourly rate: $150/hr.

Jon G. March, Miller, Johnson, Snell & Cummiskey, PLC, 800 Calder Plaza Bldg., Grand Rapids, MI 49503, (616) 459-8311, Fax: (616) 459-6708. Areas of Practice: Complex Commercial Litigation, Employment Litigation, and Professional Negligence Litigation. Hourly rate: $180/hr.

E. Thomas McCarthy, Smith, Haughey, Rice & Roegge, 200 Calder Plaza Bldg., Grand Rapids, MI 49503, (616) 774-8000, Fax: (616) 774-2461. Areas of Practice: Personal Injury, Professional Malpractice, and Employment. Hourly rate: $160 /hr.

Lawrence J. Murphy, Howard & Howard Attorneys, P.C., Suite 400, 107 W. Michigan Ave., Kalamazoo, MI 49007, (616) 382-1483, Fax: (616) 382-1568. Areas of Practice: Employment Discrimination, Wrongful Discharge, and Civil Litigation. Hourly rate: $175/hr.

Jon R. Muth, Miller, Johnson, Snell & Cummiskey, PLC, 800 Calder Plaza Bldg., Grand Rapids, MI 49503, (616) 459-8311, Fax: (616) 459-0048. Areas of Practice: General Civil/Commercial, Environmental, and Product Liability. Hourly rate: $180/hr.

H. Rhett Pinsky, Pinsky, Smith, Fayette & Hulswit, 1515 McKay Tower, Grand Rapids, MI 49503, (616) 451-8496, Fax: (616) 451-9850. Areas of Practice: Civil Rights and Employment Law. Hourly rate: $175/hr.

Perrin Rynders, Varnum, Riddering, Schmidt & Howlett, 333 Bridge Street, P.O. Box 352, Grand Rapids, MI 49501-0352, (616) 336-6734, Fax: (616) 336-7000. Areas of Practice: Commercial, Tort, and Tax Litigation. Hourly rate: $175/hr.

Stephen D. Turner, Law Weathers & Richardson, 800 Bridgewater Place, 333 Bridge Street, N.W., Grand Rapids, MI 49504, (616) 459-1171, Fax: (616) 732-1740. Areas of Practice: Business, Employment, and Environmental Litigation. Hourly rate: $185/hr.

Robert D. VanderLaan, Schenk, Boucher & Prasher, Suite 1220, 333 Bridge Street, N.W., Grand Rapids, MI 49504, (616) 454-8277, Fax: (616) 454-0958. Areas of Practice: Business Tort, Professional Negligence, and Civil Rights. Hourly rate: $175/hr.

Robert J. VanLeuven, Libner, VanLeuven, Kortering, Evans & Portenga, P.C., P.O. Box 450, Muskegon, MI 49443-0450, (616) 722-6546, Fax: (616) 725-8185. Areas of Practice: Tort, Admiralty, and Employment Law. Hourly rate: $175/hr.

Michael D. Wade, Bremer, Wade, Nelson, Lohr & Corey, 600 Three Mile Rd., N.W., Grand Rapids, MI 49504-1601, (616) 784-4434, Fax: (616) 784-7322. Areas of Practice: Personal Injury Litigation, Commercial Litigation, and Insurance Coverage. Hourly rate: $175/hr.

Douglas E. Wagner, Warner Norcross & Judd, LLP, Suite 900, 111 Lyon St., N.W., Grand Rapids, MI 49503, (616) 752-2130, Fax: (616) 752-2500. Areas of Practice: Product Liability, Commercial/Contract,

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

**,

Plaintiff,

Case No. **

v.

**

**,

Defendant.
_____/

CASE MANAGEMENT ORDER

IT IS HEREBY ORDERED:

1. TRACK ASSIGNMENT: This case is assigned to Track ____.

2. TRIAL DATE AND SETTING: This case is scheduled for [jury] [non-jury] trial in the trial session commencing _____, at _____. A list of the cases scheduled during this term will be forwarded by the Court to the parties at least thirty (30) days in advance.

3. JOINDER OF PARTIES AND AMENDMENTS OF PLEADINGS: All motions for joinder of parties and all motions to amend the pleadings must be filed by _____.

4. DISCLOSURES AND EXCHANGES: [On or before _____ each party shall, without awaiting a discovery request, provide to the other parties that information required by Fed. R. Civ. P. 26(a)(1).] [The names of plaintiff's known witnesses, including experts, must be furnished to the defendant by _____. The names of defendant's known witnesses, including experts, must be furnished to the plaintiff by _____.] [On or before _____ each party shall, without awaiting a discovery request, provide to the other parties

their written expert witness reports as required by Fed. R. Civ. P. 26(a)(2).] [On or before _____ the plaintiff shall, without awaiting a request for production, provide to the defendant the following documents: _____. On or before _____ the defendant shall, without awaiting a request for production, provide to the plaintiff the following documents: _____.] [The parties are unable to agree on voluntary production at this time.]

5. COMPLETION OF DISCOVERY: All discovery proceedings shall be completed within ____ days from the date of the Rule 16 scheduling conference and shall not continue beyond this date. All interrogatories, requests for admissions, and other written discovery requests must be served no later than thirty days before the close of discovery. All depositions must be completed before the close of discovery. [In accordance with the Differentiated Case Management plan adopted by this Court, interrogatories will be limited to ____ single-part questions and depositions will be limited to ____ fact witnesses per party.] [By request of the parties and upon a showing of good cause, interrogatories will be limited to ____ single-part questions and depositions will be limited to ____ fact witnesses per party.] There shall be no deviations from this order without prior approval of the court upon good cause shown.

6. MOTIONS:

a. Non-dispositive motions shall be filed in accordance with W.D. Mich. L.R. 28. They will be referred to Magistrate Judge _____ in _____, Michigan _____ pursuant to 28 U.S.C. Section 636 (b)(1)(A). In accordance with 28 U.S.C. Section 471 et seq., it is the policy of this Court to prohibit the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion.

b. Dispositive motions shall be filed in accordance with W.D. Mich. L.R. 29 by _____. If dispositive motions are based on supporting documents such as depositions or answers to interrogatories, only those excerpts which are relevant to the motion shall be filed. It is the responsibility of the movant's counsel to contact the Case Manager, _____, to schedule a hearing with respect to any dispositive motion.

c. Motions in limine shall be filed on or before the date for filing the proposed Final Pretrial Order.

7. ALTERNATIVE DISPUTE RESOLUTION: This matter shall be submitted to _____ no later than _____. A separate Order will issue regarding the method and schedule for alternative dispute resolution.

-OR-

In the interest of facilitating prompt resolution of this case, and the parties having voluntarily selected facilitative mediation, this matter shall be submitted to facilitative mediation. The parties have ten (10) calendar days from the date of this Order to jointly choose one mediator from the list of court certified mediators, which is attached to the Order Setting the Rule 16 Scheduling Conference. Plaintiff is responsible for notifying the ADR clerk of the name of the selected mediator. If the parties are unable to jointly select a mediator, they must notify the ADR clerk, who will select a mediator for them. Once the Mediator is selected, a separate Order will issue regarding the method and schedule for the mediation conference.

8. SETTLEMENT CONFERENCE: The parties are under an ongoing obligation to engage in good faith settlement negotiations. A settlement conference has been scheduled before _____, in _____, Michigan, on _____, commencing at

_____. Unless excused upon a showing of good cause, the attorney who is to conduct the trial shall attend the settlement conference. Counsel attending the settlement conference must be accompanied by a representative of the party with full settlement authority, unless excused upon a showing of good cause. Any party may request the magistrate judge to conduct an earlier settlement conference.

9. FINAL PRETRIAL CONFERENCE: A final pretrial conference is hereby scheduled for _____ before _____.

10. PREPARATION OF PROPOSED FINAL PRETRIAL ORDER: A proposed pretrial order, entitled "Final Pretrial Order" shall be prepared jointly by counsel and filed five (5) days prior to the final pretrial conference in the following form:

A final pretrial conference was held on the _____ day of _____. Appearing for the parties as counsel were:

(List the counsel who will attend the pretrial conference.)

1. Exhibits: The following exhibits will be offered by the plaintiff and defendant:

(List separately for each party all exhibits, including demonstrative evidence and summaries of other evidence, by name and number. Plaintiff shall use numbers [1-99]; defendant shall use numbers [100-1[illegible]. Indicate with respect to each exhibit whether and for what reason admissibility is objected to. Exhibits expected to be used solely for impeachment purposes need not be numbered or listed until identified at trial. Failure to list an exhibit required to be listed by this order will result, except upon a showing of good cause, in a determination of admissibility at trial. Objections not contained in the Pretrial Order, other than objections under Evidence Rule 402 or 403, shall be deemed waived except for good cause shown. See Fed. R. Civ. P. 26(a)(3).)

2. Uncontroverted Facts: The parties have agreed that the following may be accepted as established facts:

(State in detail all uncontroverted facts.)

3. Controverted Facts and Unresolved Issues: The factual issues remaining to be determined and issues of law for the Court's determination are:

(Set out each issue which is genuinely controverted, including issues on the merits and other matters which should be drawn to the Court's attention.)

4. Witnesses:

a. Non-expert witnesses to be called by the plaintiff and defendant, except those who may be called for impeachment purposes only, are:

(List names, addresses, and telephone numbers of all non-experts who will testify. Indicate whether they are expected to testify in person, by deposition videotape, or by reading of their deposition transcript. Indicate all objections to the anticipated testimony of each non-expert witness.)

b. Expert witnesses to be called by the plaintiff and defendant, except those who may be called for impeachment purposes only, are:

(List names, addresses, and telephone numbers of all experts who will testify, providing a brief summary of their qualifications and a statement of the scientific or medical field(s) in which they are offered as experts. Indicate whether they will testify in person, by deposition videotape, or by reading of their deposition transcript. Indicate all objections to the qualifications or anticipated testimony of each expert witness.)

It is understood that, except upon a showing of good cause, no witness whose name and address does not appear in the lists required by subsections (a) and (b) will be permitted to testify for any purpose, except impeachment, if the opposing party objects. Any objection to the use of a deposition under Fed. R. Civ. P. 32(a) not reflected in the Pretrial Order shall be deemed waived, except for good cause shown.

5. Depositions and Other Discovery Documents:

All depositions, answers to written interrogatories, and requests for admissions, or portions thereof, that are expected to be offered in evidence by the plaintiff and the defendant are:

(Designate portions of depositions by page and line number. Designate answers to interrogatories and requests for admissions by answer or request number. Designation need not be made of portions that may be

3. Controverted Facts and Unresolved Issues: The factual issues remaining to be determined and issues of law for the Court's determination are:

(Set out each issue which is genuinely controverted, including issues on the merits and other matters which should be drawn to the Court's attention.)

4. Witnesses:

a. Non-expert witnesses to be called by the plaintiff and defendant, except those who may be called for impeachment purposes only, are:

(List names, addresses, and telephone numbers of all non-experts who will testify. Indicate whether they are expected to testify in person, by deposition videotape, or by reading of their deposition transcript. Indicate all objections to the anticipated testimony of each non-expert witness.)

b. Expert witnesses to be called by the plaintiff and defendant, except those who may be called for impeachment purposes only, are:

(List names, addresses, and telephone numbers of all experts who will testify, providing a brief summary of their qualifications and a statement of the scientific or medical field(s) in which they are offered as experts. Indicate whether they will testify in person, by deposition videotape, or by reading of their deposition transcript. Indicate all objections to the qualifications or anticipated testimony of each expert witness.)

It is understood that, except upon a showing of good cause, no witness whose name and address does not appear in the lists required by subsections (a) and (b) will be permitted to testify for any purpose, except impeachment, if the opposing party objects. Any objection to the use of a deposition under Fed. R. Civ. P. 32(a) not reflected in the Pretrial Order shall be deemed waived, except for good cause shown.

5. Depositions and Other Discovery Documents:

All depositions, answers to written interrogatories, and requests for admissions, or portions thereof, that are expected to be offered in evidence by the plaintiff and the defendant are:

(Designate portions of depositions by page and line number. Designate answers to interrogatories and requests for admissions by answer or request number. Designation need not be made of portions that may

Appendix C

Northern District of Ohio

Case Management Forms

ii. Trial briefs.

b. The parties shall jointly file the following not later than three (3) days prior to trial:

i. Proposed jury instructions. This Court uses Devitt and Blackmar's Federal Jury Practice and Instructions for the preliminary instructions and the final instructions whenever applicable. Standard instructions may be submitted by number. Other "non-standard" instructions shall be submitted in full text, one per page, and include reference to the source of each requested instruction. Indicate objections, if any, to opposing counsel's proposed instructions, with a summary of the reasons for each objection.

ii. A joint statement of the case and statement of the elements that must be proven by each party. If the parties are unable to agree on the language of a joint statement of the case, then separate, concise, non-argumentative statements shall be filed. The statement(s) of the case will be read to the prospective jurors during jury selection. The elements that must be proven by each party will be included in the preliminary jury instructions.

Dated: _____

_____

UNITED STATES DISTRICT JUDGE

CASE INFORMATION STATEMENT (CIS)

(LOCAL RULE 8:3-1)

EVALUATION AND ASSIGNMENT OF CASES (LOCAL RULE 8:2-2)

The Court shall consider and apply the following factors in assigning cases to a particular track:

EXPEDITED:

(1) Legal Issues: Few and Clear
(2) Required discovery: Limited
(3) Number of Real Parties in Interest: Few
(4) Number of Fact Witnesses: Up to five (5)
(5) Expert Witnesses: None
(6) Likely Trial Days: Less than five (5)
(7) Suitability for ADR: High
(8) Character and Nature of Damage Claim: Usually a fixed amount

STANDARD:

(1) Legal Issues: More than a few, some unsettled
(2) Required Discovery: Routine
(3) Number of Real Parties in Interest: Up to five (5)
(4) Number of Fact Witnesses: Up to ten (10)
(5) Expert Witnesses: Two (2) or three (3)
(6) Likely Trial Days: five (5) to ten (10)
(7) Suitability for ADR: Moderate to high
(8) Character and Nature of Damage Claims: Routine

COMPLEX:

(1) Legal Issues: Numerous, complicated and possibly unique
(2) Required Discovery: Extensive
(3) Number of Real Parties in Interest: More than five (5)
(4) Number of Witnesses: More than ten (10)
(5) Expert Witnesses: More than three (3)
(6) Likely Trial Days: More than ten (10)
(7) Suitability for ADR: Moderate
(8) Character and Nature of Damage Claims: Usually requiring experttestimony

ADMINISTRATIVE:

Cases that, based on the Court's prior experience, are likely to result in default or cons judgment or can be resolved on the pleadings or by motion.

MASS TORT: Cases will be assigned to this track in accordance with a special management plan adopted the Court.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
CIVIL CASE INFORMATION STATEMENT (CIS)

CAPTION	CASE NO.
Do You Consent to the Jurisdiction of a Magistrate Judge? YES ☐ NO ☐ If YES, Have You Filed Out the Appropriate Form? YES ☐ NO ☐	JUDGE:

[redacted]

Briefly describe the case: include any special characteristics that may warrant extended discovery or accelerated disposition. If complex or expedited track assignment is requested, explain why. (Use Separate Sheet If Additional Space Is Required)

RELATED CASE? YES ☐ NO ☐ CASE NO._____ JUDGE_____

ATTORNEY NAME AND BAR I.D. NUMBER	TELEPHONE NUMBER ( )
FIRM NAME AND ADDRESS	PARTY NAME - DOCUMENT TYPE

The information provided on the CIS statement will be used for administrative purposes only (Local Rule 8.3.1)

DCM FORM 1/1/92

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Plaintiff	CASE NO. JUDGE
vs.	NOTICE: CASE MANAGEMENT CONFERENCE
Defendant	

This case is subject to the provisions of Section 8 of the Local Rules of the Northern District of Ohio entitled Differentiated Case Management (DCM). All counsel are expected to familiarize themselves with the Local Rules as well as with the Federal Rules of Civil Procedure. The Court shall evaluate this case in accordance with Section 8 and assign it to one of the case management tracks described in Rule 8:2.1(b). Each of the tracks (expedited, standard, complex, mass tort and administrative) has its own set of guidelines and timelines governing discovery practice, motion practice and for trial. Discovery shall be guided by Rule 8:7.1 et seq. and motion practice shall be guided by Rule 8:8.1 et seq.

SCHEDULING OF CASE MANAGEMENT CONFERENCE

All counsel and/or parties will take notice that the above-entitled action has been set for a Case Management Conference ("CMC") on _____, 199__, at _____, before Judge _____, Room _____, United States Courthouse, _____.

Local Rule 8:4.2 requires the attendance of both parties and lead counsel. "Parties" means either the named individuals or, in the case of a corporation or similar legal entity, that person who is most familiar with the actual facts of the case. "Party" does not mean in-house counsel or someone who merely has "settlement authority." If the presence of a party or lead counsel will constitute an undue hardship, a written motion to excuse the presence of such person must be filed well in advance of the CMC.

TRACK RECOMMENDATION

Pursuant to Local Rule 8:4.1, and subject to further discussion at the CMC, the Court recommends the following track:

_____ Expedited _____ Standard _____ Administrativ

_____ Complex _____ Mass Tort

_____ Recommendation reserved for CMC.

APPLICATION OF FED. R. CIV. P. 26(a)

Rule 26(a) of the Federal Rules of Civil Procedure, as amended December 1, 1993, mandates a series of required disclosures by counsel in lieu of discovery requests unless

otherwise stipulated or directed by order of the Court or by local rule.

In the above-entitled case, Rule 26(a) shall apply as follows:

_____ All disclosures mandated by Rule 26(a) shall apply, including Initial Disclosures (Rule 26(a)(1)), Disclosure of Expert Testimony (Rule 26(a)(2)), and Pre-Trial Disclosures (Rule 26(a)(3)).

_____ Initial Disclosures (Rule 26(a)(1)) shall not apply; Disclosure of Expert Testimony (Rule 26(a)(2)) and Pre-Trial Disclosures (Rule 26(a)(3)) shall apply.

CONSENT TO JURISDICTION OF MAGISTRATE JUDGE

Magistrate Judge _____ has been assigned to assist in this case. The parties are encouraged to discuss and consider consenting to the jurisdiction of the Magistrate Judge.

PREPARATION FOR CMC BY COUNSEL

The general agenda for the CMC is set by Local Rule 8:4.2(a). Counsel for the plaintiff shall arrange with opposing counsel for the meeting of the parties as required by Fed. R. Civ. P. 26(f) and Local Rule 8:4.2(b). A report of this planning meeting shall be jointly signed and submitted to the Clerk for filing not less than 3 days before the CMC. The report shall be in a form substantially similar to Attachment 1.

FORMAL DISCOVERY STAYED UNTIL CMC

Pursuant to Local Rule 8:7.2, counsel are reminded that no preliminary formal discovery may be conducted prior to the CMC

except "such discovery as is necessary and appropriate to support or defend against any claim for emergency, temporary, or preliminary relief[.]" This limitation in no way affects any disclosure required by Fed. R. Civ. P. 26(a)(1) or by this order.

OTHER DIRECTIVES

RESOLUTION PRIOR TO CMC

In the event that this case is resolved prior to the CMC, counsel should submit a jointly signed stipulation of settlement or dismissal, or otherwise notify the Court that the same is forthcoming.

IT IS SO ORDERED.

U.S. District Judge

ATTACHMENT 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

	)	**CASE NO.**
	)	
Plaintiff	)	**JUDGE**
	)	
	)	
vs.	)	**REPORT OF PARTIES' PLANNING**
	)	**MEETING UNDER FED. R. CIV.**
	)	**P. 26(f) AND L.R. 8:4.2**
Defendant	)	

1. Pursuant to Fed. R. Civ. P. 26(f) and L.R. 8:4.2, a meeting was held on _____, 199___, and was attended by:

_____ counsel for plaintiff(s) _____

_____ counsel for plaintiff(s) _____

_____ counsel for defendant(s) _____

_____ counsel for defendant(s) _____

2. The parties:

_____ have exchanged the pre-discovery disclosures required by Rule 26(a)(1) and the Court's prior order;

_____ will exchange such disclosures by _____ _____, 199___;

_____ have not been required to make initial disclosures.

3. The parties recommend the following track:

_____ Expedited _____ Standard _____ Complex

_____ Administrative _____ Mass Tort

4. This case is suitable for one or more of the following Alternative Dispute Resolution ("ADR") mechanisms:

_____Early Neutral Evaluation _____Mediation _____Arbitration

_____Summary Jury Trial _____Summary Bench Trial

_____Case not suitable for ADR

5. The parties _____do/_____do not consent to the jurisdiction of the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

6. Recommended Discovery Plan:

(a) Describe the subjects on which discovery is to be sought and the nature and extent of discovery.

_____

_____

_____

_____

_____

(b) Discovery cut-off date: _____

7. Recommended dispositive motion date: _____

8. Recommended cut-off date for amending the pleadings and/or adding additional parties: _____

9. Recommended date for a Status Hearing: _____

10. Other matters for the attention of the Court:

_____

_____

_____

_____

_____

_____

Attorney for Plaintiff(s) _____

_____

Attorney for Plaintiff(s) _____

_____

Attorney for Defendant(s) _____

_____

Attorney for Defendant(s) _____

Appendix D

Northern District of California

Case Management Forms

APPENDIX B
SAMPLE FORMS

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Plaintiff(s), **v.** **Defendant(s).**	**CASE NO.** **JOINT CASE MANAGEMENT STATEMENT AND PROPOSED ORDER**

The parties to the above-entitled action jointly submit this Case Management Statement and Proposed Order and request the Court to adopt it as its Case Management Order in this case.

DESCRIPTION OF THE CASE

1. A brief description of the events underlying the action:

2. The principal factual issues which the parties dispute:

3. The principal legal issues which the parties dispute:

4. The other factual issues *[e.g. service of process, personal jurisdiction, subject matter jurisdiction or venue]* which remain unresolved for the reason stated below and how the parties propose to resolve those issues:

5. The parties which have not been served and the reasons:

6. The additional parties which the below-specified parties intend to join and the intended time frame for such joinder:

ALTERNATIVE DISPUTE RESOLUTION

7. The following parties consent to assignment of this case to a United States Magistrate Judge for *[court or jury]* trial:

8. The parties have already been assigned *[or the parties have agreed]* to the following court ADR process *[e.g. Nonbinding Arbitration, Early Neutral Evaluation, Mediation, Early Settlement with a Magistrate Judge] [State the expected or scheduled date for the ADR session]*:

9. The ADR process to which the parties jointly request *[or a party separately requests]* referral:

DISCLOSURES

10. The parties certify that they have made the following disclosures *[list disclosures of persons, documents, damage computations and insurance agreements]*:

APPENDIX B
SAMPLE FORMS

DISCOVERY

11. The parties agree to the following discovery plan *[Describe the plan e.g., any limitation on the number, duration or subject matter for various kinds of discovery; discovery from experts; deadlines for completing discovery]*:

TRIAL SCHEDULE

12. The parties request a trial date as follows:

13. The parties expect that the trial will last for the following number of days:

SIGNATURE AND CERTIFICATION BY PARTIES AND LEAD TRIAL COUNSEL

Pursuant to Civil L.R. 16-6, each of the undersigned certifies that he or she has read the brochure entitled "Dispute Resolution Procedures in the Northern District of California," discussed the available dispute resolution options provided by the court and private entities and has considered whether this case might benefit from any of the available dispute resolution options.

Dated: _____

_____
[Typed name and signature of each party and lead trial counsel]

Dated: _____

_____
[Typed name and signature of each party and lead trial counsel]

CASE MANAGEMENT ORDER

The Case Management Statement and Proposed Order is hereby adopted by the Court as the Case Management Order for the case and the parties are ordered to comply with this Order. In addition the Court orders: *[The Court may wish to make additional orders, such as:*

a. Referral of the parties to court or private ADR process;
b. Schedule a further Case Management Conference;
c. Schedule the time and content of supplemental disclosures;
d. Specially set motions;
e. Impose limitations on disclosure or discovery;
f. Set time for disclosure of identity, background and opinions of experts;
g. Set deadlines for completing fact and expert discovery;
h. Set time for parties to meet and confer regarding pretrial submissions;
I. Set deadline for hearing motions directed to the merits of the case;
j. Set deadline for submission of pretrial material;
k. Set date and time for pretrial conference;
l. Set a date and time for trial.]

Dated: _____

_____
UNITED STATES DISTRICT JUDGE

Appendix E

Western District of Missouri

Notification Letters for "A" and "B" Cases

A Case

Date

Plaintiff's Attorney
Law Firm
Street Address
City State Zip Code

Defendant's Attorney
Law Firm
Street Address
City State Zip Code

RE: Case Name:
Case Number: 92-0000-CV-W-0

Gentlemen:

Please find enclosed a Notice of Early Assessment Meeting and an Agenda for the above-captioned case.

Very truly yours,

Kent Snapp
Administrator
U.S. Courthouse
811 Grand Avenue, Rm. 707
Kansas City, Missouri 64106

KS/ds

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

NOTICE OF EARLY ASSESSMENT MEETING

RE: Case Name
Case Number:

Date

This is notice that an initial Early Assessment Meeting will be held for the above-captioned case on _____, _____, 19__, at _____. The Early Assessment Meeting will be held at the office of the Administrator, Room 707, 811 Grand Avenue, Kansas City, Missouri.

Please read the General Order for the Early Assessment Program. You and your client(s) should be familiar with alternative dispute procedures. Your client (with settlement authority) shall be present with you at the Early Assessment Meeting (Section IV. A. of the General Order).

In the event a continuance is necessary, please call the Administrator within six (6) days after the date of this notice. Please have your calendar present for future scheduling. Please see that certificates are filed as required by Section II D of the General Order.

Please note the attached Agenda for the meeting.

Enclosed is a list of neutrals available for the Early Assessment Program. At all Early Assessment Meetings, strong consideration should be given to the selection of one of said neutrals for the mediation, early neutral evaluation or non-binding arbitration of your case.

Please note the attached Agenda for the meeting.

If you have any questions, please call the Administrator. Your cooperation is appreciated.

Kent Snapp, Administrator
U.S. Courthouse
811 Grand Avenue, Room 707
Kansas City, MO 64106

Attachment

Agenda for Initial Early Assessment Meeting

1. Material facts
2. Material legal issues
3. A plan for the prompt sharing of material information necessary to enter into meaningful settlement discussion
4. Areas of agreement
5. Reasonably anticipated litigation costs for your client(s) if the case is tried, and if the case is appealed
6. Settlement of your case
7. A plan for prompt alternative dispute resolution of your case

2/10/92

B Case

Date

Mr./Ms.
Street Address
City, State Zip

RE: Name of Case
Case Number

Dear Mr./Ms.:

As you know, the United States District Court for the Western District of Missouri has adopted an Early Assessment Program to encourage the early evaluation and settlement of civil cases. I am enclosing a copy of the General Order establishing the Early Assessment Program for you to discuss in detail with your client(s).

The above-captioned case has been selected as a case that should elect to participate in the Early Assessment Program. Your client could save time and money by electing to participate in the Program.

I have confidence that the Early Assessment Program will be of substantial benefit to you and your client(s). The process of the assessment and alternative dispute resolution could save your client unnecessary costs, expenses, and delay.

Enclosed is a list of neutrals available for the Early Assessment Program. At all Early Assessment Meetings, strong consideration should be given to the selection of one of said neutrals for the mediation, early neutral evaluation or non-binding arbitration of your case.

I am enclosing a Program Election form to be returned to me within 20 days from this date. Please forward a copy of the consent to the other lawyers in this case and review the advantages of the Program with your client(s).

If you have any questions, please call.

Your cooperation is appreciated.

Yours very truly,

Kent Snapp
Administrator

KS/ds

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

PROGRAM ELECTION

Case Number: 92-0000-CV-W-0

The undersigned attorney certifies that he/she has advised his/her client of the General Order of the United States District Court for the Western District of Missouri for the Early Assessment Program. After consulting with the client, the appropriate election has been indicated below.

The undersigned attorney also certifies that he/she has advised his/her client of the possible time and cost saving advantages of the Early Assessment Program. The client's election not to participate in the Program is indicated by the client's signature on this form.

_____ _____ Elect to Participate

_____ Elect Not to Participate

_____
(Client Signature)

Date: _____

Attorney's Signature
Attorney's address

Send Original to:

Kent Snapp, Administrator
Early Assessment Program
U.S. Courthouse
811 Grand Avenue, Room 943
Kansas City, MO 64106

Appendix F

Northern District of West Virginia

Settlement Week Forms

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

CAMERON GAS COMPANY, a
Corporation, et al,

Plaintiffs,

v. CIVIL ACTION NO. 5:93-CV-9
(STAMP)

ALLEGHENY & WESTERN ENERGY
CORPORATION, et al,

Defendants.

ORDER

It appearing incumbent upon the Court, pursuant to Rule 16, Federal Rules of Civil Procedure, and the statutory provisions of the Civil Justice Reform Act of 1990, both directed toward the pre-trial settlement of civil cases; and it further appearing that the Settlement Week mediation process has proven to be very successful in this and other jurisdictions in arriving at the fair, just, speedy, and inexpensive pre-trial resolution of numerous civil actions; and it further appearing, upon a review of the matters raised and suggested by the parties herein, that the above-styled civil action would benefit from such pre-trial mediation, it is

ORDERED that this civil action be, and the same is hereby, scheduled for Settlement Week mediation on Tuesday, November 12, 1996 at 1:00 p.m. at the Federal

their representatives, fully authorized to make final and binding decisions on behalf of the principals, MUST BE PRESENT. In the event this case involves an insurer, although not a named party, said insurer shall, nevertheless, be present for the mediation session, by a representative with full authorization to make final and binding decisions on behalf of the insurer. Counsel MAY NOT, except in extraordinary circumstances and with prior approval of the Court, serve as such representatives. Such prior approval must be requested, by written motion, within ten (10) days from the date of the entry of this Order. Failure to appear with persons authorized to make final and binding decisions as set forth above will result in the issuance of a show cause Order for sanctions.

All counsel and parties shall be prepared to negotiate openly and knowledgeably concerning the issues of the civil action in a mutual effort to reach a fair and reasonable settlement. Failure of any party or counsel to participate in good faith will be immediately brought to the attention of the presiding Judge, who will be available during the mediation of this civil action. See Rule 16(f), Federal Rules of Civil Procedure.

If there be any objections to the scheduling of this civil action for Settlement Week mediation, such objections must be made in form of written motion and

filed with the Court within ten (10) days from the date of the entry of this Order. Absent a showing of good cause why this civil action should not be included in the Settlement Week mediation, exemptions shall not be granted.

At least ten (10) days prior to the mediation conference, counsel for each party shall submit to the Clerk's office and all counsel of record a written factual presentation, not to exceed five (5) pages, with any pertinent supporting documents, other than the pleadings, attached.

Mediators are experienced members of the legal profession and are approved by the West Virginia State Bar. Under the auspices of the Court and the West Virginia State Bar, they have been trained in mediation and fully understand the nature and scope of the obligations which they have assumed. Settlement discussions will be off the record, conducted by an impartial Mediator, subject to Rule 408, Federal Rules of Evidence, and held in strictest confidence. The Mediators will not disclose any of the information divulged by any of the parties or counsel during the settlement discussions unless specifically authorized to do so by that party or counsel. See Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652 (4th Cir. 1988); See also Local Court Rule Article 5, LR Civ P 5.01.

Parties and their counsel are directed to arrive at

the Courthouse in advance of the scheduled mediation and to note their appearances with the Clerk of Court, at which time they will be given further information.

The Court recognizes the willingness of the members of the Bar of the Court to participate in this alternative dispute resolution program, which, it is believed, will continue to be of substantial benefit to litigants who are before the bar of the Court.

ENTER: October 2, 1996

United States District Judge

June 3, 1992

TOKAR, Robert; and
TOKAR, Deborah, his wife

v. Civil Action: 91-210-W(S)

NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY, a corporation.

N O T I C E

The above styled case was scheduled for MEDIATION at 10:30 a.m. on June 16, 1992 at the Wheeling location of holding Court. At the request of Mediator, this MEDIATION has been rescheduled for the same day, but at 3:00 p.m., instead of 10:30 a.m., at the Wheeling location of holding Court.

Wally Edgell, Ph.D.
Clerk of Court

David F. Cross
67 Town Square
Wellsburg, WV 26070

Bradley H. Thompson
1325 National Road
Wheeling, WV 26003

Paul T. Tucker
Bachman, Hess, Bachmann & Garden
1226 Chapline Street
P.O. Box 351
Wheeling, WV 26003

October 10, 1991

JOHN TERRY MALONE
Plaintiff,

vs. CIVIL ACTION NO. 90-37-E

THE KELLY-SPRINGFIELD TIRE COMPANY,
a Corporation
Defendant.

N O T I C E

The Court has scheduled additional mediation in the above-styled civil action for October 31, 1991 at 1:30 p.m. at the Federal Courthouse in Elkins, West Virginia.

Counsel are advised that in furtherance of the objectives of the Settlement Week Mediation Program the party or parties having full authority to make binding decisions must be present for the scheduled conference.

Upon your arrival, please check in with the Clerk's Office.

WALLY EDGELL, PH.D.
Clerk, U.S. District Court

By:_____
Deputy Clerk

Harry A. Smith, III
P. O. Box 1909
Elkins, WV 26241

Robert M. Steptoe
Union National Center
P.O. Box 2190
Clarksburg, WV 26302

N. Thompson Powers
1330 Connecticut Ave., N.W.
Washington, DC 20036

cc: Cheryl Wheeler

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

_____

_____

Plaintiff(s),
v.

Civil Action No._____

_____

_____

Defendant(s).

SETTLEMENT WEEK NON-APPEARANCE REPORT

A Settlement Week conference was schednled in the above case on _____, 19_____, in _____, West Virginia, at _____:_____ o'clock____m. This conference did not go forward for the following reason(s):

1. _____ The following parties (or their representatives) did not appear:

_____

_____

_____

2. _____ The following counsel did not appear:

_____

_____

3. _____ Other:

_____

_____

_____

Mediator

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

_____

_____
Plaintiff(s),

vs. Civil Action No.:_____

_____

_____
Defendant(s).

SETTLEMENT WEEK CONFERENCE REPORT

A Settlement Conference was held in the above-styled case on the _____ day of _____, 1993, in _____, West Virginia beginning at _____ o'clock _____.m., and as a result of this conference:

1. _____ This case was settled.

2. _____ Additional mediation will take place in this case during the next two (2) weeks, after which this form will be updated and resubmitted.

3. _____ This case was not settled and it is my opinion that:

   (a) _____ The next step should be a status conference conducted by the Court.

   (b) _____ The next step should be a settlement conference conducted by the Court.

   (c) _____ This case should proceed in normal course.