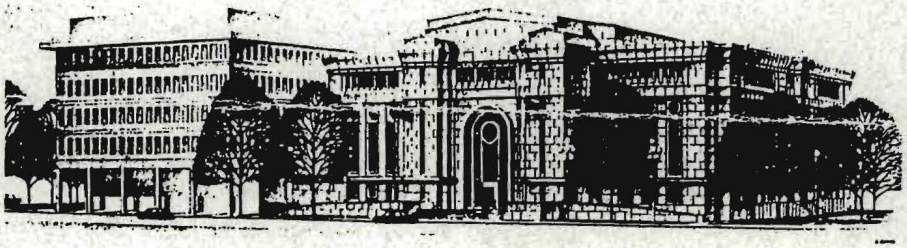
# United States District Court

# District of New Hampshire



## First Annual Assessment of the Advisory Group Adopted Under the Civil Justice Reform Act of 1990

March 3, 1997

## Preface

On December 1, 1993, the court adopted New Hampshire's Civil Justice Expense and Delay Reduction Plan ("the Plan") based in part on the recommendations of the court-appointed Civil Justice Reform Act Advisory Group. The Advisory Group began its work in 1991 and conducted a wide-reaching review of the court's policies and procedures affecting the processing of civil cases.

The court issued revised local rules, effective on January 1, 1996. This was the first major revision of the local rules since their original adoption in 1969.

The Advisory Group's membership has changed, but it has continued to meet regularly. James R. Starr, Clerk of Court, continues to serve as Chair. Current Advisory Group members include:

- Peter G. Beeson, Esq.
- Peter S. Cowan, Esq.
- Dennis T. Ducharme, Esq.
- Debra Weiss Ford, Esq.
- Katherine M. Hanna, Esq.
- Leslie J. Ludtke, Esq.
- Lynn Mather, Ph.D.
- Gretchen L. Witt, Esq.

Mary Louise Caffrey, Esq. serves as Reporter. Kathleen Northrup, Chief Deputy Clerk, is an active and invaluable participant in the work of the Advisory Group. Lori Bourassa and Mary Chase provide clerical assistance.

The Plan has not been reviewed or revised because the 1996 revision to the local rules incorporated its major provisions, so the focus of the court and this Advisory Group has been on the functioning of the civil litigation system under those rules. The Advisory Group's emphasis will continue to remain on the refinement of the local rules and procedures. The Group does not envision revisiting the Plan.

The Advisory Group has worked this year with the Clerk's Office to monitor the impact of the amendments to the local rules and to educate the bar about them. The Clerk's Office conducted six seminars, targeted at legal staff, to familiarize them with the new procedures under the revised local rules and federal court practice. Paralegals and secretaries from sixty law firms attended these workshops. The Clerk's Office also submitted a number of articles about its procedural requirements to *The New Hampshire Bar News*, a publication of the New Hampshire Bar Association. The judges and magistrate judge and one member of the Advisory Group have spoken about the revised local rules and current federal practice at continuing education seminars for lawyers.

A detailed analysis of the revised local rules' impact on civil litigation is premature because the revised local rules have been in effect only a little over a year. However, the Advisory Group has gained valuable insight into the attorneys' experiences with and perceptions of the revised local rules and federal civil practice through an attorney survey.

The Advisory Group designed a survey for attorneys of record in civil cases in which a discovery plan, a requirement under the new rules, had been filed. The Advisory Group mailed 404

surveys to these attorneys in August 1996 together with a cover letter to each attorney from Chief Judge DiClerico (attached as Exhibits A and B). The Advisory Group received responses from 40% of the targeted attorneys.

The survey results confirmed the Advisory Group's opinion that it is too early to get a firm reading on the effect the revised local rules are having on civil litigation, but that there are areas which merit further study. Comments were focused primarily on pretrial and discovery issues simply because not enough time had elapsed since the adoption of the revised rules to bring a case to the final pretrial or trial stage. Attorneys indicated general overall satisfaction with the operation of the federal court and its efficiency.

As might well be expected with a diverse collection of attorneys, there was no clear consensus expressed by the attorneys in their survey responses concerning the revised local rules and their effect on federal civil practice. Survey results indicate a lack of agreement on the substantive changes, if any, that are needed for the rules.

The Advisory Group did endorse some minor rule amendments which became effective on January 1, 1997. The amendment to Local Rule 26.1 (f)(4) was occasioned in large part due to the urging of many survey respondents. The rule has been amended to make it clear that discovery in pro se cases will now commence twenty days after the answer date.

Additionally, the filing deadline for the proposed discovery plan was changed from two days before the pretrial to four days (Local Rule 26.1 (f) (2)). This was done as a result of many survey comments suggesting that when the parties agree on a discovery plan, they should be able to request a waiver of the pretrial conference. The extra days will allow the court time to review the plan, and, if in agreement with counsel, order cancellation of the pretrial. As a result of this change, the Sample Report of Parties' Planning Meeting (Form 2 of the Local Rules) now includes a section where counsel can indicate whether or not they request a pretrial.

The Advisory Group has targeted the following areas for analysis in next year's assessment :

- The desirability and feasibility of increasing the use of ADR.
- The effectiveness of pretrial plans and conferences.
- The impact of the revised local rules and the Federal Rules of Civil Procedure on litigation cost and delay, particularly with respect to expert disclosure and final pretrial filing requirements and conferences.
- Whether discovery deadlines should be extended while awaiting rulings from the court and how such extensions would affect the discovery plan.

## Survey Synopsis

The Advisory Group received 160 of the 404 surveys sent out by the Clerk's Office. Five attorneys returned the surveys unanswered, indicating a lack of experience necessary to respond.

We tallied each response for an overall survey result and also broke down the responses by attorneys representing primarily plaintiffs, primarily defendants, and equal numbers of plaintiffs and defendants. We also tracked the responses of experienced attorneys--those handling more than ten federal court cases over the past five years.

There was no significant disparity in the responses of the experienced versus less experienced attorneys. The responses of plaintiff's attorneys and defendant's attorneys differed little except that:

- Plaintiff's attorneys favor the discovery plan more than defense attorneys.
- More plaintiff's attorneys indicated that the final pretrial filing requirements result in earlier settlement than did defense attorneys.
- Plaintiff's attorneys are more in favor of making mandatory ADR a part of the discovery plan than defense attorneys.
- Plaintiff's counsel are more in favor of increased judicial involvement in case settlement than defense counsel.

Attorney's Profile - Questions 1 - 5

From a demographic viewpoint, the respondents were fairly experienced in federal court practice:

- 6% had 1 case before the court in the last five years.
- 29% had 2-5 cases before the court in the last five years.
- 28% handled 11-25 cases in the last five years.
- 62% of the attorneys handled between 2-5 cases since the new rules were implemented.
- In 55% of the cases, attorneys represented defendants, and in 45% of the cases, attorneys represented plaintiffs.
- In 50% of the cases, the attorneys were retained by insurance carriers.

Case Tracking - Questions 6 - 10

Respondents are satisfied overall with the case tracking system. The narrative answers indicated that the attorneys want more flexibility with discovery deadlines, for as one attorney suggested, "A little elasticity, a bit less ruthlessness--we're human after all!" Many want the court to rule more quickly on motions because the discovery deadlines can expire while counsel await court rulings.

- 74% reported that the tracking deadlines were usually met.
- 65% reported that the track assignments were usually appropriate to their case.

Discovery and Pretrial Conferences - Questions 11 - 23

As noted in the Preface, two items mentioned by counsel in the surveys were addressed in the January 1, 1997 amendments to the rules--the opportunity for counsel to request waiver of the preliminary pretrial conference when the parties agree to do so, and the issue of when discovery may commence in a case involving pro se party.

Although a majority of the attorneys indicated that pretrial conferences are effective, there were many criticisms of the conferences as time consuming and an additional expense for clients. Respondents indicated that the conferences are most meaningful when the court is actively involved.

- 61% of attorneys overall indicated that the joint development of a discovery plan has increased the effectiveness of the pretrial conference.
- 72% of plaintiff's counsel indicate that the joint discovery plan has increased the effectiveness of the conference; 18% answered that it has not.
- 57% of defense attorneys indicated that the plan has increased the effectiveness of the conferences; 31% of them say it has not.
- 59% of attorneys overall indicated that a pretrial conference is beneficial even if the parties agree on the discovery plan.
- 54% of plaintiff's attorneys find pretrial conferences beneficial when there is an agreed-to discovery plan, while 39% indicated that it is not beneficial.
- 58% of defense counsel answered that the conference is beneficial when there is an agreed-to discovery plan, while 34% answered that it is not.
- 53% of attorneys overall are usually able to agree with opposing counsel on discovery in the discovery plan. There was no significant difference in the responses of plaintiff's and defendant's counsel.

Expert Disclosure - Questions 23 - 29

There were many complaints about expert disclosure, Local Rule 26.1 (b). Suggestions for amendments included going back to the old rules, staggering disclosure for plaintiffs and defendants, limiting disclosure to the expert's curriculum vitae and written reports, and stricter enforcement of the current rules. This local rule is based on Fed. R. Civ. P. 26 (a) (2), but based on some survey results and the experience of the Group members, the court will consider modifying the requirements on a case-by-case basis. This will be an area for further study in next year's assessment.

Final Pretrial Matters - Questions 30 - 35

Attorneys' experience with final pretrial matters under the revised local rules is not extensive because of the recent adoption of the rules. However, there were several instructive comments and interesting trends from the survey:

- 38% of plaintiff's attorneys agreed that the new final pretrial requirements have resulted in earlier settlements, while 22% disagreed.

- 28% of defense attorneys agreed that the final pretrial requirements resulted in earlier settlements, and 33% indicated that they did not.

A number of attorneys complained in the narrative responses about Local Rule 16.3, which requires parties and insurance carriers to attend final pretrial conferences. Their concern is that court attendance is an expensive and time-consuming commitment, and that frequently the clients were not needed and had no interaction with the court. Attorneys seem unaware the local rule does provide that a client's attendance can be excused by prior order of the court as long as the client is available by telephone. Statistics are not available to track whether requests to excuse court attendance at final pretrials are granted. Since this local rule is perceived to be a problem, it will be examined further in next year's assessment.

ADR - Questions 36 - 38

- 60% of the attorneys either strongly or moderately agreed that mandatory ADR should be imposed by the court as part of the discovery plan, while 35% either moderately or strongly disagreed.

- 74% of plaintiff's counsel either strongly or moderately agreed about imposing mandatory ADR, with 23% registering strong or moderate disagreement.

- 57% of defense attorneys favored mandatory ADR in the discovery plan, and 39% disagreed with its imposition.

General Questions - Questions 36 - 42

- 81% of attorneys overall agreed that the court should take a more active role in case settlement, while 11% disagreed.

- 92% of plaintiff's counsel favor a more active role of the court in case settlement, while 5% oppose it.

- 72% of defense attorneys favor more activism by the court in settlement, while 17% oppose it.

Attorneys overall indicated that the court schedules hearings on motions in a timely manner, with 59% registering either strong or moderate agreement. However, many attorneys indicated that they are having difficulty operating under the pressures of newly tightened discovery deadlines while awaiting a ruling from the court. Many attorneys indicated that the parties and the court need to build flexibility into the discovery plan. Further, the attorneys and Advisory Group members feel that the court should give serious consideration to requests for a stay of discovery while a dispositive motion is pending.

Unfortunately, there was no consensus among the respondents on the most burdensome or most beneficial revision to the rules. For example, while some found them onerous, others mentioned benefiting from the new planning meeting requirement and new materials to accompany the final pretrial statements.

Many attorneys did suggest that the court conduct more hearings by telephone to increase efficiency and reduce costs. The Group agrees and urges the court to consider doing so on a case-by-case basis as appropriate.

## Civil and Criminal Workload Statistics

One of the responsibilities of the Group is to annually assess the condition of the court's civil and criminal dockets.

Below in Table One is a numerical summary of the cases filed for each year from 1986 through 1996. The bar chart depiction in Graph One is an illustration of the filing trends. Here are some highlights from these statistics:

- The civil filings have decreased from the high of 1991 of 789 cases filed and have declined to 631 in 1996, showing a downward trend.

- The number of criminal filings is relatively small, yet it continues to grow moderately. There were 148 criminal filings in 1996, which is a substantial increase from the 41 filings in 1986.

Table One
**Cases Filed Each Year Ending 12/31**

| Year | Civil | Criminal | Total |
|---|---|---|---|
| 1986 | 602 | 41 | 643 |
| 1987 | 566 | 46 | 612 |
| 1988 | 579 | 42 | 621 |
| 1989 | 622 | 55 | 677 |
| 1990 | 610 | 112 | 722 |
| 1991 | 789 | 67 | 856 |
| 1992 | 757 | 83 | 840 |
| 1993 | 732 | 100 | 832 |
| 1994 | 728 | 109 | 837 |
| 1995 | 672 | 115 | 787 |
| 1996 | 631 | 148 | 779 |

Graph One
**Cases Filed Each Year Ending 12/31**

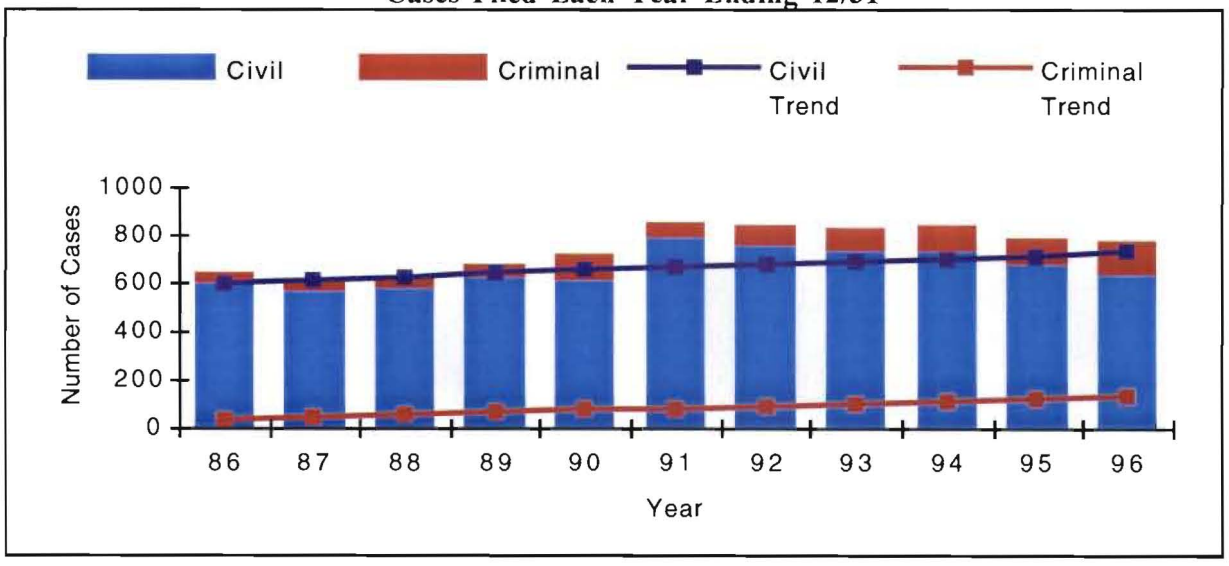


Table Two below sets forth data on the number of cases pending on December 31 for each of the years from 1986 through 1996. Graph Two is a bar chart depiction of this data.

- Although there was some fluctuation from year to year, the number of civil cases pending grew modestly from 1986 to 1991. Since 1991, there has been a steady decline in the number of civil cases pending.

- While relatively small, the number of criminal cases pending grew steadily over this period.

Table Two
**Cases Pending at End of Each Year Ending 12/31**

| Year | Civil | Criminal | Total |
|---|---|---|---|
| 1986 | 768 | 18 | 786 |
| 1987 | 681 | 17 | 698 |
| 1988 | 660 | 24 | 684 |
| 1989 | 754 | 38 | 792 |
| 1990 | 803 | 61 | 864 |
| 1991 | 921 | 53 | 974 |
| 1992 | 894 | 55 | 949 |
| 1993 | 742 | 77 | 819 |
| 1994 | 661 | 101 | 762 |
| 1995 | 657 | 77 | 734 |
| 1996 | 659 | 97 | 756 |

Graph Two
**Cases Pending at End of Each Year Ending 12/31**

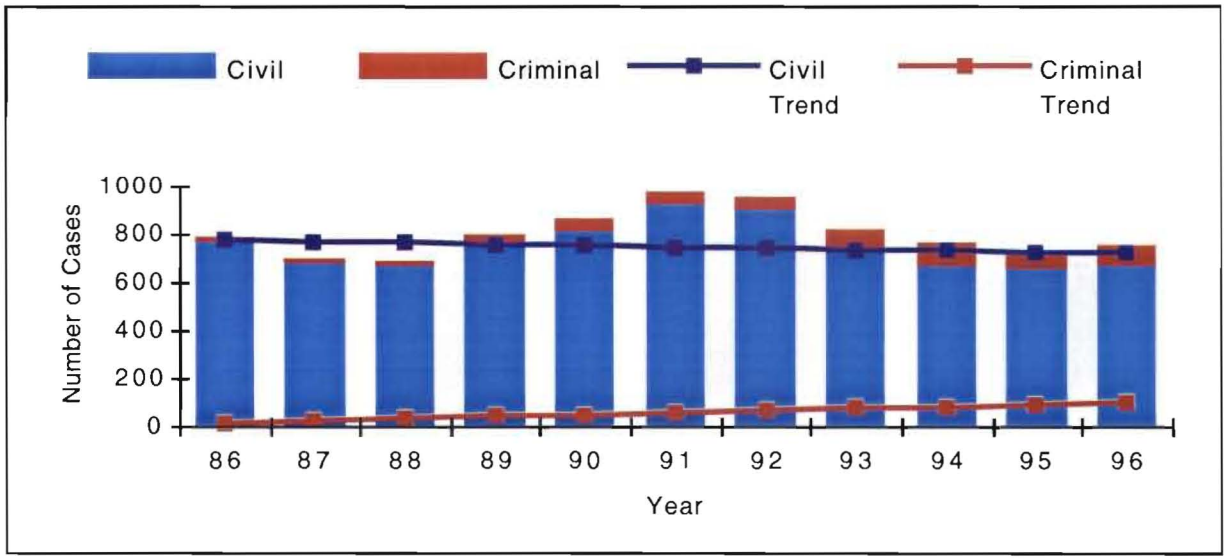


Table Four shows how this court compared to the other district courts in this circuit and in the country in filing to disposition time and filing to trial time. There are five district courts in the First Circuit, and there are 94 district courts in the country. The lowest number, number one, is assigned to the district with the fastest termination rate. On average, this court in 1996 took 10 months to handle a case from filing to disposition. This gave the court a ranking of 64 out of the 94 district courts nationally and placed the court's ranking as 3rd out of 5 district courts in this circuit. In 1996, the court averaged 24 months from filing to trial, ranking 69th in the nation out of 94 district courts and 4th out of 5 district courts in the circuit.

Table Four
**Civil Median Times in Months**

| Year | Filing to Disposition | NH Ranked Among 94 District Courts | NH Ranked Among 5 District Courts in the First Circuit | Filing to Trial | NH Ranked Among 94 District Courts | NH Ranked Among 5 District Courts in the First Circuit |
|---|---|---|---|---|---|---|
| 1989 | 11 | 60 | 4 | 24 | 85 | 5 |
| 1990 | 12 | 70 | 4 | 21 | 75 | 4 |
| 1991 | 13 | 81 | 5 | 26 | 86 | 5 |
| 1992 | 8 | 16 | 2 | 23 | 75 | 4 |
| 1993 | 13 | 90 | 4 | 29 | 86 | 5 |
| 1994 | 11 | 72 | 3 | 27 | 82 | 5 |
| 1995 | 9 | 43 | 2 | 23 | 66 | 4 |
| 1996 | 10 | 64 | 3 | 24 | 69 | 4 |

## Differential Case Management System/Tracks

Pursuant to provisions of the plan, on March 1, 1994 the court began assigning cases to a tracking system. Each track has procedures established to handle a particular type of case most efficiently and economically, consistent with such case-specific management concerns as case complexity, the amount of time reasonably needed to prepare the case for the trial, and the judicial and other resources required and available for the preparation and disposition of the case.

The tracks established were Administrative, Expedited, Standard, and Complex. The Administrative track is assigned at case opening; all other tracks are assigned at the preliminary pretrial conference. At the direction of the initial Advisory Group, the Clerk's Office has maintained statistics on the number of track assignments for each judge.

From 1994 through 1996, these statistics indicate that there has been a slight shift of track assignment of the cases. It appears that more cases are closing before pretrial and hence are not even assigned to a track. Further study of tracking may reveal the explanation for this shift. As may be expected, most cases are assigned to the Standard track, followed by Administrative, Expedited, and Complex tracks.

Most cases which went to trial met the track assignment deadline; those that did not were as a result of continuances requested by counsel.

## Terminations

A sampling of termination data was also analyzed to see if such things as earlier judicial involvement, more meaningful pretrials, firm trial dates, and other new procedures were impacting the settlement rate or contributing to the earlier settlement of cases.

Numbers for the six-month period June through December of the years 1993, 1994, 1995, and 1996 were reviewed and reveal that while there appears to be no significant change in the settlement rate, there does appear to be a slight trend toward earlier case termination.

Overall settlement rates (which include those cases terminated by consent, those dismissed voluntarily, and cases settled by agreement of the parties) for the six-month period of each year studied changed little:

| Year | Settlement Rate |
|---|---|
| 1993 | 42% |
| 1994 | 47% |
| 1995 | 42% |
| 1996 | 41% |

However, the percentage of cases terminated for all reasons in under eighteen months and in under twelve months shows that the cases are being terminated earlier.

| | Cases Terminated | |
|---|---|---|
| Year | In Under 18 Months | In Under 12 Months |
| 1993 | 63% | 54% |
| 1994 | 72% | 67% |
| 1995 | 74% | 65% |
| 1996 | 74% | 67% |

## Summary and Conclusion

The first full year under the revised local rules has gone well, due to the foresight and hard work of the court, the Clerk's office, and the original Advisory Group. Survey results indicate general satisfaction with the functioning of an efficient federal civil litigation system, and the statistics seem to confirm that.

The challenges ahead involve the inherent tension between fixed scheduling for predictability and the flexibility needed when dealing with the unique characteristics of each case. The survey responses and our Advisory Group discussions confirmed that there are no simple solutions to expediting cases and reducing the expense of civil litigation, which are the aims of the Civil Justice Reform Act. Unfortunately, our Advisory Group discussions and the survey results suggest that the newly revised rules, with the focus on speed and adherence to deadlines, may sometimes increase the cost of litigation.

With compressed discovery and trial dates, attorneys need to adhere to discovery deadlines even through they await dispositive rulings which could obviate the need for discovery. For example, when a motion to dismiss or a motion for summary judgment has been filed but not ruled on, it is expensive to engage in what may turn out to be needless discovery if the motion is ultimately granted. However, failure to complete discovery within the time confines of the discovery plan will jeopardize the entire case. This puts the attorney in the difficult position of explaining additional and perhaps unnecessary discovery expense to a client.

The original Advisory Group recommended that the court adopt a guideline of 60 days for ruling on dispositive motions which the court has considered and rejected as unrealistic and too limiting. The current Advisory Group appreciates the thoroughness of this court's care and analysis in its rulings and recognizes that accelerating the pace of decision making could jeopardize the caliber and depth of current court rulings. The Advisory Group intends to determine whether there is a significant problem with flexibility in setting and extending discovery deadlines. In tandem with that, the Advisory Group will examine the issue of how long the court takes to issue dispositive rulings.

While many of the survey respondents echoed the original Advisory Group's request for increased and earlier judicial involvement in litigation, our Advisory Group is mindful that the court cannot devote significantly more time to case management than it does currently and that attorneys do not want to be micro-managed. Our reading of the survey responses and our discussions lead us to recommend that the court continue to work actively with parties and counsel for earlier case resolution throughout the litigation process, but that the role of mediator is not the proper one for the trial judge.

The mediation efforts of Magistrate Judge Muirhead were often lauded in the survey.

- From September 1, 1995 through August 31, 1996 Magistrate Judge Muirhead held 25 mediation conferences and settled 15 cases, which is a 60% settlement rate.

- From September 1, 1996 through December 31, 1996 Magistrate Judge Muirhead conducted 22 mediation conferences and settled 16 cases for a 73% settlement rate.

While it is clear that Magistrate Judge Muirhead's involvement saved the litigants and the court time and expense, the impact of these mediation sessions on his schedule needs to be recognized. For most mediation conferences, the magistrate judge needs to devote time to preparation and then commit a day to the conference, thus eliminating a day when he could be hearing other court matters. To the extent his schedule permits, our Advisory Group encourages Magistrate Judge Muirhead to continue his mediation efforts.

Still to be studied for next year's assessment is the issue whether ADR should be mandated as part of each discovery plan. As discussed in the Survey Synopsis, the majority of attorneys in their survey responses favor the imposition of mandatory ADR. However, a vocal minority strongly oppose ADR. The Advisory Group intends to conduct an in-depth analysis of mandatory ADR with particular attention to the successes and pitfalls experienced with ADR in state court practice.

With the addition of one year's experience, attorneys in next year's assessment should be able to provide more complete information about final pretrial issues. Many attorneys have expressed dissatisfaction with the early and more expensive filing requirements associated with final pretrial statements. They fear duplication of effort for trial and the resulting increase in expense to clients and outlay of their time. Additionally, the expert disclosure requirements of the federal expert disclosure rule were cited by many as unworkable and also adding to litigation expense. These issues will be scrutinized in next year's assessment.

Our Advisory Group congratulates the bench, bar and Clerk's Office for their flexibility and cooperation in adjusting to the changes brought about by the revised local rules. We feel fortunate to practice in a climate of such extraordinary congeniality and professionalism.

Table Three and Graph Three portray encouraging statistics concerning the number of civil cases pending for three years or more. Since 1989, the number of cases pending for three years or more has been steadily declining.

Table Three

**Civil Cases Pending Three Years or More for a 12-Month Period Ending September 30**

| Year | Number of Cases | Percentage of Caseload |
|---|---|---|
| 1989 | 82 | 11.1 |
| 1990 | 70 | 8.7 |
| 1991 | 54 | 6.7 |
| 1992 | 57 | 6.0 |
| 1993 | 67 | 8.8 |
| 1994 | 36 | 5.2 |
| 1995 | 31 | 4.7 |
| 1996 | 31 | 4.6 |

Graph Three

**Civil Cases Pending Three Years or More for a 12-Month Period Ending September 30**