UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
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UNITED STATES COURTHOUSE
NEW HAVEN 06510

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FRANCES J. CONSIGLIO
DEPUTY-IN-CHARGE
NEW HAVEN

May 26, 1993

Abel J. Mattos, Esq.
Court Administration Divsion
Administrative Office of the
United States Courts
One Columbus Circle, N. E.
Washington, D. C. 20544

Dear Mr. Mattos:

I enclose a copy of the "Report and Plan of the Civil Justice Advisory Group for the District of Connecticut" filed on December 17, 1992, and adopted by the Court on March 3, 1993.

Please let me know if you require anything further.

Very truly yours,

Kevin F. Rowe,
Clerk

Enclosure

REPORT AND PLAN OF

CIVIL JUSTICE ADVISORY GROUP

FOR THE DISTRICT OF CONNECTICUT

December, 1992

REPORT AND PLAN OF CIVIL JUSTICE ADVISORY GROUP FOR THE DISTRICT OF CONNECTICUT

December, 1992

I. PROFILE OF THE DISTRICT OF CONNECTICUT

The District of Connecticut is coterminous with the State of Connecticut. It is a single district with five statutory seats of court: New Haven, Bridgeport, Hartford, Waterbury, and New London. 28 U.S.C. §86. Only New Haven, Bridgeport, and Hartford are active seats of court with judicial officers conducting proceedings on a regular basis. Until recently the Waterbury seat of court was used three to four months a year by Judge Thomas F. Murphy, Senior United States District Judge, SDNY, sitting by designation. It also has been used in the past to accommodate visiting judges who assist with the District's backlog of civil cases. The facility is now being used by judges of the Superior Court to conduct civil trials. Within the next year or two, we expect Waterbury to become active again when Judge Daly relocates his chambers to that site. The New London facility was located in the New London Post Office, but fell into disuse with the deaths of Judge Robert P. Anderson and Judge Leonard P. Moore, Senior United States Circuit Judges, who occasionally used the courtroom to conduct proceedings. The District has relinquished this space to the United States Postal Service for reassignment.

JUDICIAL OFFICERS

The District of Connecticut is authorized eight (8) judgeships. The court currently has five (5) active judges and three (3) senior judges. The Judicial Conference of the United States has approved a ninth temporary judgeship (with an expiration date of 1995) that awaits statutory authorization.

As of November 23, 1992, the judges are assigned as follows:

NEW HAVEN: Honorable Jose A. Cabranes, Chief Judge; Honorable Peter C. Dorsey; Honorable Ellen Bree Burns, Senior Judge; and Honorable Robert C. Zampano, Senior Judge.

BRIDGEPORT: Honorable T. F. Gilroy Daly; Honorable Alan H. Nevas; and Honorable Warren W. Eginton, Senior Judge.

HARTFORD: Honorable Alfred V. Covello.

MAGISTRATE JUDGES

In addition to Article III Judges, the court now has four (4) Magistrate Judges. In September, the Judicial Conference of the United States authorized a fifth Magistrate Judge position to be filled in the spring of 1993, subject to funding.

The Magistrate Judges are assigned as follows:

NEW HAVEN: Honorable Arthur H. Latimer.

BRIDGEPORT: Honorable Joan G. Margolis.

HARTFORD: Honorable F. Owen Eagan and Honorable Thomas P. Smith.

The Local Rules of the District of Connecticut authorize Magistrate Judges to handle all matters authorized by statute. Magistrate judges receive referrals from the district judges on a district-wide rotation. This allows for an even distribution of assignment. In addition to civil assignments, the magistrate judges handle most criminal presentments, bond hearings, arraignments, and, in some instances, handle guilty pleas in felony cases on referral for a recommendation to the court.

II. ASSESSMENT OF CONDITIONS IN THE DISTRICT

A. Condition of the Docket

CIVIL FILINGS

The 1992 Federal Court Management Statistics, covering the statistical year July 1, 1991 through June 30, 1992, show the District experienced a 7% increase in civil filings, from 2,651 in 1991 to 2,842 in 1992. The report shows 355 new civil cases per judge in 1992 based on the District's eight-judge authorization. However, during this time period, the District only had six judges, which translates into 474 actual new cases per judge.

In statistical year 1992, the judges increased their civil terminations by 1% from 2,481 (or 414 cases per judge) to 2,507 (or 418 cases per judge). This resulted in a 10% increase of pending civil cases from 3,445 to 3,802, which equates to 634 pending civil cases per judge.

The latest statistical report further shows that the District continues to carry one of the most complex caseloads in the country. Again using the official figure based on eight judges, the judges carry 447 weighted cases. This weighted caseload ranks the District 24th nationally and third within the Second Circuit. However, using the actual judge figure, the judges carry a weighted caseload of 596, which places the District second in the country behind only the District of Alaska. This figure is well above the benchmark of 400 weighted case per judge used by the Judicial Conference of the United States to determine the need for additional judges. In fact, the judges of this District have carried a weighted caseload well above the benchmark figure for the past 18 years.

During the past two years the District showed significant increases in the following areas of litigation: real property litigation up 300%, from 90 cases in statistical year 1991 to 352 cases in statistical year 1992; contract litigation up 32%, from 457 to 605

cases; and civil rights litigation up 23%, from 335 to 413 cases. The increase in the first two categories can be attributed to the downturn in the economy in the Northeast and to the impact of this downturn on the area's banks. Twenty-seven Connecticut banks have failed in the past two years, with more expected. These failures have resulted in an increased number of removals from the Superior Court of the State of Connecticut. Many of these cases are foreclosure actions. While this increase is a temporary problem, we also expect a rise in director and officer liability litigation as a result of the bank failures. These cases are complex and time-consuming.

Despite these increases, the District has improved by two months its median disposition time from filing to disposition in all civil cases (from 13 months in 1990 to 11 months in 1992). Also, the median disposition time for cases disposed of by trial decreased from 23 months in 1990 to 18 months in 1992. These times respectively rank the District fourth and second within the Second Circuit.

CRIMINAL FILINGS

While the District has experienced an increase in civil filings, during the past year it has experienced a 5% decrease in criminal filings. In statistical year 1991, 288 criminal cases were filed, for an average 48 cases per judge. In statistical year 1992, 275 criminal cases were filed, for an average of 43 cases per judges. For the same time period the terminations decreased 4%. The judges disposed of 270 cases in statistical year 1991, for an average of 45 cases, and 258 cases in statistical year 1992, for an average of 43 cases. At the end of statistical year 1992, the number of pending criminal cases increased 8%, from 218 to 235 cases.

Over the past several years, in addition to the Gerena case discussed below at page 6, the United States Attorney's Office has investigated and prosecuted an increased

number of complex and protracted public corruption, financial fraud, government procurement fraud, narcotics, and organized crime cases. The majority of these prosecutions have been multi-count, multi-defendant cases attended by complicated and prolonged pre-trial litigation. These cases, by their nature, compound and prolong normal processing. Many involved lengthy pre-trial detention hearings before Magistrate Judges followed by appeals to District Judges. A number involved complicated and lengthy wiretap issues. A significant number resulted in long trials.

Related asset forfeiture cases, particularly narcotics based forfeitures, have also increased dramatically. This numerical increase is compounded by recent case law requiring the Court to conduct probable cause hearings before it can issue a warrant of arrest for certain classes of property. These hearings now consume significant judicial resources, whereas probable cause previously was determined as a matter of review in chambers.

Moreover, during the past year, several significant public corruption, fraud, and organized crime cases seeded additional, and more complex, criminal investigations and cases. In addition, in response to huge financial losses associated with numerous financial institution failures, the United States Attorney's Office established, in 1992, a Financial Fraud Task Force consisting of four (4) Assistant United States Attorneys and four (4) Department of Justice Special Prosecutors assigned to Connecticut from the New England Bank Fraud Task Force. This new Financial Fraud Task Force initiated several cases during 1992 and is currently investigating over one hundred major financial fraud cases each involving a loss in excess of $100,000.00. Also, in 1992, a Federal Gang Violence Task Force was established and initiated a complex multi-defendant case in New Haven. That Task Force is conducting major criminal investigations in several other locations in the State. Similarly, increased attention to environmental law violations resulted in an increase in the number and complexity of such prosecutions.

During the past several years, criminal cases in the District of Connecticut and the related pretrial, trial, and post-trial litigation have increased dramatically in size and complexity. Based on the continuing initiatives and on several new initiatives undertaken by the United States Attorney's Office, the Advisory Group has reason to believe this trend will continue. The latest Administrative Office statistics do not reflect the increase in cases that will result from the expanding scope of these investigations and from the growth in the number of Assistant United States Attorneys (now up to 46).

JUDICIAL RESOURCES

On November 1, 1990, Title II of the Judicial Improvements Act of 1990 authorized two additional judges for the District of Connecticut. This action ended a six-year effort by the District to obtain the additional judgeships needed to cope with the increased filings. The need for additional judgeships was first recognized by the Judicial Conference of the United States in 1984. Every two years the Conference reaffirmed its support for additional judgeships for the District with the submission of the Biennial Judgeship Surveys. Unfortunately, statutory authority for the positions had to await an amendment to the original Judicial Improvements Act. Even though the positions were authorized and names were submitted, it took 22 months before one position was filled.

Many changes took place during this six year period. In 1985, a sixth judge, Judge Alan H. Nevas, was appointed to the bench and in February 1985, a fourth magistrate judge, Joan G. Margolis, was appointed by the court. While these additions provided much needed relief to a caseload that grew astronomically in the early 1980s, they were offset by other changes. In late 1985, Judge T. Emmet Clarie, Senior Judge, was effectively removed from the case assignment rotation to handle a large multi-defendant criminal case, United States v. Gerena. The pretrial hearings lasted 18 months. The

first trial in the case, which was severed by defendants, began in 1988 and lasted eight months. After the first trial, Senior Judge Clarie, who has recently assumed inactive status, remained out of the rotation to allow him to address and resolve his then-pending civil case load. The Gerena case was transferred to Judge Daly, and resulted in two more jury trials the last of which concluded December 9, 1992. In 1986, a change in the law of Connecticut resulted in the last-minute filing of 390 additional asbestos cases. Judge Robert C. Zampano, Senior Judge, was removed from the civil and criminal rotation to oversee the District's settlement programs, including the special masters program and mediation programs. His efforts in this area have been extraordinary and have saved the state and federal courts years of trial time. In 1988, Judge M. Joseph Blumenfeld, Senior Judge, died and his 500 pending cases were redistributed among the remaining judges. In 1988, Judge Thomas F. Murphy, Senior Judge, SDNY, who had sat routinely by designation in the District, cut back on his workload.

The District now has three vacant positions: the unfilled position authorized in 1990, and the two vacancies created by the election of senior judge status by Judge Warren W. Eginton on August 1, 1992 and Judge Ellen Bree Burns on September 1, 1992.

In addition to the above, one magistrate recently was removed from the civil referral rotation in order to allow him to concentrate his efforts in overseeing the bank failure litigation, which is in excess of 500 cases. Another magistrate judge recently had his appearance reduced in the case assignment rotation. This leaves two magistrate judges handling the majority of the referrals.

In September 1991 the District sought authorization to appoint a fifth magistrate judge. The Administrative Office investigated the request and prepared a report recommending a fifth magistrate judge position. In December 1991, the Subcommittee on magistrate judges deferred action on our request, recommending that the District

wait until the two new judgeship positions were filled and then re-examine the need. The District petitioned for reconsideration of this action in March 1992. In September, the Judicial Conference recommended the fifth magistrate judge position. The District expects to fill this position next spring or in October 1993, depending on the availability of funds.

B. Advisory Group's Operating Procedure

The Civil Justice Advisory Group for the District of Connecticut was created in January 1991 by then Chief Judge Ellen Bree Burns. Acting pursuant to 28 U.S.C. §478, Chief Judge Burns appointed 24 members to the Group (later expanded to 28), including laypersons, attorneys representing a diversity of practices and geographic locations within the District, the Chief of the United States Attorney's Civil Division, and judges (a district judge, a senior district judge, a magistrate judge, and a state court judge). [A list of the members is attached as Exhibit 7.]

Attorney Charles C. Goetsch was appointed Chairman, and the Chief Clerk of the Court, Kevin Rowe, was appointed Reporter. Informal subcommittees were formed as needed to address particular issues, but in general the Group functioned as a whole. A total of eight formal meetings were held prior to the issuance of the Report.

The Group began its activities by analyzing the Administrative Office's statistical data regarding the District's civil and criminal dockets, a process which has been repeated as the latest figures become available. [The most recent statistical analysis is attached as Exhibit 6.] The next step taken was to personally interview at length every district judge and magistrate judge in the District. These interviews were wide-ranging, but all attempted to elicit each judge's insights regarding the causes for expense and delay in civil litigation as well as their suggestions as to how best to reduce such expense and delay.

The Group then devised and mailed a questionnaire to the attorneys and parties in 52 cases which had been pending for at least four years at the time they were closed. The questionnaire was designed to encourage comments from the attorneys and parties as to why each case had been pending for so long. A total of 260 questionnaires were mailed, and over 50 responses were received.

In order to generate comments and suggestions from a wider range of practicing attorneys, the Group held three meetings in conjunction with the Federal Practice Section of the Connecticut Bar Association. The first such meeting was held after one year of the Group's activity, and was used to share the Group's preliminary findings and focus. The next such meeting was devoted to a discussion of how best to utilize magistrate judges, and was greatly aided by the presense of Attorney Douglas Lee, a representative from the Administrative Office's Magistrate Judge Division. The final joint meeting was used as a forum for the presentation and discussion of the new Local Rules drafted by the Group for inclusion in the recommended Plan.

Consistent with the Group's desire to formulate a Plan that enjoys a consensus of support among both the bar and the bench, prior to submitting its formal Report and Plan the Group submitted its draft of the new Local Rules to the active district judges for their informal feedback. The judges' response proved valuable and increased the efficiency of the final steps of the process.

C. Cost and Delay

Based on its interviews with the judges, the responses to its questionaires, and its discussions with the bar, the Group made several findings regarding the main causes of delay and expense in civil litigation. Unnecessary and unproductive discovery disputes are one such cause, along with the overuse of discovery tools by attorneys

seeking to exact any advantage regardless of the cost. The most used tool for case management was the scheduling of pre-trial activity, and the least used tool was the scheduling of an early firm trial date.

One cause of delay particular to this District has been the lack of adequate judicial manpower. This District has been entitled to two new judgeships for the past two years. Currently there are three vacancies waiting to be filled out of a total of eight authorized judgeships. Obviously, if these positions had been filled promptly the size of each judge's docket would have been reduced and their ability to reach and try civil cases would have increased proportionately.

Another important cause of delay in civil litigation was the effect of the criminal docket. The negative effect of the criminal docket on the timely prosecution civil litigation cannot be overstated. Criminal matters take precedence over civil cases, and the Speedy Trial Act, 18 U.S.C. §1361 et seq., combines with the mandatory minimum sentences of the new Federal Sentencing Guidelines to generate an ongoing backlog in the trial of civil cases. Unfortunately, there is not much that can be done by the bar or bench to ameliorate the adverse effect of such federal criminal legislation. And the recent tendency of Congress to enact increasing numbers of federal criminal statutes only exacerbates this intractable problem.

While recognizing that significant delay does exist, the Group also was sensitive to the legal culture prevalent in this District. Perhaps due to the relatively small size of the bench and bar in this District, generally an atmosphere of mutual respect and consideration prevails. The Group does not believe in change merely for the sake of change, and there are many aspects of the District that are functioning quite well.

For example, the District has had a Special Masters Program in place for 27 years. Enabled by Local Rule 28, the Special Masters Program is a form of court-referred mediation. The special masters for each case are appointed from a list of experienced attorneys who volunteer their time to the District. Each case is heard by a pair of special masters, one with experience on the plaintiff's side and the other with experience on the defendant's side. Each party submits an ex parte memorandum to the special masters prior to the conference date, and the masters hold the conference in one of the federal courthouses. After listening to both sides and asking questions, the special masters confer between themselves and make a recommendation as to settlement. They then file a report with the court as to whether the case has settled. Approximately 40% of the cases referred to the Special Masters Program settle as a result of such efforts.

Similarly, the District already has in place a requirement in the Local Rules that attorneys cannot file a discovery motion without first contacting their opponent and attempting in good faith to narrow or to resolve the dispute. Local Rule 9(d)(4) requires the filing of an Affidavit certifying such attempts before a discovery motion will be considered by a judge. And pursuant to Local Rule 11(b)(3) the District also requires that trial attorneys and parties attend settlement conferences with the authority to make and accept final demands and offers. The District consistently has been a leader in the nation in the efficient utilization of jurors. The District's asbestos docket, while relatively large, was kept under control by the focussed efforts of District Judge Alan H. Nevas. As a result of a ruling last year by the Judicial Panel on Multidistrict Litigation, all asbestos cases nationwide were transferred to the Eastern District of Pennsylvania. Thus, no changes in the procedures designed to handle those cases are appropriate.

In addition to the Special Masters Program, the District does utilize other alternative dispute resolution methods such as mini-trials, summary jury trials, and

arbitration. These other methods, however, are employed only in a small number of cases, and depend in large part on the services of Senior District Judge Robert C. Zampano. Four District Judges also utilize the services of Parajudicial Officers (retired attorneys who volunteer their time to mediate selected cases and who work out of the chambers of a district judge).

A preliminary focus for change emerged from the Group's initial examinations of the causes of expense and delay in civil litigation: an emphasis on early intervention. The idea was that some form of intervention early on in the litigation process would be desirable for two reasons: first, the possibility of settlement could be explored prior to the expenditure of resources by the court and the parties, and second, if settlement was not possible or indicated, then the conference at least could streamline the litigation process by resolving discovery disputes, setting discovery schedules, and narrowing legal issues. In general, it was felt that such a conference could set the stage for the most efficient resolution of the case by settlement or trial.

However, the Group was mindful of the primary principle guiding a physician's approach to a patient: first, do no harm. In other words, the last thing the Group wanted to do was to recommend changes in the Local Rules that -- while sounding attractive in theory -- actually would have the practical effect of <u>increasing</u> cost and delay in civil litigation. While talking to the district judges, magistrate judges, and members of the bar about the possibility of an early intervention program, all agreed that, to be meaningful, an early intervention conference must be conducted at some length in order to allow the judge to dig into the facts and issues involved. But everyone also acknowledged that in this District the judges and magistrate judges are staggering under the burden of their civil and criminal dockets and simply cannot afford to expend the large blocks of time necessary to conduct meaningful early intervention

conferences. This presented the real danger that mandatory early intervention conferences inevitably would degenerate into another pro forma step in the litigation process, wasting the time of the judges and the parties alike and actually increasing cost and delay.

The Group also considered the initial disclosure of core information along the lines of the rule proposed by the Judicial Conference's Committee. The purpose of such a rule is to force the disclosure of core information at an early stage of the litigation without any use of discovery demands or motions. The benefit of such a rule is that the early disclosure will lay the groundwork for settlement or the narrowing of discovery and legal issues, and enable early intervention conferences to be more productive. The danger of such a rule is that in reality it will generate satellite disputes over the scope and content of the initial disclosure. The Group feared that it could become a more costly method of obtaining information which is routinely disclosed now pursuant to the usual interrogatories and requests to produce. Also, it appears likely that some form of an initial disclosure rule will be enacted on a national level within the next year, and the Group felt that it would be more desirable to be governed by a uniform national rule rather than an idiosyncratic Local Rule.

Finally, the Group considered how to maximize the efficient expenditure of time and resources by the District's magistrate judges. The quality and dedication of the magistrate judges in the District is well-known, and they are held in high esteem by both the bench and bar. They capably handle dockets whose size and complexity rivals that of any district judge. Indeed, the Group recognized that if there is some way to divert the more routine aspects of the magistrate judges' dockets, thereby freeing them to focus on more challenging matters, then the District's civil docket as a whole would benefit tremendously.

It was with this goal in mind that the Group looked at the effect of Social Security appeals on the efficiency of the magistrate judges. Currently, all appeals from denials of Social Security benefits routinely are referred to the already overburdened dockets of the magistrate judges, and it is apparent that the adjudication of these cases consumes a disproportionate amount their time and effort. Such appeals are not amenable to settlement and virtually every one must be decided on the merits with a written decision. There is a constant backlog in the decision of these cases simply because the magistrate judges do not have the time to promptly dispose of such administrative appeals. Given the number of these cases and the amount of magistrate judge resources they absorb, the referral of Social Security cases within the District is definitely a problem area requiring a productive solution. The Group's response to this problem is to recommend that the District hire a staff attorney to handle the Social Security appeal cases, just as a staff attorney currently handles the pro se cases within the District.

III. RECOMMENDATIONS AND THEIR BASIS

The Group then considered how best to accomplish its goal of facilitating settlements and the narrowing of discovery and legal disputes without further depleting the time and resources of the District's judges, magistrate judges, and clerks office. The referral of cases to private alternative dispute resolution (ADR) providers was one possibility, and has been recommended in other Districts. The Group was hesitant, however, to limit the referral of federal cases to private ADR providers. Given the relatively high cost of processing a case through private ADR providers, the Group was concerned that the exclusive delegation of ADR programs to such providers in effect will create a two-tiered system of justice: one for the rich (i.e., those able to afford private ADR) and one for the middle-class and the poor (those only able to afford the courts).

Another concern was that the staff and neutrals employed by private ADR providers are not accountable to the District's judges nor to any code of ethics.

The Group's response to these concerns is to recommend that the District Judges adopt two new Local Rules as their Civil Justice Expense and Delay Reduction Plan. Proposed Rule 36 enables the referral of federal cases to all manner of voluntary ADR methods, and the proposed Rule 37 adopts a court-annexed ADR program that all parties can afford and that is accountable to the District's judges. These proposed Rules are part of the Group's recommended Plan and are attached as Exhibits 1 and 2.

Rule 36 enables--for the first time--the federal court-sanctioned voluntary referral of federal cases to private ADR providers. Thus parties can agree to utilize the private ADR provider of their choice. At the same time, however, Rule 36 does not limit the choice of parties only to private ADR providers. The Rule specifically enables the parties to agree to utilize a joint state-federal court-annexed ADR program. The Rule requires--among other things--that the parties and judge agree on the form, scope, effect, and scheduling of the ADR session. It also allows for the stay of judicial proceedings (such as discovery, motions, and trial) and guarantees the confidentiality of the ADR proceedings. Of particular importance, Rule 36 provides that if the case does not settle, the ADR provider may proceed to conduct an early intervention type conference by encouraging the parties to resolve discovery disputes, narrow the legal issues, and stipulate to facts.

Rule 37 specifically appoints Sta-Fed ADR, Inc. as the District's joint state-federal court-annexed ADR program. Sta-Fed ADR, Inc. is the not-for-profit corporation created to serve as the joint vehicle for state and federal court-annexed ADR in Connecticut. It is not the creature of the Group, although one of the Group's members, Senior United States District Judge Robert C. Zampano, has been instrumental in its genesis and development.

A detailed Overview of Sta-Fed ADR, Inc. is attached as Exhibit 3. That Overview confirms that Sta-Fed ADR, Inc.: will not deplete the time or resources of the active judges because it will use primarily senior federal and state judges as mediators; it will not place any undue burden on the District's clerks office because it will be self-administered through its own separate clerks office; and it will be affordable for all parties because it will levy users' fees on a sliding scale, with a waiver of fees available to those unable to pay. A Memorandum Opinion addressing and resolving several legal and ethical issues raised by the proposed new Local Rules 36 and 37 and by the adoption of Sta-Fed ADR, Inc. as the District's court-annexed ADR program is attached as Exhibit 4.

Civil justice reforms succeed only if they have the solid backing of the bench, the bar, and the public. Sta-Fed ADR, Inc. has such backing in this District, having attracted the support of the District's judges as well as that of Connecticut's Chief Justice, Governor, and legislature. Bold in concept, Sta-Fed ADR, Inc. is an exciting experiment that has the potential to provide high-quality, affordable ADR which will significantly reduce the cost and delay of civil litigation. The Group's recommendation that Sta-Fed ADR, Inc. be adopted as the District's court-annexed ADR program is consistent with the Group's goal of recommending meaningful reforms which actually will reduce -- rather than inadvertently increase -- the cost and delay of civil litigation.

While recommending that the District adopt Sta-Fed ADR, Inc. as its court-annexed ADR program, the Group leaves it up to the District Judges to decide whether to do so by Local Rule or by a standing Judges Order. Accordingly, the Group includes as part of its Plan a possible Judges Order as well as a proposed Local Rule 37 [see Exhibit 2].

Finally, the Group recommends that the District apply to the Committee on Court Administration and Case Management for the funding necessary to hire a full-time staff attorney whose primary responsibility will be to handle all the Social Security appeals within the District. This will free up the highly capable magistrate judges to focus their energies on more complex matters, thus lending more substantial aid to the hard-pressed district judges. And most likely the hiring of such a staff attorney will reduce the delay in the resolution of the District's Social Security cases because such an individual will develop the expertise and economies of a specialist.

List of Exhibits

1. Proposed Rule 36
2. Proposed Rule 37 and Judges Order
3. Overview of Sta-Fed ADR, Inc.
4. Memorandum Opinion
5. Recommendation Regarding Social Security Cases
6. 1992 Statistical Data Regarding District of Connecticut
7. Civil Justice Advisory Group Membership List

RULE 36. Alternative Dispute Resolution (ADR)

1. In addition to existing ADR programs (such as Local Rule 28's Special Masters Program) and those promulgated by individual judges (e.g., Parajudicials Program), a case may be referred for voluntary ADR at any stage of the litigation deemed appropriate by the parties and the judge to whom the particular case has been assigned.

2. Before a case is referred to voluntary ADR, the parties must agree upon, subject to the approval of the judge:

(A) The form of the ADR process (e.g., mediation, arbitration, summary jury trial, minitrial, etc.);

(B) The general scope of the ADR process (e.g., settlement of all or specified issues, resolution of discovery schedules or disputes, narrowing of issues, etc.);

(C) The ADR provider (i.e., a joint state-federal court-annexed ADR program; a profit or not-for-profit private ADR organization; or any qualified person or panel selected by the parties);

(D) The effect of the ADR process (e.g., binding or nonbinding).

3. When agreement for a voluntary ADR referral has been reached, the parties shall file jointly for the judge's endorsement a "Stipulation For Reference to ADR." The Stipulation, subject to the judge's approval, shall specify:

(A) The form and scope of ADR procedure and the name of the ADR provider agreed upon;

(B) The judicial proceedings, if any, to be stayed pending ADR (e.g., discovery matters, filing of motions, trial, etc.);

(C) The procedures, if any, to be completed prior to ADR (e.g., exchange of documents, medical examination, etc.);

(D) The effect of the ADR process (e.g., binding or nonbinding);

(E) The date or dates for the filing of progress reports by the ADR provider with the trial judge or for the completion of the ADR process; and

(F) The special conditions, if any, imposed by the judge upon any aspect of the ADR process (e.g., requiring trial counsel, the parties, and/or representatives of insurers with settlement authority to attend the voluntary ADR session fully prepared to make final demands or offers).

4. Attendance at ADR sessions shall take precedence over all non-judicially assigned matters (depositions, etc.). With respect to court assignments that conflict with a scheduled ADR session, trial judges should make every effort to excuse trial counsel temporarily to attend the ADR session. In this regard, trial counsel, upon receiving notice of an ADR session, immediately shall inform the trial judge and opposing counsel in matters scheduled for the same date of his or her obligation to appear at the ADR session.

5. All ADR sessions shall be deemed confidential and protected by the provisions of Fed. R. Evid. 408 and Fed. R. Civ. P. 68. No statement made or document produced as part of an ADR proceeding, not otherwise discoverable or obtainable, shall be admissible as evidence or subject to discovery.

6. At the conclusion of the voluntary ADR session(s), the ADR provider's report to the judge shall merely indicate "case settled or not settled," unless the parties agree to a more detailed report (e.g., stipulation of facts, narrowing of issues and discovery procedures, etc.). If a case settles, the parties shall agree upon the appropriate moving papers to be filed for the trial judge's endorsement (Judgment, Stipulation For Dismissal, etc.). If a case does not settle but the parties agree to the narrowing of discovery matters or legal issues, then the ADR provider's report shall set forth those matters for endorsement or amendment by the judge.

RULE 37. Court-Annexed ADR

1. Pursuant to Title 28, United States Code, Section 471 et seq. and to Local Rule 36, Sta-Fed ADR, Inc. is hereby appointed as the District's joint state-federal court-annexed ADR program.

2. An active federal judge may be assigned by the Chief Judge to serve as a member of the Board of Directors of the joint state-federal ADR program, Sta-Fed ADR, Inc.

3. A senior federal judge may serve as a mediator, neutral, officer, member of the Board of Directors, or consultant to the joint state-federal ADR program, Sta-Fed ADR, Inc.

ORDER TO BE PASSED AT JUDGES' MEETING

After considering the recommendations of the Civil Justice Advisory Group appointed pursuant to Title 28, United States Code, Section 478, the United States District Court for the District of Connecticut hereby implements pursuant to Title 28, United States Code, Section 471, et seq. a Civil Justice Expense and Delay Reduction Plan by:

adopting the new Local Rule 36 (copy attached hereto);

appointing Sta-Fed ADR, Inc. as the District's joint state-federal court-annexed ADR program;

declaring that an active federal judge may be assigned by the Chief Judge to serve as a member of the Board of Directors of the joint state-federal ADR program, Sta-Fed ADR, Inc.; and

declaring that a senior federal judge may serve as a mediator, neutral, officer, member of the Board of Directors, or consultant to the joint state-federal ADR program, Sta-Fed ADR, Inc.

Adopted by the Court

December , 1992

Jose A. Cabranes
Chief Judge

T.F. Gilroy Daly
U.S. District Judge

Peter C. Dorsey
U.S. District Judge

Alan H. Nevas
U.S. District Judge

Alfred V. Covello
U.S. District Judge

AN OVERVIEW OF THE PROPOSED JOINT STATE-FEDERAL ADR PROJECT

Submitted, October 28, 1992, by:

Aaron Ment, Chief Administrative Judge,
State of Connecticut

Robert C. Zampano, Senior U.S. District Judge

I. General Background

The growth of Alternative Dispute Resolution (ADR) programs throughout the United States has been remarkable with over 1200 various projects serving state and federal courts. In addition, private provider organizations are increasing at an astonishing rate.

Under the Civil Justice Reform Act of 1990, every federal district court is required to promulgate a justice expense and delay reduction plan which must consider and may include "authorization of alternative dispute resolution programs in appropriate cases . . . ." 28 U.S.C. § 473(a)(6). In the District of Connecticut, a Civil Justice Advisory Group, chaired by Attorney Charles C. Goetsch, has been appointed to recommend proposals to comply with the mandates of the Act.

On the state side, in December 1990, a Task Force on ADR, appointed by Chief Justice Ellen Ash Peters, strongly recommended that a series of ADR programs, including a mediation program, be instituted to relieve the problems of delay and expense resulting from the increasing volume of civil cases.

It is generally agreed that neither jurisdiction on its own has to date been able to institutionalize workable, effective ADR programs to meet the goals set forth in both the state and federal studies and plans.

II. The Concept And Pilot Program

The basic concept is to have a not-for-profit corporation serve as the vehicle to provide significant, uniform, and effective ADR programs for state and federal court litigants.

The corporation initially will conduct a pilot program, which will be limited in terms of the number of cases processed and the geographic area serviced. If the pilot program is successful, the project will be expanded and modified based on the results of the pilot program.

However, if either adequate funding or required support from the bar and the judicial, legislative and executive departments is not forthcoming, neither the concept nor the pilot program will be implemented.

III. The Feasibility Study

The feasibility of a joint state and federal ADR project has been explored during the last three months.

Among others, the concept has been explained to and discussed with Chief Judge Ellen Ash Peters, Chief Judge José A. Cabranes, members of the state and federal judiciaries, representatives of the Governor's Office, prominent members of the State Legislature, officials of insurance companies, officers and the Board of Governors of the Connecticut Bar Association, over 100 of the State's most active trial lawyers, national ADR organizations, and various experts in the ADR field.

As a result of those discussions, the State's Chief Court Administrator, Aaron Ment, and Senior United States District Judge Robert C. Zampano have concluded that the project is a viable one that should be promptly implemented for approval by the state and federal judicial bodies.

IV. The Basic Framework

A. The Corporate Structure

A condition precedent to the implementation of the concept for a joint state-federal ADR project and to obtain foundation grants is that the ADR corporation must qualify as a not-for-profit entity under Section 501(c)(3) of the Internal Revenue Code of 1986.

As a general rule, an IRS certification takes between three to six months. Therefore, in order not to unduly delay the implementation of the joint state-federal ADR pilot program, the initial steps to qualify for IRS certification are already in progress. A Section 501(c)(3) application will be filed in the near future. Of course, in the event the project is aborted at any stage for any reason, these preliminary steps will be immediately withdrawn and vacated.

The name of the corporation (which can be changed later) is Sta-Fed ADR, Inc.; incorporation papers prepared by Cummings & Lockwood were filed by Judge Zampano on September 30, 1992.

A representative Board of Directors will direct and manage the Corporation's business and make all major policy decisions. The Board will consist of not less than three nor more than fifteen members, with staggered terms (one, three, and four-year terms). An Executive Director, Deputy Executive Director, staff, and Officers of the Corporation will conduct the day-to-day business of the Corporation. It is anticipated that the Officers of the Corporation, Executive Director and Deputy will receive no compensation during the first year.

The main divisions of the Corporation will be Administrative, Clerk's Office, Legal, and Mediators.

The Corporation's business, including the ADR mediation sessions, will be conducted in leased facilities convenient to users in the area of the pilot program, with a minimum burden upon the present state and federal courts' personnel, Clerks' Offices, and staffs.

B. ADR Options

ADR generally provides a menu of options: mediation, Special Masters Programs, arbitration, summary jury trials, early neutral evaluation, binding and nonbinding minitrials, and various hybrid mandatory and voluntary approaches to ADR in civil cases.

C. Mediation

Reliable studies reveal that mediation has proven the most effective and most popular of the various ADR techniques.

In its simplest form, mediation is settlement negotiations between the parties facilitated by a skilled neutral. The trial counsel, the parties and/or an insurer's representative with settlement authority must attend the mediation session.

Mediation can be a process by itself, or it can be a component of other ADR techniques, including binding and nonbinding mediation with an agreed-upon panel, or it can be a part of an early evaluation program with one or more neutrals or experts, or it can be a feature of a minitrial before a neutral or a panel selected by the parties, and so forth.

The mediator's function is to assist the parties to arrive at a reasonable, amicable, and voluntary resolution of their dispute. The mediator does not adjudicate any factual or legal issues. If the case does not settle, it is transferred back to the court docket for trial without penalty or sanctions; if the case settles, a stipulated settlement order is signed by the trial judge.

The mediation process involves a confidential exchange of settlement proposals advanced by the parties or by the neutral either during a joint conference or during ex parte communications between a party, counsel, and the neutral. Even if the case does not settle, the mediation process may serve to identify and narrow the issues; define the parameters of discovery procedures; crystallize each party's underlying concerns; and explore bases for a settlement agreement in the future.

It has been decided that mediation shall be the ADR procedure that will be instituted for the pilot program in the New Haven area.

D. Voluntary Participation

It has been decided that, for the purposes of the pilot program, referrals to the mediation process shall be on a wholly voluntary basis for the following reasons:

(1) Most of the trial lawyers interviewed recommended a voluntary approach to ADR;

(2) Litigants and lawyers who are committed to the mediation process are more likely to participate in a meaningful fashion than those who are required by court order to attend against their will; and

(3) The litigants who voluntarily request ADR will be more receptive to paying users' fees, as discussed below.

E. Types of Cases

Any civil case, including domestic, in which all the parties consent to ADR will be eligible for referral.

F. Other Features

Some essential elements of the mediation process will be:

(1) Trial counsel, the parties, and/or representatives of insurers, must attend the mediation sessions;

(2) All mediation proceedings shall be deemed confidential. All statements made or documents produced during the mediation session shall be deemed made or produced "for settlement purposes only";

(3) Upon referral to the Corporation, the trial judge may stay all formal proceedings in the case (discovery, filing of motions, etc.);

(4) The trial judge shall make every effort to excuse trial counsel from other state or federal trial court appearances to attend scheduled mediation sessions. Upon receiving notice of a mediation session, counsel shall promptly inform the trial judge and opponents in matters scheduled for the same date of his or her obligation to appear at the mediation session;

(5) The mediation session will be conducted expeditiously after the referral to ADR; and

(6) Neither the Corporation nor the mediator shall be liable for any act or omission in connection with the mediation.

G. Mediators

There is little doubt that the ultimate success of the ADR services depends on the competence and quality of the mediators.

Mediators may be assembled from five sources: (1) senior State and federal judges and State judge referees; (2) retired lawyers; (3) practicing lawyers; (4) a neutral selected by agreement of the parties; and (5) mediators associated with private providers.

For the purposes of the pilot program, the core group of mediators will be selected from the pool of available State senior judges, judge referees, and federal senior judges. However, if demand or necessity requires, mediators will be selected from any one or more of the other categories mentioned above.

H. Training of Neutrals

It is imperative that litigants and their counsel have the utmost confidence in the skill and professionalism of the mediators.

Therefore, every mediator must complete a training program before being assigned to a mediation session.

I. Support Staffs For The Mediators

The ADR project will not place an added or undue burden upon present State or federal courts' support staffs such as the Clerks' Offices.

The Corporation will have a separate "ADR Clerk's Office" and staff that will administer almost all aspects of the project.

In addition, the Corporation will hire paralegals, attorneys, and other personnel who will be assigned to assist the mediators in the performance of their duties.

J. Funding The Project

It is anticipated that the project will be self-supporting from users' fees within one to two years after commencement of the project.

"Seed" or "start up" funds will be obtained from diverse sources: State funds, grants from foundations, and other acceptable contributors.

K. Users' Fees

The consensus of the trial lawyers' interviewed is that users' fees should be levied on a sliding scale.

Total or partial waiver of users' fees will be available to any party who is financially unable to pay the users' fees.

Special users' fees will be set for matters involving non-monetary demands (injunctions, etc.), complex matters involving monetary and non-monetary demands (class actions, etc.), and for other claims or counterclaims requiring individualized services.

L. Mediators' Compensation

Study after study reveal that, if ADR is an important component of dispute resolution, it cannot depend on a system of volunteers to provide it. While volunteers will be welcomed and incorporated into the Corporation's ADR programs, the Corporation's mediators will be reasonably compensated.

With respect to State senior judges and judge referees who will devote a portion of their time to ADR, it is anticipated that the necessary rule or legislative amendments will be enacted to enable them to accept additional compensation from the Corporation for their ADR services without any loss or diminution of their existing benefits.

With respect to federal senior judges, they cannot and will not be paid by the Corporation for their ADR services.

With respect to retired State or federal judges, they will be paid reasonable compensation by the Corporation for their services.

Members of the bar and other neutrals will receive reasonable compensation for their services, unless they volunteer their services.

Parties who agree upon a private ADR provider will pay the neutral's fees set by the private provider.

M. Evaluation

The ADR project will be monitored and evaluated periodically to determine: whether it is meeting its intended goals; whether the pilot program should be extended to other areas of the State; and what adjustments to the pilot program are desirable.

CUMMINGS & LOCKWOOD

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December 10, 1992

VIA FAX

Charles C. Goetsch, Esq., Chairman
District of Connecticut
Civil Justice Advisory Group
Cahill, Goetsch & DiPersia, P.C.
43 Trumbull Street
New Haven, CT 06511

Re: STA-FED ADR, INC.

Dear Mr. Goetsch:

At the request of Chief Judge Cabranes we have reviewed the proposed new Local Rules 36 and 37 and the joint state-federal ADR project involving Sta-Fed ADR, Inc. and are providing this opinion to the Civil Justice Advisory Group, and in turn to the Judges of the District of Connecticut, regarding the authority of the District Court to adopt the proposed rules and the ethical propriety of the ADR plan they embody.

The issues to which we have been requested to direct our attention are:

1. Whether the District Court is empowered under the Federal Rules

and applicable statutes to adopt the proposed new Local Rules 36 and 37.

2. Whether it is ethically appropriate for a senior district judge to act as a mediator on behalf of Sta-Fed ADR, Inc.

3. Whether it is appropriate for an active district judge to sit on the Board of Directors of Sta-Fed ADR, Inc.

4. Whether principles of judicial immunity apply to judges or mediators or to the District Clerk's Office personnel involved in administrative aspects of matters referred for voluntary ADR.

5. Whether the possible adverse competitive effect the operation of Sta-Fed ADR, Inc. may have on private providers of ADR services presents any anti-trust issues.

General Authorization For Proposed Rules 36 and 37

The Civil Justice Reform Act of 1990 (28 U.S.C. § 471, et seq.) requires every district court to promulgate a civil justice expense and delay reduction plan. Such plans may include "alternative dispute resolution programs . . . that the court may make available . . ." Id. § 473(a)(6). The Act specifically contemplates that the report of the Civil Justice Advisory Group appointed by the District Court will include "recommended measures, rules, and programs" for implementation of the plan. Id. § 472. (Emphasis supplied.)

Accordingly, we conclude that the adoption of new local rules under the general authority of F.R.C.P. Rule 83 is specifically contemplated by the Act and is the appropriate method by which to implement the ADR program that the district court will make available.

The use of a nonprofit corporation as an agency through which to implement an ADR program is not inconsistent with the federal rules. Even before the Civil Justice Reform Act of 1990, the Sixth Circuit upheld an ADR plan, adopted by local rule in the Eastern District of Michigan, against the challenge that it violated the right to a jury trial and conflicted with the Federal Rules of Civil Procedure. The local rule authorized district judges to refer any diversity case involving only monetary damages to mediation. Referral by the court was mandatory on the parties, but the result could be rejected and trial de novo obtained, by jury if appropriate. Rhea v. Massey-Ferguson, Inc., 767 F.2d 266 (6th Cir. 1985).

In Michigan the only entity to which such referrals are made is the Mediation Tribunal Association (MTA), an independent nonprofit association of lawyers organized in 1971. The program is authorized by statewide court rules for the state courts and by local rules for the

federal district courts. Wayne D. Brazil (U.S. Magistrate Judge, N.D. Calif.) "Institutionalizing Court ADR Programs", pp. 150-52 (April 19, 1991).

The Michigan local rules contained a provision imposing costs and attorney's fees on a party who demanded a trial de novo and did not better its mediation award by 10%. This enforcement provision (which has no counterpart in proposed Rule 36) was subsequently held to be invalid, but the validity of the ADR program was not questioned. Tiedel v. Northwestern Michigan College, 865 F.2d 88 (6th Cir. 1988).

Under proposed Rule 36, referral to ADR is voluntary; the parties may select Sta-Fed ADR, Inc. or another provider, and the result is binding only if the parties so agree. Accordingly, the ADR program contemplated by Rule 36 seems far less restrictive than the Michigan ADR program. Michigan's use of a nonprofit entity to provide the ADR services has not been successfully challenged, and its program has been in effect for more than twenty years.

Senior Federal Judges As Mediators

The proposed joint state and federal court annexed ADR plan contemplates that the mediators and

neutrals supplying ADR services through Sta-Fed ADR, Inc. would include senior federal district judges, senior state court judges and state referees. The senior federal judges would serve without any additional compensation for their services.

From 1972 until 1990 the Code of Judicial Conduct promulgated by the American Bar Association and adopted by the federal and Connecticut judiciaries contained a blanket prohibition against judges acting as arbitrators or mediators. Canon 5 E (which is still in effect for the Connecticut Judiciary) stated simply:

> A judge should not act as an arbitrator or mediator.

Despite this prohibition, there is nothing inherently wrong with judges acting as arbitrators or mediators. Prior to 1972 judges were permitted to act as arbitrators under old Canon 31, provided their activity did not interfere with their judicial duties and was not prohibited by law. When the 1972 Code of Judicial Conduct was adopted by the ABA, the drafters considered statistics indicating there had been very limited use of judges as arbitrators. In addition:

> The Committee received information from other sources about potential conflicts inhering in a judge's acting as an

> arbitrator: the arbitration proceeding could come before the court on which he sits; the court could be drawn into social and political controversies in which a judge acted as an arbitrator; the judicial office could be exploited in an effort to secure its dignity and prestige in support of an award; and judicial time could be diverted in a case in which a judge's fee would be thousands of dollars.

F. Wayne Thode, Reporters Notes to Code of Judicial Conduct, p. 89 (ABA 1973).

Based on these considerations, the drafters of the ABA Code decided that a blanket prohibition against acting as an arbitrator was appropriate and that the same reasoning applied to acting as a mediator. Id. The prohibition of Canon 5 E was applied to full-time judges (which included senior federal judges) but not to part-time judges. In Connecticut, senior state court judges were excepted from the prohibition of Canon 5 E until 1986, when that exception was deleted from the Compliance section of the Code.

We note that one of the above ethical concerns that led to the blanket prohibition was that compensation received for such services would create a conflict of interest, and that needed judicial resources might as a result be diverted into compensated private activities.

Since senior federal judges will not be compensated by Sta-Fed ADR, Inc., that conflict issue will not arise under proposed Rule 37. Moreover, the basic premise of the plan embodied in Rules 36 and 37 is that employment of senior judges as mediators in a supervised ADR program will secure the maximum benefits for the judicial system from the services of those senior judges and will not improperly divert judicial resources.

The other more intangible and more speculative potential conflicts listed by Professor Thode, supra, e.g., getting involved in social or political controversies, exploitation of judicial prestige etc., should be readily avoidable. The types of cases assigned for voluntary ADR under Rule 36 will be subject to the control of the active federal judges. In addition, state and federal judges on the Board of Directors of Sta-Fed ADR, Inc. should be able to establish operating policies that would avoid or minimize such problems if they were to arise.

Accordingly, while there are potential issues or conflicts that might arise from allowing judges, without restriction, to act as private arbitrators or mediators, there is no fundamental underlying ethical problem that requires a blanket prohibition of such activity. This was

recognized in 1990 when the ABA made substantial revisions in its Code of Judicial Conduct. The provision regarding arbitration and mediation, now in ABA Canon 4 F, provides:

> F. **Service as Arbitrator or Mediator.** A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law*.
>
> Commentary:
>
> Section 4F does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties. (Emphasis supplied.)

The asterisk signifies that the word "law" in the Code is a defined term. It "denotes court rules as well as statutes, constitutional provisions and decisional law."

On September 22, 1992, the Judicial Conference approved revisions to the Code of Conduct for United States Judges (the "Code of Conduct") that included adopting the text of the 1990 ABA Canon 4 F as federal Canon 5 E. Although the definitions were not specifically incorporated into the Code of Conduct, we do not believe there is any basis for inferring any different interpretation of the word "law." Accordingly, we conclude that under the recent amendments, the Code of Conduct expressly recognizes that federal judges may ethically act in a private capacity as

arbitrators or mediators if authorized by a rule of court. From the standpoint of judicial ethics it is not necessary to consider whether a senior judge serving as a mediator or neutral on behalf of Sta-Fed ADR, Inc. is acting in a private capacity or in discharge of his judicial duties. In either event, his conduct will be ethical since it will be specifically authorized by court rule.

Active District Judge As A Member Of The Board Of Directors

Proposed Rule 37 provides that an active federal judge may be assigned to serve as a member of the Board of Directors of Sta-Fed ADR, Inc. While the Rule is silent on the subject of compensation, we understand that no directors fees or other remuneration will be paid for these services. The purpose of the appointment is to oversee the activities of Sta-Fed ADR, Inc. as the provider for the court annexed ADR program.

Canon 4 of the Code of Conduct provides that a judge may engage in extra-judicial activities "to improve the law, the legal system and the administration of justice." Section C of Canon 4 states:

> A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice.

In our opinion Sta-Fed ADR, Inc. is an organization devoted to improvement of the administration of justice within the meaning of Canon 4 C, and federal judges are therefore expressly authorized to serve on its Board of Directors.

Since the judge appointed to serve on the Board of Directors will be serving as a representative of the District Court, we do not believe there is any actual conflict or appearance of conflict between the judge's fiduciary responsibilities to the corporation and his judicial responsibilities.

Judicial Immunity

The common law principle of judicial immunity provides absolute immunity to judges for acts done in the exercise of their judicial function or capacity. The same absolute protection is given to Court Clerks from liability for acts which are judicial or quasi judicial in nature or which they are required to perform under court order or at a judge's direction. Restatement, Torts (Second) § 895D; 48A C.J.S. Judges, § 86; 21 C.J.S. Courts, § 256. However, as the Supreme Court noted in discussing immunity at length in Forrester v. White, 484 U.S. 219, 227 (1988):

> Difficulties have arisen primarily in attempting to draw the line between truly judicial acts for which immunity is appropriate and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches. (Emphasis in original.)

The Court went on to note that the decided cases "suggest an intelligible distinction between judicial acts and the administrative, legislative or executive functions that judges may on occasion be assigned by law to perform." Id.

However, other forms of sovereign immunity apply to nonjudicial governmental acts. The adoption of the new rules is immune as a quasi legislative act. Restatement, Torts (Second) § 845D(2); cf. Forrester v. White, supra, at 228, 230. The decision of a trial judge to refer a case to ADR may be administrative rather than judicial, but in either event it should be clothed with sovereign immunity as a discretionary act in the performance of a governmental function. Restatement, Torts (Second) § 895D(3)(a).

The actions of the active district judge who sits on the Board of Directors of Sta-Fed ADR, Inc. at the direction of the Chief Judge may or may not be clothed with sovereign immunity. To the extent the acts are in exercise of a discretionary governmental function as a representative of

the District Court, the sovereign immunity argument can be made. Other decisions involving administration of the entity, e.g., hiring or firing personnel, would not be clothed with immunity. See Forrester v. White, supra.

We found no authorities specifically discussing the liability, or immunity from liability, of mediators. However, applying the broad principles discussed above to the present context, we would expect that when senior judges are assigned to provide ADR services through Sta-Fed ADR, Inc. in a binding mediation, they are engaged in performing a judicial or quasi judicial act and would be clothed with some degree of judicial immunity. See 6 C.J.S. Arbitration, § 74 discussing the immunity of arbitrators.

In the case of nonbinding mediation it is difficult to identify a quasi judicial act causing damage. It is therefore difficult to speculate on the type of claim that might arise in such a situation. We are unable to express any opinion as to common law immunity in this context, except to say that the defense of sovereign immunity should be available as to discretionary acts of senior district court judges assigned to engage in the process of mediation, whether these services are rendered through Sta-Fed ADR, Inc. or in the course of their normal judicial duties.

Retired judges, attorneys and other private citizens providing ADR services at their own election and for compensation would not appear to be clothed with sovereign immunity unless it can be established that the entire operation of Sta-Fed ADR, Inc. is so closely supervised by state and federal judges that it amounts to a government agency or a private agency carrying out defined governmental policies. Cf. Hoover v. Ronwin, 466 U.S. 558 (1984); Patrick v. Burget, 486 U.S. 94 (1988); Washington State Elect. Contractors Ass'n. v. Collins Electric Co., 1991-1 Trade Cases CCH ¶ 69406 (cases dealing with the state action exception to the antitrust laws). However, to the extent that the act complained of is quasi judicial, common law principles of arbitral immunity would apply.

Without a specific fact situation to consider we are unable to express any opinion with respect to the extent of the availability of judicial immunity for the Clerk's Office in relation to activities involving the ADR project.

Antitrust Issues

Newspaper articles discussing the proposed state-federal ADR project quoted at least one private ADR service provider as suggesting that the formation of Sta-Fed ADR, Inc. involved the creation of an unlawful monopoly.

There is no factual basis at present for any claim of monopoly. The state-federal ADR project embodied in the new rules is not compulsory and Sta-Fed ADR, Inc. is not designated as the exclusive provider of such services. Other districts have opted for plans which are both mandatory and exclusive, e.g., Michigan.

The mere establishment of a nonprofit corporation to provide ADR services, in part through private funding and in part through government employees, does not violate the antitrust laws. There must be some showing of the commission of an act prohibited by the antitrust laws, that the act affects trade or commerce and that the act is not clothed with state or federal governmental immunity.

Congress has authorized the federal courts to provide ADR services. The providing of those services on a basis that is either fully or partially subsidized by the federal government necessarily is capable of having an adverse economic effect on private providers of such services. The private providers of ADR services are providing an alternative or substitute for the normal judicial process. These providers suffer no legal injury when the government improves its own services any more than Federal

Express could complain when the U.S. Post Office introduced U.S. Express Mail.

Accordingly, while we cannot foreclose the possibility that some action hereafter taken by Sta-Fed ADR, Inc. would be outside the cloak of any governmental immunity and would violate the antitrust laws, we see nothing in the concept itself or in the present proposals for its implementation that would be violative of any laws regarding monopolization or restraint of trade.

Very truly yours,

CUMMINGS & LOCKWOOD

By: Frederic H. Weisberg

RECOMMENDATION REGARDING SOCIAL SECURITY CASES

It is recommended that the District apply to the Committee on Court Administration and Case Management for approval of funding for the hiring of a full-time staff attorney who will handle the administration and adjudication of all the District's cases involving appeals from the Social Security Administration.

Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990

SY92 Statistics Supplement

September 1992

Prepared for the District of Connecticut

NOTES:

(Except for the update to 1992 data and this parenthetical, this document is identical to the one entitled "Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990 SY91 Statistics Supplement, October 1991.")

The pages that follow provide an update to section IIb of the February 28, 1991 "Guidance to Advisory Groups" memorandum, incorporating data for Statistical Year 1992 (the twelve months ended June 30, 1992). The pages have been formatted exactly like the corresponding pages of the original memorandum, and may replace the corresponding pages in the original. There are no changes to the text of the document, except for a few references to the dates covered by the data. Certain discrepancies may be apparent between the original document and this update, as follows:

1. Table 1 (page 12) may show slightly different counts of case filings for recent years (e.g., SY88-90) than were shown in Table 1 of the original document. The variations arise from two sources. First, some cases actually filed in a particular statistical year are not reported to the Administrative Office until after it has officially closed the data files for that year (it is a practical necessity that the A.O. at some point close the files so that it may prepare its annual statistical reports). This can result in increased counts of cases filed in prior years. Second, both filing dates and case-type identifiers are occasionally reported incorrectly when a case is filed, but corrected when the case is terminated. The corrections can result in both increases and decreases in case filing counts.

2. Chart 6 (page 15) in the original document was incorrectly based on a subset of the "Type II" cases (as defined on page 10). It has been replaced in this update with a chart entitled "Chart 6 Corrected," which is based on all Type II cases. In most districts, the difference between the original, incorrect Chart 6 and the new version will be insignificant. In only a few districts is the difference significant.

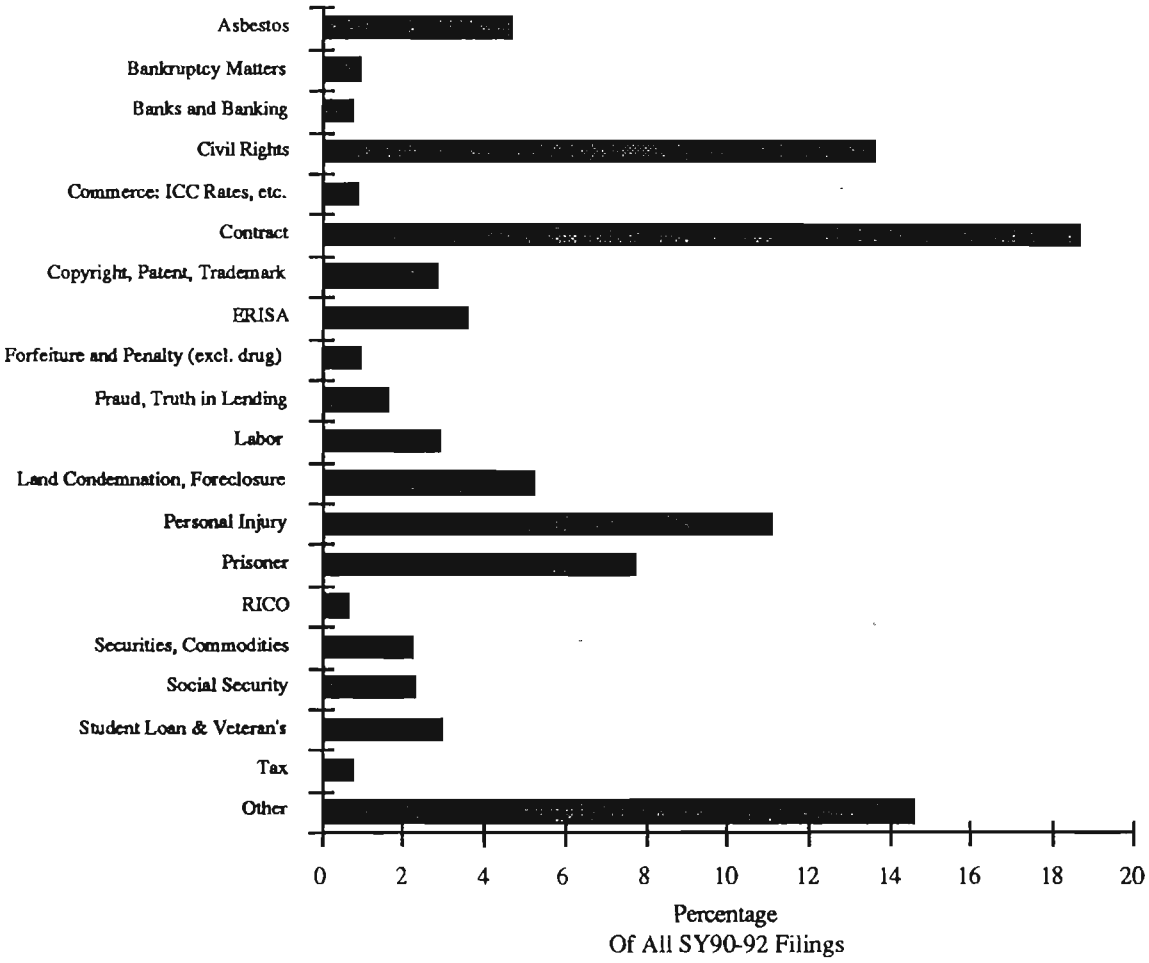
3. An error was made in constructing Chart 8 in the original document. The text indicating the percentage of cases in the "Other" category lasting 3 years or more was shown as "8.0%," without regard to the actual percentage. The bars shown in the chart, however, were accurate. The error has been corrected in this update.

- securities cases
- other actions under federal statutes; e.g., FOIA, RICO, and banking laws

Chart 1 shows the percentage distribution among types of civil cases filed in your district for the past three years.

Chart 1: Distribution of Case Filings, SY90-92

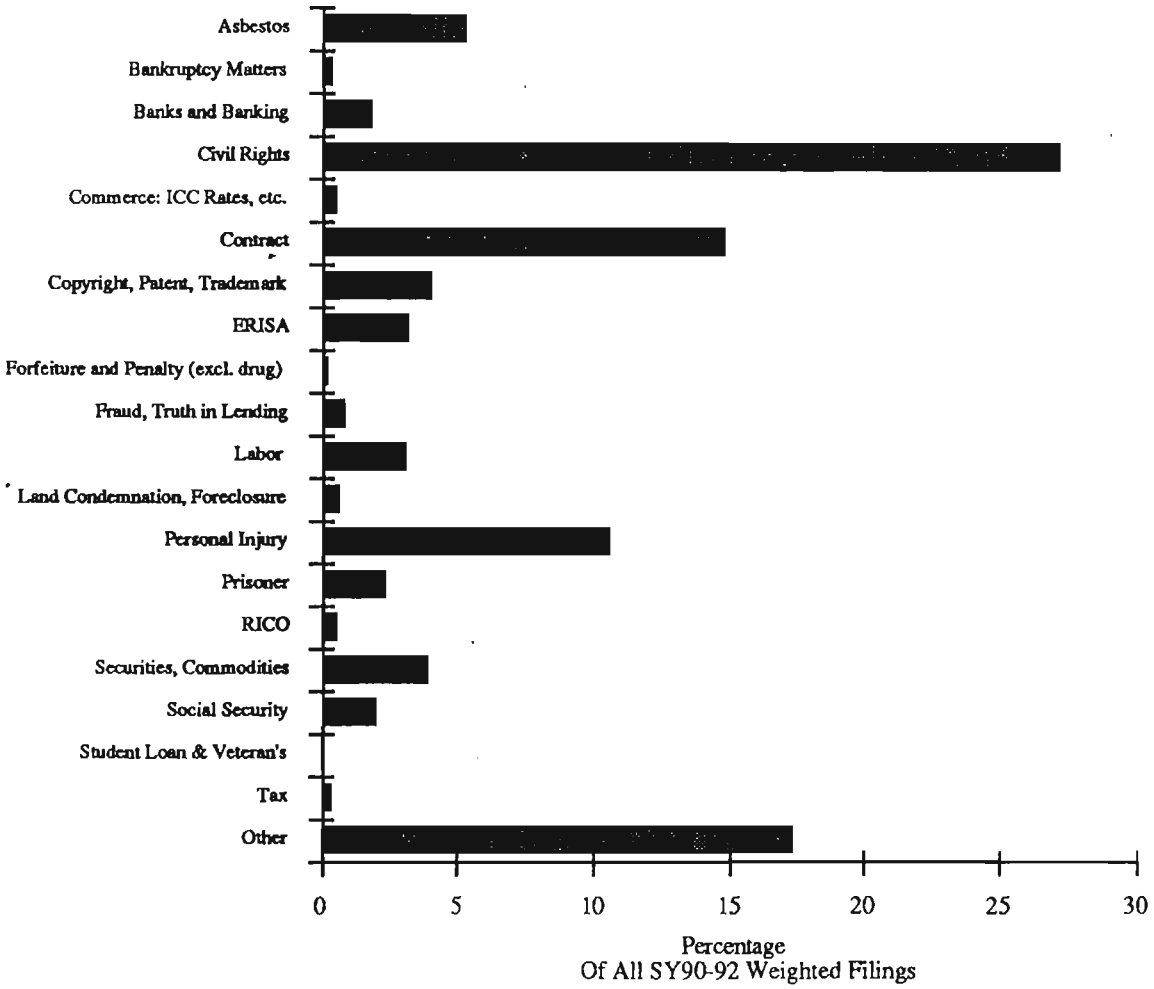
District of Connecticut



c. Burden. While total number of cases filed is an important figure, it does not provide much information about the work the cases will impose on the court. For this reason, the Judicial Conference uses a system of case weights based on measurements of judge time devoted to different types of cases. Chart 3 employs the current case weights to show the approximate distribution of demands on judge time among the case types accounting for the past three years' filings in this district. The chart does not reflect the demand placed on magistrate judges.

Chart 3: Distribution of Weighted Civil Case Filings, SY90-92

District of Connecticut



indicate that the court disposes of its cases faster than the average, and values above 12 indicate that the court disposes of its cases more slowly than the average. (The calculation of these measures is explained in Appendix B.)

Note that these measures serve different purposes. Life expectancy is used to assess change in the trend of actual case lifespan; it is a timeliness measure, corrected for changes in the filing rate but not for changes in case mix. IAL is used for comparison among districts; it is corrected for changes in the case mix but not for changes in the filing rate. Charts 5 and 6 display calculations we have made for this district using these measures.

Chart 5: Life Expectancy and Indexed Average Lifespan, All Civil Cases SY83-92
District of Connecticut

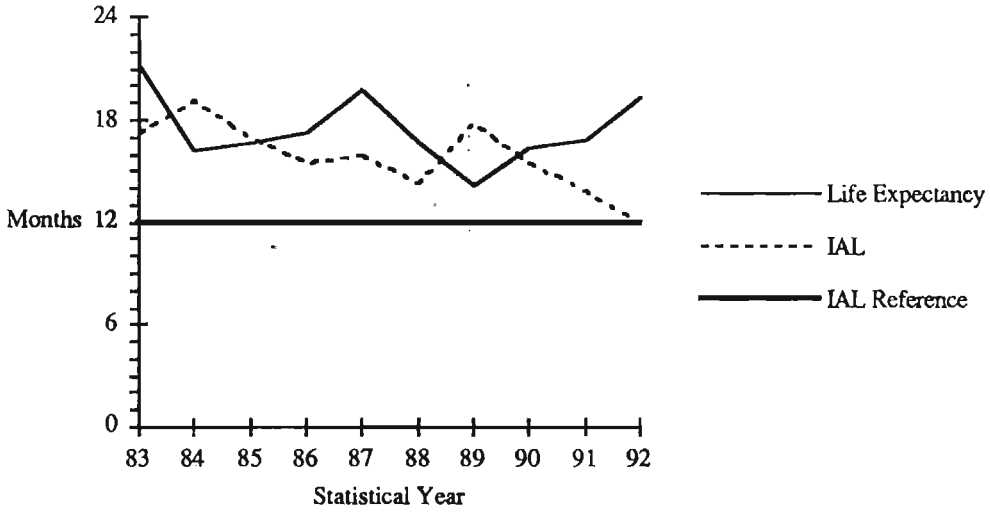


Chart 6: Life Expectancy and Indexed Average Lifespan, Type II Civil Cases SY83-92
District of Connecticut

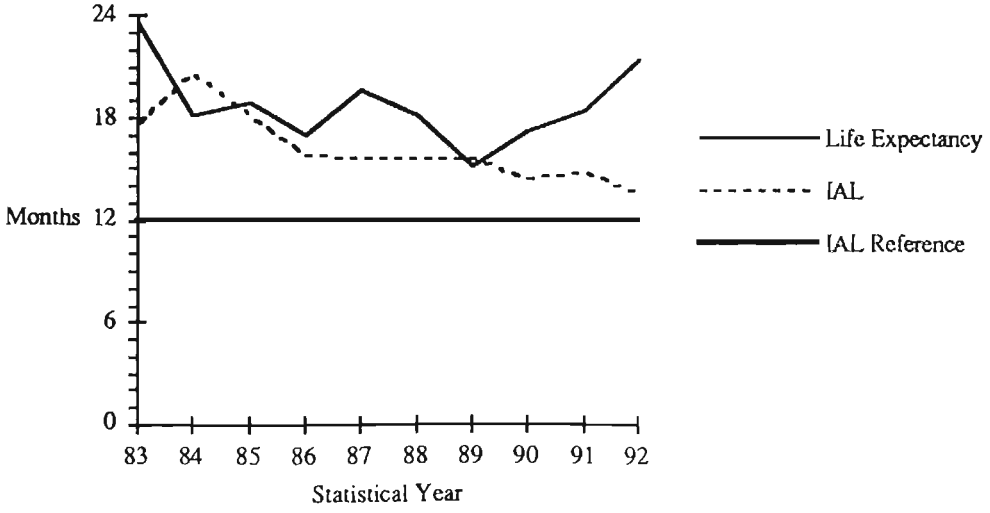
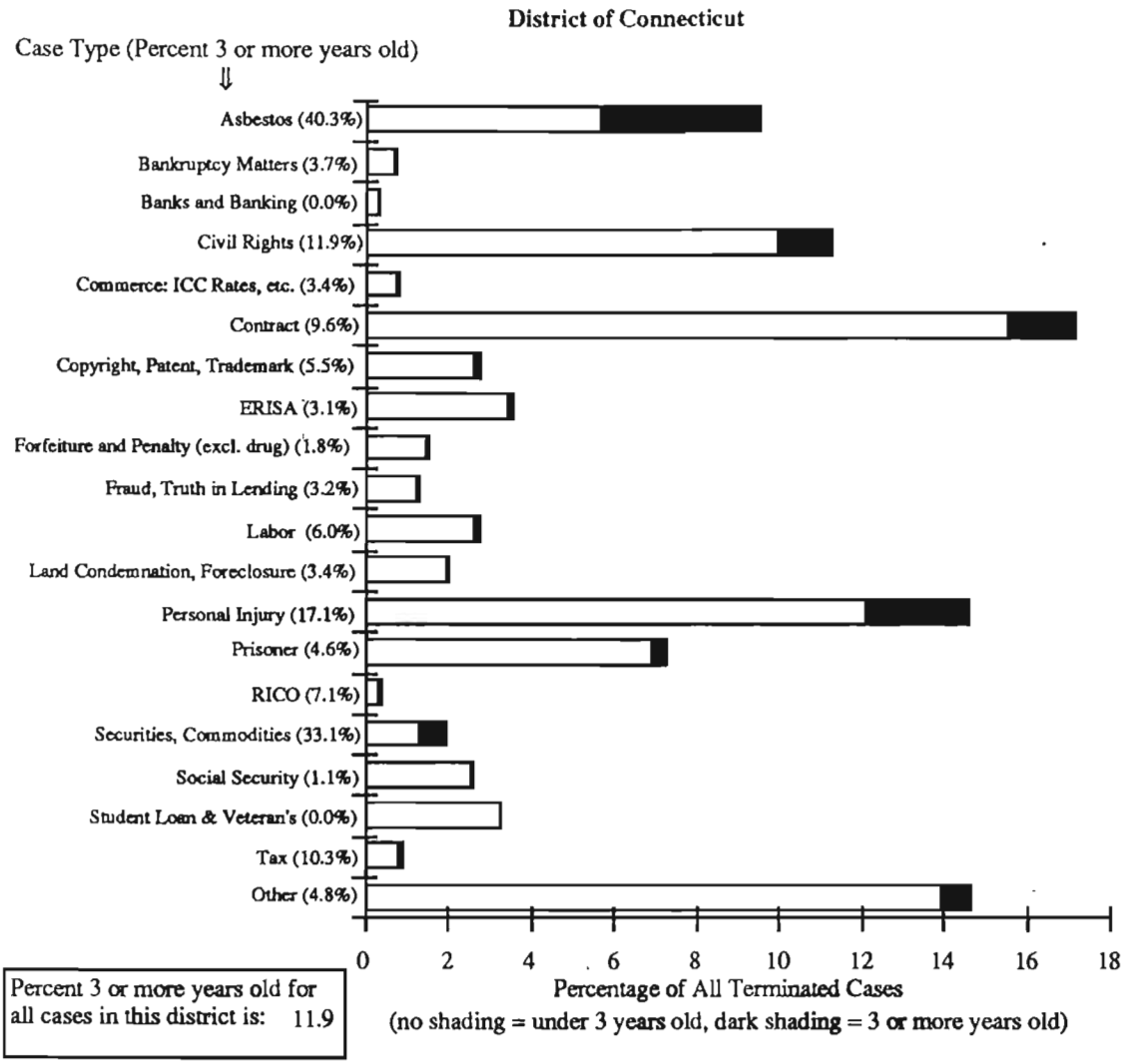


Chart 8 shows the distribution of terminations among the major case types and shows within each type the percentage of cases that were three years old or more at termination.

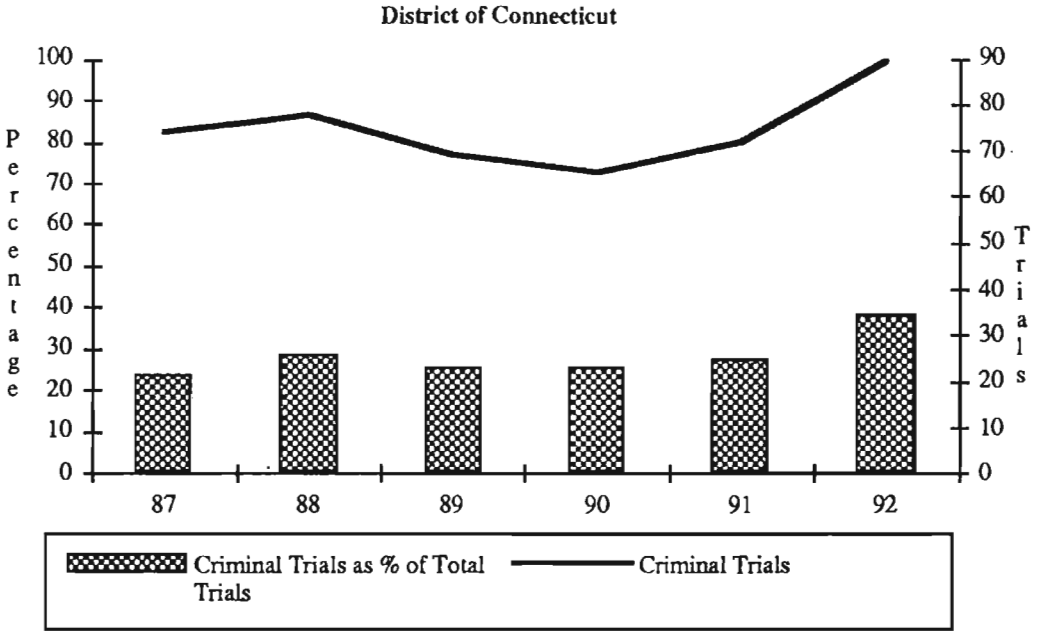
Chart 8: Cases Terminated in SY90-92, By Case Type and Age



f. Vacant judgeships. The judgeship data given in *MgmtRep* permit a calculation of available judge power for each reported year. If the table shows any vacant judgeship months for this district, a simple calculation can be used to assess the impact: Multiply the number of judgeships by 12, subtract the number of vacant judgeship months, divide the result by 12, and then divide the result into the number of judgeships. The result is an adjustment factor that may be multiplied by any of the per-judgeship figures in the *MgmtRep* table to show what the figure would be if computed on a per-available-active-judge basis. For instance, if the district has three judgeships and six vacant judgeship months, the adjustment factor would be 1.2 (36 – 6 = 30; 30 / 12 = 2.5; 3 / 2.5 = 1.2). If terminations per judgeship are 400, then terminations per available active judge would be 480 (400 × 1.2). This will overstate the workload of the active judges if

b. The demand on resources by criminal trials. Chart 10 shows the number of criminal trials and the percentage of all trials accounted for by criminal cases during the last six years.

Chart 10: Number of Criminal Trials and Criminal Trials as a Percentage of Total Trials, SY86-91



For more information on caseload issues

This section was prepared by John Shapard of the Federal Judicial Center with assistance from David Cook and his staff in the Statistics Division of the Administrative Office of the U.S. Courts. Questions and requests for additional information should be directed to Mr. Shapard at (FTS/202) 633-6326 or Mr. Cook at (FTS/202) 633-6094.

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

O R D E R

It is hereby ordered that, effective February 8, 1993, Rule 36 of the Local Rules of Civil Procedure for the District of Connecticut shall be amended to read as follows:

CIVIL RULE 36

ALTERNATIVE DISPUTE RESOLUTION (ADR)

1. In addition to existing ADR programs (such as Local Rule 28's Special Masters Program) and those promulgated by individual judges (e.g., Parajudicials Program), a case may be referred for voluntary ADR at any stage of the litigation deemed appropriate by the parties and the judge to whom the particular case has been assigned.

2. Before a case is referred to voluntary ADR, the parties must agree upon, subject to the approval of the judge:

(A) The form of the ADR process (e.g., mediation, arbitration, summary jury trial, minitrial, etc.);

(B) The scope of the ADR process (e.g., settlement of all or specified issues, resolution of discovery schedules or disputes, narrowing of issues, etc.);

(C) The ADR provider (e.g., a court-annexed ADR project; a profit or not-for-profit private ADR organization; or any qualified person or panel selected by the parties);

(D) The effect of the ADR process (e.g., binding or nonbinding).

3. When agreement between the parties and the judge for a voluntary ADR referral has been reached, the parties shall file jointly for the judge's endorsement a "Stipulation for Reference to ADR." The Stipulation, subject to the judge's approval, shall specify:

(A) The form of ADR procedure and the name of the ADR provider agreed upon;

(B) The judicial proceedings, if any, to be stayed pending ADR (e.g., discovery matters, filing of motions, trial, etc.);

(C) The procedures, if any, to be completed prior to ADR (e.g., exchange of documents, medical examination, etc.);

(D) The effect of the ADR process (e.g., binding or nonbinding).

(E) The date or dates for the filing of progress reports by the ADR provider with the trial judge or for the completion of the ADR process; and

(F) The special conditions, if any, imposed by the judge upon any aspect of the ADR process (e.g., requiring trial counsel, the parties, and/or representatives of insurers with settlement authority to attend the voluntary ADR session fully prepared to make final demands or offers.)

4. Attendance at ADR sessions shall take precedence over all non-judicially assigned matters (depositions, etc.). With respect to court assignments that conflict with a scheduled ADR session, trial judges may excuse trial counsel temporarily to attend the ADR session, consistent with the orderly disposition of judicially assigned matters. In this regard, trial counsel, upon receiving notice of an ADR session, immediately shall inform the trial judge and opposing counsel in matters scheduled for the same date of his or her obligation to appear at the ADR session.

5. All ADR sessions shall be deemed confidential and protected by the provisions of Fed. R. Evid. 408 and Fed. R. Civ. P. 68. No statement made or document produced as part of an ADR proceeding, not otherwise discoverable or obtainable, shall be admissible as evidence or subject to discovery.

6. At the conclusion of the voluntary ADR session(s), the ADR provider's report to the judge shall merely indicate "case settled or not settled," unless the parties agree to a more detailed report (e.g., stipulation of facts, narrowing of issues and discovery procedures, etc.). If a case settles, the parties shall agree upon the appropriate moving papers to be filed for the trial judge's endorsement (Judgment, Stipulation for Dismissal, etc.). If a case does not settle but the parties

agree to the narrowing of discovery matters or legal issues, then the ADR provider's report shall set forth those matters for endorsement or amendment by the judge.

Dated at New Haven, Connecticut this 8th day of February, 1993.

José A. Cabranes
Chief United States District Judge

T.F. Gilroy Daly
United States District Judge

Peter C. Dorsey
United States District Judge

Alan H. Nevas
United States District Judge

Alfred V. Covello
United States District Judge

In the Matter of :

A Court-Annexed Alternative :

Dispute Resolution Program :

_____:

ORDER

Whereas, under the Civil Justice Reform Act of 1990, every federal district court is required to promulgate a justice expense and delay reduction plan which must consider and may include "authorization to refer appropriate cases to alternative dispute programs that . . . have been designated for use in a district court . . . ." 28 U.S.C. § 473(a)(6).

Whereas, pursuant to the Act, in January 1991 then Chief Judge Ellen Bree Burns appointed the Civil Justice Advisory Group, consisting of 24 members, to recommend to the judges of this District an expense and delay reduction plan;

Whereas, after extended study, the Advisory Group in December 1992 recommended, inter alia, that the District Judges adopt as their part of their Civil Justice Expense and Delay Reduction Plan a proposed new Local Civil Rule 36 which, in effect, would facilitate the voluntary referral of federal cases to a court-annexed ADR program, to private ADR providers, or to any qualified person of the parties' and the court's choice;

Whereas, on February 8, 1993, the District Judges, after public notice and consideration of comments submitted, adopted a new Local Civil Rule 36 and forwarded it to the Judicial Council of the Second Circuit for the Council's consideration and approval;

Whereas, Sta-Fed ADR, Inc. has requested the District Judges to appoint it as a court-annexed ADR program within the contemplation of the new Local Civil Rule 36(2)(c);

Whereas, Sta-Fed ADR, Inc. represents:

(1) That it has been certified as a not-for-profit corporation pursuant to Section 501(c)(3) of the Internal Revenue Code;

(2) That its Board of Directors will direct and control all major aspects of its operations, including users' fees, mediators' compensation, waiver of fees for the indigent, and so forth;

(3) That members of the state and federal judiciary will be invited to hold one or more positions as Officers of the Corporation and to sit on its Board of Directors;

(4) That the core group of mediators for the corporation will be members of the state judiciary who are subject to the Code of Judicial Ethics of the State of Connecticut;

(5) That its users' fee schedule will be reasonable and will be set by the corporation's Board of Directors and will be submitted annually to the Judges of the District Court and to the Chief Court Administrator of the State of Connecticut for their information and reference; and

(6) That its mediators' fees will be reasonable and set by the Corporation's Board of Directors and not by individual mediators, and the schedule of such fees will be submitted annually to the Judges of the District Court and to the Chief Court Administrator of the State of Connecticut for their information and reference;

Whereas, the District Judges may if they wish appoint an active judge to the Board of Directors of Sta-Fed ADR, Inc.;

Whereas, a senior district judge may not serve as a mediator for Sta-Fed ADR, Inc. unless and until such service is approved by the Committee on Codes of Conduct of the Judicial Conference of the United States;

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

If and when Local Civil Rule 36 enters into force, after consideration and action by the Court of Appeals, Sta-Fed ADR, Inc. shall be appointed as a court-annexed ADR program, pursuant to that Rule.

Dated at New Haven, Connecticut, this 19th day of February, 1993.

José A. Cabranes
Chief Judge

T.F. Gilroy Daly
United States District Judge

Peter C. Dorsey
United States District Judge

Alan H. Nevas
United States District Judge

Alfred V. Covello
United States District Judge