ADVISORY GROUP
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201

December 4, 1992

Ms. Donna Sienstra
Federal Judicial Center
One Columbus Circle, N.E.
Washington, D.C. 20002

Re: E.D.N.Y. Feedback Conference

Dear Donna:

Sol Schreiber of our Advisory Group suggested that I send you the enclosed notes of our feedback conference with the judges and magistrate judges of the Eastern District of New York held on November 16, 1992. The Advisory Group is in the process of interviewing those judicial officers who could not attend.

We found our meeting very useful and hope that this report will be helpful to you. Best regards.

Sincerely,

Edward D Cavanagh

Edward D. Cavanagh

Enclosure

November 18, 1992

To: E.D.N.Y. Advisory Group

From: Edward D. Cavanagh, Reporter

Re: Feedback Conference with E.D.N.Y. Judges and Magistrate Judges -- November 16, 1992

On Monday, November 16, 1992 a feedback conference regarding the E.D.N.Y. Civil Litigation Expense and Delay Reduction Plan was held in the ceremonial courtroom in the Brooklyn Courthouse from 4 p.m. to 6 p.m.

Present from the court were: Chief Judge Platt and Judges Weinstein, Bartels, Sifton, Amon, Raggi and Hurley. Also present were Magistrate Judges Chrein and Carter.

Present from the Advisory Group were Edwin J. Wesely, Stephen P. Hoffman, Robert L. Begleiter, Joel Berger, Margaret A. Berger, Edward D. Cavanagh, Oscar G. Chase, Thomas C. Clauss, Jr., Thomas Concannon, Jo Davis, Dianne Dixon, George F. Hritz, V. Anthony Maggipinto, Peter Reilly, Sol Schreiber, Anne Y. Shields and Lawrence Zweifach. Also present were United States Attorney Andrew Maloney, Bruce Nims, Susan Herman, Gerald Lepp and James Giokas. Excused were John C. Gray, Jr., Peter Herbert and Guy Miller Struve.

Chief Judge Platt opened the meeting with a brief welcome and introduced Mr. Wesely. Mr. Wesely noted that under 28 U.S.C. § 475, the civil litigation expense and delay reduction plan is to be assessed annually. He then introduced a series of speakers to report on various aspects of the plan.

1. Criminal Docket

Mr. Zweifach addressed the criminal docket. He stated that the number of criminal filings continue to increase and that, on average, nearly 63% of judges' time is spent handling criminal trials. This figure does not include time spent off the bench on sentencing and probation reports. He then called on United States Attorney Andrew Maloney to report on his perspective on the criminal docket. Mr. Maloney stated that he expected a slight increase in prosecutions as a result of new federal legislation, notably the recently enacted car-jacking statute. He also stated

that there is currently a hiring freeze in place and that he did not anticipate any increase in staff size.

Asked about the impact of the Sentencing Guidelines on guilty pleas, Mr. Maloney stated that it was his impression that there appear to be more pleas (rather than more trials) under the Guidelines. He noted, however, that there were more sentencing hearings under the Guidelines. Mr. Maloney did not believe that the increase in sentencing hearings would adversely impact on civil litigation because the Speedy Trial Act does not apply to sentencing hearings. Judge Sifton agreed with this assessment.

Judge Raggi pointed out that the United States Attorney's willingness to take a flexible approach to the Sentencing Guidelines by "bumping down" sentences below prescribed minimums has had the effect of encouraging pleas. Without the bump down policy, fewer pleas would be forthcoming.

Magistrate Judge Chrein, in response to a question whether magistrate judges were being used more in criminal cases, stated that he was taking more guilty pleas.

With respect to whether there were problems in meeting firm trial dates in criminal cases, Judge Weinstein stated that problems existed where defendants were subject to multiple indictments.

2. Housing Emergency

Judge Platt reported that he expected that construction on the new Long Island facility will proceed but that plans with respect to the new Brooklyn facility were back to square one.

3. Vacancies

Judge Platt reported that two vacancies currently exist, and, if two more judgeships are created for the District as he anticipates, there will be a total of four.

4. Automatic Disclosure

Mr. Hritz explained the provisions for automatic disclosure were adopted under the plan on a pilot basis. He then inquired of the court whether, in their view, the automatic disclosure provisions were working. Magistrate

Judge Chrein responded, noting that magistrate judges are normally the first point of contact for the parties through the Rule 16(b) conference, and stated that most attorneys appear unaware of the automatic disclosure requirement. Indeed, it appears that there is only one case where the attorneys for all parties were aware of the plan requirements. Magistrate Judge Chrein said that his normal policy is to ask whether the attorneys have complied with the automatic disclosure requirement. It then becomes clear that the attorneys are unfamiliar with the procedure. He then typically sets a deadline for automatic disclosure. Magistrate Judge Chrein stressed the need for educating the bar regarding automatic disclosure.

Magistrate Judge Carter reported that his experiences were similar to those of Magistrate Judge Chrein. He stated that while automatic disclosure can work well in diversity personal injury cases, he did not believe that it would be effective in complex cases involving large numbers of documents. He suggested that the Advisory Group consider a two-tier litigation system which would have a track for standard cases and a track for complex cases. Automatic disclosure would not apply in complex cases. It was pointed out by a member of the Advisory Group that an informal tracking system already exists in the Eastern District and that complex cases are treated as sui generis. Moreover, the plan specifically empowers the court to exempt the litigants from the operation of the plan for cause shown and a showing that automatic disclosure would increase rather than decrease expense and delay would be sufficient cause for exemption.

Mr. Begleiter reported that the United States Attorney's Office has complied with the automatic disclosure requirements. He did think that the automatic disclosure provisions may create problems in RICO cases.

Judge Sifton stated that automatic disclosure is a good idea but expressed the fear that the value of the procedure would be lost if it falls into disuse because of ignorance. He urged the magistrate judges to educate attorneys on automatic disclosure. Judge Sifton noted that automatic disclosure has worked well in criminal cases, notwithstanding the fact that many attorneys initially opposed the concept and doubted its worth. Finally, Judge Sifton urged the Advisory Group not to give up on the experiment. He asked that the group should take a hard look at where the automatic disclosure works and where it is inefficient.

5. Discovery Limitations

Mr. Hoffman reported that the plan does provide for presumptive limits on interrogatories (15 per side) and depositions (10 per side), unless the court orders, or the parties agree on, a different number. He noted that the Advisory Group initially opposed any limitations on discovery but revisited the issue after survey results showed that practitioners strongly favored discovery limits.

The question posed to the court was whether attorneys have been abiding by discovery limits. Magistrate Judge Chrein stated that the issue of discovery limitations had not caused problems in his courtroom and that parties have been agreeing on the numbers of interrogatories and depositions. Magistrate Judge Carter said that in his view some litigants use discovery limits as an excuse to avoid their own obligations on discovery. He also stated that agreed on limitations are often set too low.

Mr. Begleiter stated that the government's policy was to observe the presumptive limitations. The government does not, in the normal course, seek agreement on discovery limitations

6. Alternative Dispute Resolution

Messrs. Kaskell and Lepp reported on the new alternative dispute resolution ("ADR") programs: court-annexed mediation and early neutral evaluation ("ENE"). In ENE, an expert, early in the case and prior to significant discovery, evaluates the case for the parties in the hope of encouraging settlement. ENE may be ordered by the court. In court-annexed mediation, a negotiator seeks to bring the parties together. Mediation may be conducted only on consent of the parties. Both programs are underutilized. A group of prospective mediators and evaluators has been assembled and trained but only five cases have been referred to ENE and no cases for mediation. Some 8% of the Eastern District cases have been referred to the pre-existing program of court-annexed arbitration. The court was urged to channel suitable cases to ENE and mediation.

7. Differential Case Management

Professor Cavanagh reported that the Advisory Group had considered a formal tracking system for different kinds of cases but concluded that the existing informal tracking system under which Social Security, Habeas Corpus and complex cases are given special treatment was working

well and should not be changed. The Advisory Group continues to hold that view. Professor Cavanagh noted that the Southern District had adopted a three-track system but cited anecdotal evidence suggesting that the Southern District system was widely ignored.

8. Mandatory Pretrial Disclosure

Mr. Clauss reported on the mandatory pretrial disclosure requirements under the plan. He observed that the provisions are largely uncontroversial, since most judges in the district required these disclosures through pretrial orders. Chief Judge Platt stated that pretrial orders are very effective in expediting proof at trial.

9. Expert Discovery

Professor Chase reported on expert discovery. Judge Sifton stressed the need to educate doctors and lawyers as to what constitutes adequate discovery of expert opinions. He stated that what has been viewed as adequate is a letter from a doctor to a lawyer expressing the doctor's expert opinion but questioned whether such disclosure was sufficient. Judge Sifton stated that it would be helpful if a standardized form were developed so that the nature of any disclosure would become uniform.

Judge Sifton also stated that it is important for the courts and the parties to understand the practicalities of expert discovery. He noted that expert discovery is taken at the last minute because doctors are reluctant to commit time unless the trial date is certain, which is frequently not the case. Mr. Reilly, in response to an inquiry from Judge Sifton, estimated that medical experts cost $5,000-$10,000 per day. He suggested that expert testimony from doctors be taken via videotaped deposition.

Mr. Begleiter stated that under the President's October 22, 1991 Executive Order, the government, prior to filing an action, must give the other side an opportunity to settle. He also noted that core disclosure under the Executive Order is broader than that under the plan.

10. Premotion Conferences

Ms. Shields reported on premotion conferences and asked whether, in the view of the court, they were effective. Judge Platt, noting that he only recently began employing premotion conferences, stated that these

conferences save time and effort and serve to focus motions. He stated that of all the tools recommended by the Advisory Group, the premotion conference is the most effective. Judge Weinstein expressed a different view, stating that premotion conferences normally necessitate a court meeting with the parties twice, instead of only once, and are therefore inefficient. Use of premotion conferences routinely, in his view, would be unwise.

Judge Sifton also opposed premotion conferences but for a different reason. He expressed concern that, at least in bench trials, the process may prejudice the court's view on the merits. He was also concerned that the litigants in the process of feeling out how the judge views a motion without having seen anything in writing may be chilled in pursuing their remedies.

11. Reassignment of Trial Ready Cases

Mr. Giokas reported that attorneys have sought reassignment of trial ready cases only once.

12. Status of Motions

Mr. Giokas reported that the procedures for ascertaining the status of a pending motion have been utilized only three times.

13. Complex Litigation

Mr. Schreiber reported that the Eastern District currently has only four class actions pending, two of which are dormant. Therefore, complex cases do not presently present a problem.

14. Pretrial Conferences

Professor Berger inquired of the court whether procedures at pretrial conferences have been modified in light of the plan. Magistrate Judge Chrein reported that he is not doing anything differently. He does not require clients to sign orders granting adjournments because the requests from the attorneys have been reasonable. Nor does he require discovery to be completed within six months. He believes that a 6-12 month time from for discovery is usually reasonable.

Judge Sifton urged that there be more effective coordination between the trial judge and the magistrate judge supervising discovery so that the trial calendar can be in harmony with trial preparation. He noted that he has had some time available to try cases recently but had no civil cases ready for trial.

15. Trials By Magistrate Judges

Magistrate Judge Chrein stated that the magistrate judges have been trying many more cases as a result of the amendment to 28 U.S.C. § 636(a) which requires that the parties be informed that they may on consent obtain a trial date before a magistrate judge.

16. Closing

Chief Judge Platt thanked the participants in the feedback conference. Mr. Wesely thanked the court for its outreach to the bar.