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

December 9, 1991

FINAL REPORT

TO

HONORABLE THOMAS C. PLATT, CHIEF JUDGE

TABLE OF CONTENTS

FINAL REPORT OF THE EASTERN DISTRICT OF NEW YORK ADVISORY GROUP

Executive Summary

Findings

The Advisory Group concludes that there are three principal causes of unnecessary cost and delay in civil litigation in the District: (1) the enormous and continuing growth of the criminal docket and the volume of criminal litigation, coupled with the growing civil docket; (2) a space shortage of crisis proportions which has led to an overtaxing of present courthouse facilities; and (3) the failure promptly to fill vacant judgeships in the District. We further conclude that these three factors have in combination impacted severely and adversely on the administration of civil justice in the Court.

Most critical is the burgeoning criminal docket in the District. The dominance of the criminal docket is caused by a national commitment to the federalization of the prosecution of an increasing variety of crimes. That national commitment has led to a doubling of the federal prosecutors in the District since 1986 and the substantial enlargement of the staffs of federal law enforcement agencies in the area, which, in turn has generated significant increases in criminal case filings. Moreover, because of the Speedy Trial Act and constitutional mandates, criminal cases continue to receive preferential treatment

over civil cases. Unless there is a commitment to allocating resources to the Court so that the increasing criminal caseload can be addressed without sacrificing the civil justice system, the efforts of the Advisory Group are likely to bring about only incremental improvements. All information that has been accumulated so far confirms that the dominance of the criminal docket is not likely to be significantly affected by the proposals herein because the size and status of the criminal docket are dictated in large measure by national federal policy and statutory and constitutional constraints.

There also has been a significant increase in federal subject matter jurisdiction in the civil realm. Congress has enacted 195 statutes expanding federal jurisdiction in civil cases. See generally, Report of the Federal Courts Study Committee (1990). At the same time, Congress has not given equal attention to the impact of these statutes on the court system. The expansion of federal jurisdiction and the huge increase in federal crime-fighting pose a painful dilemma for the Advisory Group. We are asked to offer proposals to reduce unnecessary costs and delay in the civil justice system, and yet we know that, by comparison to the problem and a principal root cause of delay, our recommendations, as desirable as we believe them to be, are likely to be band-aids -- some large, some small -- but nonetheless band-aids. A lay member of our Advisory Group has

described these recommendations as moving chairs around the deck of the Titanic.

The need for a commitment of additional resources to civil cases in the Eastern District is readily apparent. While during the fiscal year ending June 30, 1990 civil case filings nationally declined by 2%, civil filings within the Eastern District rose 3.7%. Moreover, the number of pending cases increased from 5,886 to 6,554, a jump of 15.2%. Some 13% of these cases are over three years old. Yet, at a time when the workload of the Court calls for additional judges, three of the 15 judgeships allotted to the Eastern District remain unfilled as of this date. [1] The failure to appoint a sufficient number of judges to handle the increasing caseload in the District is a substantial cause of unnecessary delay and expense. We also believe that a judicial impact statement should be prepared for each new piece of significant federal legislation.

In addition, the physical facilities for handling federal cases within the District are inadequate. The Brooklyn courthouse is literally bursting at the seams. Presently, there are no courtrooms to house visiting judges from other courts or

---

[1] The most recent appointee, Honorable Sterling Johnson, began his judicial duties in September 1991. Another prospective judge has been nominated to fill a second vacancy, but the appointment process is fraught with delay. The failure of the federal government to fill judicial vacancies promptly has been an ongoing source of delay within the District.

other districts and hence an important means of reducing the existing caseloads -- the visiting judge -- is no longer an effective option. The space crunch will be somewhat eased, but not completely solved, when the courthouse expands to quarters formerly occupied by the Internal Revenue Service; but this is merely a stop-gap measure, which does not address the long-term space needs of the Eastern District.

Moreover, within recent years, the Eastern District has dealt with a significant number of complex and multi-district litigations, including the Agent Orange case and the Asbestos Litigation. Complex cases necessitate not only a disproportionately greater investment of time by judges than non-complex cases but also a significantly larger support staff to administer cases. The present level of support staff is not adequate to handle these multi-district litigations efficiently.

The Advisory Group is satisfied that both on the civil and criminal sides, within the systemic limitations imposed upon it, the Court is operating efficiently, and the results of our survey of practitioners in the District confirm this belief. As noted, a fundamental systemic limitation is a near overwhelming of the civil docket by the growing criminal docket, while at the same time civil case filings are increasing.

While we cite and use statistical data in this report, we also realize that statistics do not tell the whole story. We

know, and the diversity of this Advisory Group confirms, that despite the best efforts of the district judges and magistrate judges of the Court, determinations of dispositive motions, for example, take longer than they should. Furthermore, if a civil case is not resolved by dispositive motion, then there is a very real danger that by the time of trial, witnesses may have died or recollections of important events may have lapsed. We also know that civil trials, particularly civil jury trials of cases of more than ordinary length, require huge efforts on the part of the Court to schedule and try. None of these facts is reflected in statistical reports.

The watchwords of the Advisory Group have been "Equal justice for civil litigants." And, while we make specific suggestions for improving the conduct of civil litigation within the Eastern District, we also believe that our recommendations will produce at best peripheral improvements because of the failure to commit adequate resources to the civil justice system in the District and the Congressionally driven allocation of resources to the criminal justice system to meet the demands of expanded federal criminal jurisdiction and federal law enforcement activity.

Recommendations

The Advisory Group makes the following recommendations which are detailed in the Report:

A. Discovery and Pretrial Practice

1. Adoption, on a trial basis, of a system of automatic disclosure of certain basic information. For an eighteen month period, in every civil case filed, excluding social security, habeas corpus, student loan and pro se cases, as well as civil rights cases in which there is an immunity defense available, the parties would be required to disclose

- identity of all persons with pertinent information respecting claims, defenses and damages;

- a general description of all documents in the custody and control of the parties bearing significantly on claims and defenses;

- authorization to obtain medical, hospital, no-fault and worker's compensation records;

- the documents relied on by the parties in preparing the pleadings or documents that are expected to be used to support allegations;

- the contents of any insurance agreement.

The failure to make these required disclosures would result in sanctions.

2. Expert Discovery

-- Automatic disclosure of the following information:

- a statement of all opinions expressed and the basis and reasons for each opinion;

- the information relied upon in forming the opinion;

- tables, charts, graphics or other exhibits to be used as a summary of data or support for the experts' opinions;

- the qualifications of the expert, including a curriculum vitae detailing the expert's education, employment history, professional affiliations, and all articles authored by the expert;

- a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years.

3. Limitations on Discovery

-- A limitation on the number of interrogatories shall be established by agreement of the parties or by court order. In the absence of any agreement or court order, the number of interrogatories shall be presumptively limited to fifteen.

-- A limitation on the number of depositions shall be established by agreement of the parties or by court order. In the absence of any agreement or court order, the number of depositions shall be presumptively limited to ten per side.

4. Mandatory Pretrial Disclosures

-- Adoption of proposed Rule 26(a)(3) requiring the following disclosures pertaining to evidence that may be presented at trial to be made at least 30 days prior to trial.

- The name, address and telephone number of each witness, separately identifying those witnesses the party expects to call and those that may be called if the need arises;

- Designation of those portions of testimony that are to be presented by deposition or non-stenographic means (including a transcript);

- An identification of each document or exhibit, separately identifying those that the party expects to offer and those that may be

offered if the need arises, other than for impeachment or rebuttal.

5. Motion Practice

-- Judges are requested not to schedule for hearing more motions than could be heard within a reasonable period.

-- Where a motion has been pending for more than six months, the Clerk's Office would then contact chambers to ascertain the status of the motion.

-- Mandatory premotion conferences on dispositive motions, except that if a premotion conference is not held within four weeks of the date originally requested, then the motion may be made without a prior conference.

-- Expansion of the use of letter motion practice under Standing Order 6 to other motions that are procedural.

6. Pretrial Conferences

-- adoption of Standing Order 3(b), requiring counsel to confer on a possible Scheduling Order, as a local rule;

-- requiring the initial pretrial conference to be held face to face with the judicial officer, except where the attorneys are distant from the courthouse;

-- subsequent pretrial conferences should be held in the discretion of the court;

-- utilization of a final pretrial conference in all cases;

-- adoption of the proposed amendment to Rule 16(c) expanding the agenda of issues to be discussed at a pretrial conference;

-- adoption of the proposals for pretrial agenda items contained in the Federal Judicial Center's Memorandum of January 16, 1991.

7. Complex Litigation

-- retention of random selection process for judicial assignment in all cases, including complex cases;

-- tiering or phasing of discovery;

-- procedures for obtaining more detailed information from experts during discovery;

-- screening of expert testimony prior to trial;

-- providing for testimony by plaintiff's expert and defendant's expert back-to-back where doing so would assist the fact-finder.

B. Alternative Dispute Resolution; Sanctions and Attorneys' Fees

1. Alternative Dispute Resolution ("ADR")

-- continuation of court-annexed arbitration program with certain minor modifications;

-- adoption on a pilot basis of an Early Neutral Evaluation Program;

-- publicizing the availability of early, firm trial dates before magistrate judges for consenting parties;

-- use of settlement conferences in all cases except where the judicial officer finds them to be unwarranted;

-- continued use of Special Masters under Rule 53, where appropriate;

-- adoption on an experimental basis of a court-annexed mediation program;

-- greater advocacy of voluntary ADR;

-- hiring of an ADR administrator.

2. Sanctions

-- requirement that party victimized by alleged Rule 11 violation give timely notice to violator so that offending conduct might cease;

-- requirement that sanctions motions be made in separate applications and not merely a sanctions request tacked on to another motion.

3. Attorneys' Fees

-- in common fund cases, fees will be measured by a percentage of recovery;

- where the matter settles relatively early, fee awards should be sufficient to encourage early settlement but yet not create a windfall for attorneys;

- where the matter settles relatively late in the proceedings, the fee award would be based on a percentage of recovery, using the lodestar measure as a guide;

-- in statutory fee cases, fee awards should approximate the fees paid by clients in non-statutory fee cases.

C. Prefiling; Pleading; Assignment; Reassignment

1. Retention of the present system of individual assignment of judges.

2. Modified procedures for reassignment of judges which would permit counsel with trial-ready cases that had not been reached by the assigned judge within a specified period to request a conference with the Clerk's Office. The Clerk's Office would then, through the Chief Judge, seek to ascertain the availability of another judge to try the matter on short notice.

3. Hiring of an additional pool of experienced, part-time or flex-time law clerks to assist judges on an as-needed basis.

D. Trial Practices

1. Expert Witnesses

-- in bench trials, other than cases involving expert medical testimony, direct testimony of experts would be submitted in writing.

2. Jury Selection

-- attorneys may submit timely written questions to the court for use on voir dire;

-- judges should request prospective jurors to complete a standardized juror questionnaire prior to voir dire.

3. Bench Trials

-- bench trials should be encouraged;

-- if parties consent to a trial before a magistrate judge, any party may request that a magistrate judge other than the one assigned to the case for pretrial purposes be designated at random to try the matter.

4. Miscellaneous Practices

-- use of pretrial statement of stipulated facts and of facts that are disputed;

-- use of stipulations regarding the admissibility of documents;

-- premarking of exhibits.

5. Government Litigation

-- urges the court to use discretion in referring social security matters to magistrate judges;

-- urges the government to publicize the time frame necessary for government officials to consider settlements and to streamline the settlement process.

6. Pro Se Litigation

-- more careful screening of the merits of cases by the court before counsel is assigned;

-- use of pro se clerks to draft opinions and bench memos in pro se cases.

7. Visiting Judges; Senior Judges; Magistrate Judges; Buildings and Facilities; Automation

-- Automation

- updating the office equipment in the courthouse by purchase of

  - additional fax machines

  - imaging devices with monitors

  - "real time" transcript production and filing

  - additional VCRs

  - master daily court calendar on video monitors

- upgrading of salary structure for personnel operating automated equipment

- replacement equipment funding

-- Visiting Judges

- use of visiting judges to hold settlement conferences and non-jury civil trials in leased facilities away from the courthouse.

-- Magistrate Judges

- creation of two additional magistrate judge positions

-- Buildings and Facilities

- construction of two new courthouses: one in downtown Brooklyn (to replace the existing Brooklyn courthouse) and the other near the Nassau-Suffolk County line (to replace both existing Long Island courthouses).

- federal legislation to transfer unencumbered to the federal courts the use of the Brooklyn Post Office

Introduction

This sets forth the Report of the Eastern District of New York Advisory Group ("Advisory Group") appointed by Chief Judge Thomas C. Platt pursuant to the Civil Justice Reform Act of 1990. Under that statute, the Advisory Group is charged with two basic functions: (1) to identify the sources of unnecessary costs and delay, if any, in the civil justice system in the District; and (2) to propose prescriptions for avoiding or limiting identified unnecessary costs and delay. In the course of preparing this Report, we have carefully reviewed the requirements of the Civil Justice Reform Act of 1990 and believe that the Report meets the requirements of that statute. (See Appendix B). The work of the Advisory Group is ongoing, and we continue

our careful review of the criminal and civil dockets within the Eastern District.

The Civil Justice Reform Act of 1990 is the first statutorily mandated attempt to examine at the grass roots the functioning of the federal civil justice system on a nationwide basis. A similar effort, however, has been in place under the auspices of the District Court in the Eastern District of New York for nearly a decade. The origins of the Advisory Group can be traced directly to the Special Committee on Effective Discovery in Civil Cases for the Eastern District of New York ("Special Committee") established on November 30, 1982 by then - Chief Judge Jack B. Weinstein. That committee, also chaired by Advisory Group Chair Edwin J. Wesely, conducted a detailed analysis of discovery practices within the Eastern District and issued the Revised Report of the Special Committee on Effective Discovery in Civil Cases for the Eastern District of New York to the Honorable Jack B. Weinstein, Chief Judge, 102 F.R.D. 357 (1984). That report proposed a series of Standing Orders designed to (1) set forth guidelines for presumptively proper conduct of discovery and thereby encourage cooperation among counsel; (2) streamline the process of raising discovery disputes with the Court; and (3) provide easy access to a judicial officer for the prompt resolution of these disputes.

The Standing Orders were adopted by the Court for an initial three-year period effective March 1, 1984. During that three-year period, the Special Committee was reconstituted as the Discovery Oversight Committee to observe and evaluate the implementation and effectiveness of the Standing Orders. The Oversight Committee recommended that the Standing Orders be retained, with some modifications, for an additional four-year period. Report of the Discovery Oversight Committee to the United States District Court for the Eastern District of New York, June 10, 1986. The Standing Orders have since been adopted by the Board of Judges on a permanent basis.

In August 1986, then-Chief Judge Weinstein also established the Eastern District Civil Caseflow Committee, later known as the Committee on Civil Litigation of the Eastern District of New York, which was charged with the broad responsibility of reviewing litigation practices within the Eastern District and proposing improvements. Among other things, this committee has sponsored a series of continuing legal education programs designed to facilitate dialogue between bench and bar, reviewed the District's local rules, analyzed settlement practices within the Eastern District, and reported on the impact of Rule 11 sanctions within the District. A significant product of the Committee was the July 28, 1986 Report of the Civil Caseflow Committee, which analyzed many of the issues of unnecessary delay and costs that

are the subject of this report. Many Advisory Group members have served on these predecessor committees and some members have served since their beginning in November 1982.

Aided by this strong foundation, the Advisory Group has revisited the issues of the causes of unnecessary delay and costs within the Eastern District, and this Report provides further prescriptions and experiments to address the problems identified. The work of the Advisory Group was aided by the fact that its members were drawn from widely diverse practice and judicial backgrounds, litigators from large firms, small firms and sole practitioners in metropolitan New York City, Nassau County and Suffolk County, bringing to the subject of litigation reform the experiences of the full spectrum of civil and criminal litigation found within the Eastern District. Membership included corporate general counsel as well as attorneys from the government, community law offices, the federal defender's office, and academia. Members also included Chief Judge Thomas C. Platt, Chief Magistrate Judge A. Simon Chrein, District Executive Bruce Barton and Robert C. Heinemann, Clerk of the Court. In addition, the Advisory Group benefited from the advice and counsel of three non-lawyers who contributed a lay perspective to the Group's deliberations.

The Advisory Group met regularly both in plenary sessions and in smaller working groups and consulted widely, not

only among themselves but also with judges, other practicing lawyers and members of Advisory Groups from other districts. The Advisory Group also utilized expert and technical assistance of the firm of Ernst & Young. Following an organizational meeting held on February 18, 1991, the Advisory Group was divided into seven Subgroups.

1. Assessment and Statistics -- co-chaired by Thomas F. Clauss, Jr. and Robert C. Heinemann

2. Prefiling; Pleading; Assignment; Reassignment; Inactive Cases -- chaired by George F. Hritz

3. Discovery and Motion Practice, including Rule 16 Conferences, Local Rules and Standing Orders, Final Pretrial Conferences, including Client Participation, and Special Problems Relating to Complex Litigation -- chaired by Stephen P. Hoffman

4. Settlement and Alternative Dispute Resolution, including Client Participation, Attorneys' Fees and Sanctions -- chaired by Sol Schreiber

5. Trial Practices, Jury and Non-Jury, including Injunctions, and Appeals practices -- chaired by Raymond L. Casey

6. Use of Senior and Visiting Judges, Magistrate Judges, Special Masters and the District Executive's and Clerk's offices, including communication among same, Buildings and Facilities and Automation and other services; Rules of Individual Judges and Magistrate Judges -- chaired by the Honorable A. Simon Chrein

7. Special Problems Relating to United States Government, State and Local Government, and pro se Litigation, including the State of the Criminal Docket and What To Do About It -- chaired by Guy Miller Struve

The Statistics and Assessment Subgroup produced an initial report to serve as an overall framework for the Advisory Group's deliberations. The Statistics and Assessment Subgroup had two distinct functions: (1) to review and analyze available statistical data which might identify causes of unnecessary delay and costs and (2) to prepare an outline of topics to be used in conducting interviews with court personnel for the consideration of the Advisory Group. That report was reviewed and considered by the Advisory Group at its first working session on April 1, 1991. During the ensuing two months, members of the Advisory Group interviewed each of the judges and magistrate judges of the District. At the same time, the remaining Subgroups met and prepared written reports. Those reports were considered and analyzed by the entire Advisory Group at all-day sessions held on June 3, June 17, June 24 and July 1, 1991.

The initial draft of this Report was prepared by Professor Edward D. Cavanagh, the Advisory Group Reporter. It was then thoroughly reviewed and commented upon by the Committee on Form and Style at a meeting held on July 31, 1991. Members of the Committee on Form and Style include: Edwin J. Wesely, Stephen P. Hoffman, Margaret A. Berger, Raymond L. Casey, Edward D. Cavanagh, Oscar G. Chase, Chief Magistrate Judge A. Simon Chrein, Thomas F. Clauss, Jr., Robert C. Heinemann, George F. Hritz, Sol Schreiber, Guy Miller Struve and Lawrence J. Zweifach. A revised

Report prepared by the Reporter was then reviewed by the chair and transmitted to the full Advisory Group for final comment. Those comments were reviewed by the chair and an Interim Report prepared for circulation for public comment. Following its completion on August 28, 1991, some 250 copies of this Interim Report were disseminated to practitioners, academics and bar associations in the metropolitan area. Copies of the interim report were also made available to Advisory Groups in other districts. We received formal written comments from six sources: (1) the New York County Lawyers Association; (2) the New York State Attorney General's Office; (3) the Federal Courts Committee of the Association of the Bar of the City of New York; (4) the Defense Association of New York; (5) the Federal Courts Committee of the New York State Bar Association; and (6) narrative responses to open-ended questions in the survey. The Advisory Group also received extensive informal comment from the United States Attorney's Office for the Eastern District of New York. At meetings on October 14, and 16, 1991 the Advisory Group carefully considered these comments and adopted a number of them. Reporter Cavanagh revised the Interim Report accordingly and that document was reviewed by the Committee on Form and Style. A further revision was reviewed by the chair which resulted in this Report.

Thereafter, on November 18, 1991, the Advisory Group met with the judges of the Court to discuss the October 22

Report. A public hearing was held at the Courthouse in Brooklyn on December 2, 1991 to obtain public comment on the October 22 Report. Public notice of the hearing was published in The New York Times (twice), Daily News (twice), the Long Island edition of Newsday, Amsterdam News, El Diario, New York Law Journal, American Lawyer and Manhattan Lawyer, as well as by notice posted at the Courthouse. At the public hearing, the Advisory Group heard comments from a representative of the Suffolk County Bar Association, the president of HALT, and several individuals. In addition, the Advisory Group received written comments from the Suffolk County Bar Association, the Columbian Lawyers Association and other individuals.

The Advisory Group met on December 4, 1991 and considered the written comments on its October 22 Report and the comments made at the public hearing. The Reporter then drafted the amendments decided upon by the Advisory Group which were reviewed by the chair.

Another subcommittee of the Advisory Group, with the expert and logistical assistance of Ernst & Young, designed a survey for practitioners in the District in order to elicit their views with respect to the causes of unnecessary delay and costs and how these problems might be remedied. The survey, which is annexed as Appendix C, was sent to more than 2,200 attorneys who practice in the Court as determined from the docket sheets of the

Court. The 437 responses to the survey (20%) data provided the Advisory Group with significant insights. For example, only one-third of those responding to the survey say they have encountered unreasonable delays in the District; nearly two-thirds say that they have not. [2] The results also show that 48% of those responding to the survey say that civil litigation in the District is unnecessarily costly; 52% say that it is not unnecessarily costly. The respondents by and large do not attribute problems of unnecessary delay and cost to judicial inefficiency. Finally, there appears to be strong support for many of the kinds of practice reforms proposed in this Report, such as automatic disclosure, presumptive limits on the number of interrogatories and depositions, and procedures pertaining to expert witnesses. While the Advisory Group does not feel bound by the survey results -- what is unnecessary delay and what are unnecessary costs are in part subjective judgments -- we do believe that the survey results are entitled to substantial weight. The Advisory Group revisited a number of issues in light of the survey data, and the results of its deliberation are set forth in this Report.

Lawrence J. Zweifach, chair of the Court's Criminal Litigation Committee, has been an ex officio member of the Ad-

---

[2] The percentages referred to in this Report are the percentages of those responding to a particular question. That number is typically smaller than the number of respondents to the questionnaire as a whole.

visory Group since the Group's inception. Working with Professor Susan N. Herman of the Brooklyn Law School, Committee members Kevin O'Brien and Jonny Frank, Chief of Special Prosecutions of the United States Attorney's Office, and other sources in the United States Attorney's Office, notably William J. Muller, Chief of the Criminal Division, undertook to assist the Advisory Group in analyzing the criminal docket. Through gathering statistical information and interviewing key personnel in the United States Attorney's Office, the Committee sought to determine the nature of the criminal docket, the reasons for the recent growth in the number of criminal prosecutions in the Eastern District, any changes likely to take place in the Court's criminal docket in the near future, and any procedures of the United States Attorney's Office or the Court which might be revised to make the processing of criminal cases more efficient.

The Advisory Group's analysis would not have been possible without the active cooperation of the United States Attorney's Office in gathering data, which we acknowledge with gratitude. The Advisory Group will continue to work with the Criminal Litigation Committee in order to gain a deeper understanding of the criminal docket.

Finally, the Advisory Group is deeply grateful to the judges and magistrate judges in the District, particularly Chief Magistrate Judge A. Simon Chrein, for their availability and

cooperation in the work of the Advisory Group. We are also especially grateful to the Clerk of the Court, Robert C. Heinemann, and his staff for their counsel and assistance, particularly in retrieving statistical data. The Advisory Group, and most particularly its chairman, would be churlish if special tribute were not paid to the faithful reporting of Professor Cavanagh and his great dedication to this cause, including the all-nighters he pulled to meet the demands of his task.

Report and Recommendations

I. Overview

To put the Advisory Group's Report and Recommendations in the proper context, this Overview sets forth facts demonstrating the causes of unnecessary expense and delay within the Eastern District: (1) civil filings in the Eastern District have increased; (2) criminal filings within the District have increased at a rate greater than the national average; (3) vacant judgeships are not being filled promptly; (4) the Eastern District's case termination rate has declined; (5) the number of trials in 1990 increased, even though total bench time was down slightly; (6) non-trial criminal proceedings have increased dramatically in the Eastern District; and (7) magistrate judges handle a large number of civil matters.

A. Contrary To The Nationwide Trend, Civil Filings In The Eastern District Have Increased

Civil filings in the United States district courts have declined every year since 1985. See Federal Judicial Workload Statistics June 30, 1991, prepared by the Administrative Office of the United States Courts (1991 Annual Report of the Director). This has not been the experience in the Eastern District. Although there was an insignificant decrease in the period from 1985 through 1988, civil filings in the Eastern District have been on the rise for the last three years. See 1991 Federal Court Management Statistics for year ended June 30, 1991, prepared by Administrative Office of the United States Courts (1991 Annual Report of the Director) at 47; Federal Judicial Center, Guidance to Advisory Groups Appointed Under The Civil Justice Reform Act of 1990 ("Guidance Mem.") at 8. Driving this growth are increased filings of ERISA, asbestos, prisoner and securities cases and forfeiture and penalty proceedings. See Guidance Mem. at 12. The increase in forfeiture and penalty proceedings is a reflection of the growth of the criminal docket.

Notwithstanding this increase, it may not, at first, appear that the civil caseload is any more or less burdensome in the Eastern District than in other district courts. There were 4,741 civil filings in the Eastern District for the statistical year ending June 30, 1991, an increase of 309 cases or 7% from

statistical year 1990. See Appendix of Statistical Tables, 1991 Annual Report of the Director of the Administrative Office of the United States Courts for Twelve Month period ended June 30, 1991 ("June 1991 Appendix I") at Table C-3, p. 58. These filings represent approximately 2.1% of the 207,742 civil filings in all United States districts in 1991. See id, Table C-1 at 54. The Eastern District, with 15 available or allotted judgeships in 1991, had approximately 2.3% of the 649 available judgeships in the United States. See June 1991 National Judicial Workload Profile and Workload Profile for Eastern District of New York (hereinafter "National Profile" and "Eastern District Profile" respectively). Thus, it would appear that 2.3% of the judgeships were available to handle 2.1% of the civil filings. This analysis, however, does not take into account the vacant judgeship months, which in the Eastern District totalled 31.0 in statistical year 1991, or the complexity of the cases filed and the demands placed on judicial time by such cases.

With 31.0 vacant judgeship months, the Eastern District had 3.13% of the total of 988.7 vacant judgeship months in all district courts. See id. In short, "available" judicial resources did not equate with actual judicial resources in 1991, or in any of the five years prior thereto.

Moreover, the complexity of the cases filed in the Eastern District and the demands placed on the Court as a result

demonstrate an even greater burden. The Judicial Conference and the Administrative Office have assigned relative "weights" to all types of cases filed in the district courts. See Guidance Mem. at 9. For the statistical year ending June 30, 1991, "weighted" filings for each of the 649 available judgeships in the United States district courts averaged 386. In the Eastern District, there were 453 "weighted" case filings for each of the 15 available judgeships. See National and Eastern District Profiles. Although the "weighted" filing statistics do not distinguish between criminal and civil cases, we know that there is a greater than average criminal case burden on the Eastern District.

B. Eastern District Criminal Filings Have Increased At A Rate Greater Than National Average

For the statistical year ending June 30, 1991, criminal case filings in all of the district courts decreased by 3.7% from 47,962 in 1990 to 46,177. In the Eastern District, there was a 16.6% increase, from 1,000 in 1990 to 1,166 in 1991. See June 1991 Appendix 1 at Table D, p. 62. This 16.6% increase in 1991 was preceded by an increase of 27.4% from statistical year 1989 to statistical year 1990. See June 1990 Appendix at Table D, p. 58. This increase is part of a longer trend over the past five years in which there has been a 74% increase in criminal case filings in the Eastern District as compared with a 32% increase nationally.

It was not just the number of cases that increased. The number of defendants in criminal cases pending in the Eastern District rose from 2,412 in pending cases as of June 30, 1990 to 2,947 for the period ending June 30, 1991. See June 1991 Appendix Table D-1 at 68-69. There were a total of 58,393 defendants in pending criminal cases as of June 30, 1991 for the whole country. See id. This means that the Eastern District, with 2.3% of the available judgeships, was responsible for approximately 5.1% (2,947 of 58,393) of the total pending criminal defendants in the United States.

C. Vacant Judgeships Are Not Being Filled Promptly

The Eastern District had 31.0 vacant judgeships months for 1991. See Eastern District Profile. This was substantially worse than 1990 in which the Eastern District had 17.5 vacant judgeships months and 1989 in which it had 24 vacant judgeships months. A comparison with nationwide statistics again shows that the Eastern District bore a disproportionate burden in these years. With 2.3% of the available or allotted judgeships, the Eastern District had 3.14% of the vacant judgeship months in 1991 (31.0 of 988.7), 3.2% in 1990 (17.5 of 540.1) and 6.4% in 1989 (24 of 374.1). See id. This would seem to indicate that it takes slightly longer to fill a vacant judgeship in the Eastern

District than in other districts. We note that there are currently three vacancies in the Eastern District.[3]

D. The Eastern District's Termination Rate Has Declined

The Eastern District terminated 4,551 cases in the statistical year ending June 30, 1991 and 4,687 cases in the statistical year ending June 30, 1990. See Eastern District Profile. The June 1991 figures represent approximately 1.9% of the 240,952 terminations by all district courts. The June 1990 figures also represent approximately 1.9% of the 243,512 terminations by all district courts. See id. and National Profile.

Other statistics provide a strong indication that the problem of delayed resolution of civil cases within the District is getting worse. For example, the number of Eastern District civil cases over three years old increased from 450 in 1988 (or 8.3% of the total civil caseload) to 548 in 1989 (10.3%) to 762 (13.1%) in 1990 and to 809 (11.9%) in 1991. See Eastern District Profile. In 1989 the national average of three-year cases as a percentage of total civil cases was 9.2% and in 1990 the percentage was 10.4%. See National Profile. In 1991, the Eastern

---

[3] Congress recently increased the number of judgeships in the Eastern District from 12 to 15, and added two additional magistrate judge positions. When these new positions are filled, the burdens imposed by the civil and criminal caseload of the Eastern District will be ameliorated. Nevertheless, it is the best judgment of the Advisory Group that the existing crisis will neither be cured nor significantly improved.

District's percentage of three-year old civil cases amounted to 11.9% of its total civil caseload, while the national average was 11.8%. See id. These statistics reveal the sad plight of civil litigants in the District and further demonstrate that litigants nationwide have little to cheer about.

The "aging" of the Eastern District's civil caseload has coincided with a decrease in the number of civil cases terminated, providing further evidence of the deterioration of the civil justice system within the District. Terminations of civil cases in the Eastern District declined 10.8% from 4,435, for the 12 months ending June 30, 1989, to 3,956 for the 12 months ending June 30, 1990 and 2.5%. See June 1990 Appendix I at Table C-6, p. 50; June 1991 Appendix at Table C-1, P.54. Nationally, terminations fell 9.1% and 1.0% for the same periods, see id., indicating that the Eastern District was apparently terminating cases at a rate slightly slower than the rest of the country. The dramatic decline in civil case terminations in the District continued in 1991, as terminations fell to 3,809, a drop of nearly 4%. Again, these statistics reveal a frightening trend nationally but an even worse situation within the Eastern District.

This analysis, of course, does not take into account the problem presented by "available" judgeships as opposed to actual active judges or the complexity of the cases handled by

the Eastern District. According to the National Judicial Workload Profile, there were 461 terminations per judgeship in 1989; 476 per judgeship in 1990; and 422 per judgeship in 1991. During the same periods, according to the Judicial Workload Profile for the Eastern District of New York, there were 423 terminations per judgeship in 1989; 391 per judgeship in 1990 and only 303 per judgeship in 1991. See National and Eastern District Profiles. These numbers strongly suggest that the increasing burdens of an increasing caseload and too few judgeships have resulted in a significant decrease in terminations per judgeships.

E. The Number Of Trials Increased Although Total Bench Time Was Down Slightly In 1990

For the twelve-month period ending June 30, 1989, each Eastern District judge spent an average of 667.95 hours trying cases and 419 hours on the bench handling such matters as arraignments, sentencings, motions, pretrial conferences and grand jury proceedings.[4] For the period ending June 30, 1990, the average trial hours were slightly less, 621.7 per judge, with the non-trial bench time averaging 362 hours per judge. For the period ending June 30, 1991, the average trial hours per active

[4] Statistics presented in this section reflect calculations of the Eastern District Clerk's office and the Administrative Office of the United States Courts based upon specific requests by the Advisory Group. The average trial hours referred to above took into account the vacant judgeship months in the Eastern District as explained in Table III to Appendix A hereto.

judge were 580 with non-trial bench time averaging 360 hours per active judge.

During the same period, the number of trials each active Eastern District judge handled increased from an average of 37 in 1989 to 42.5 in 1990 to 44.8 in 1991.

Because the Administrative Office of the United States Courts keeps extensive statistics, it would be useful to track the time spent by judges in trials as compared with non-trial matters and time spent in civil as compared with criminal matters. If these data exist, they should be made available; if the information does not exist, the government should begin to compile it.

F. Non-Trial Criminal Proceedings Have Increased Dramatically In The Eastern District

Set forth below are the particulars of the Eastern District judges' bench time spent on proceedings other than trials.

SY 1989 NUMBER OF NON-TRIAL HOURS AND PROCEEDINGS

	Total Hours	Arraignments	Sentencing	Motions	Pre-Trial Confs.	Grand Jury Proceedings	Other Proceedings
Active Judges	4,189	1,248	1,030	2,140	3,628	17	*1,120
Senior Judges	655	215	214	354	1,468	15	220
Visiting Judges	29	0	8	1	0	0	13
Total	4,873	1,463	1,252	2,495	5,096	32	1,353

SY 1990 NUMBER OF NON-TRIAL HOURS AND PROCEEDINGS

	Total Hours	Arraignments	Sentencing	Motions	Pre-Trial Confs.	Grand Jury Proceedings	Other Proceedings
Active Judges	3,815.5	1,604	1,167	2,180	3,539	68	*584
Senior Judges	555	219	156	280	995	25	212
Visiting Judges	3.5	0	1	1	1	0	0
Total	4,374	1,823	1,324	2,461	4,535	93	796

SY 1991 - NUMBER OF NON-TRIAL HOURS AND PROCEEDINGS

	Non-Trial Total							
	Hours	Proceedings	Arraign-ments	Senten-cing	Motions	Pre-Trial Conference	Grand Jury Proceedings	Other Pro-ceedings
Active Judge	4,471	10,475	2,252	1,405	2,300	3,899	41	578*
Senior Judges	439.5	1,026	213	130	148	484	8	43
Visit-ing Judges	20.5	34	2	2	1	29	0	0
Total	4,931	11,535	2,467	1,537	2,449	4,412	49	621

[*Some law clerk use has been reported in this number]

The productivity of the active Eastern District judges appears to have slightly increased in 1991 as they handled 10,475 non-trial bench proceedings as compared with 1990 when they handled 9,142 non-trial bench proceedings. Second, the non-trial bench proceedings relating to criminal cases have increased dramatically. Arraignments, sentencings and grand jury proceedings totalled 3,698 in 1991 as compared to 2,839 in 1990, as compared to 2,295 in 1989. This information provides further support for the conclusion that criminal matters are demanding more and more of the Eastern District's resources at the expense of civil justice in the Court.

G. Magistrate Judges Handle A Large Number Of Civil Matters

In 1989, civil proceedings, excluding evidentiary hearings, before the five magistrate judges for the Eastern District totaled 5,611, of which 4,633 were pretrial conferences. See June 1989 Appendix 1 at Table M-4A, p. 128. In 1990, those civil proceedings totalled 4,728, with pretrial conferences numbering 4,169. See June 1990 Appendix I at Table M-4A, p. 130. As discussed infra, more than one-third of these conferences were held pursuant to Rule 26(f) and almost one-quarter were Rule 16(b) conferences.

In addition, in 1989, the Eastern District magistrate judges were responsible for terminating 72 civil cases in which the parties consented, pursuant to 28 U.S.C. § 636(c), to trial before the magistrate judges. See June 1989 Appendix I at Table M-5, p. 181. In 1990, the Eastern District magistrate judges terminated

74 such cases. See June 1990 Appendix I at Table M-J, p. 132. In 1991, the Eastern District magistrate judges were responsible for terminating 74 civil cases in which the parties consented to jurisdiction. See June 1991 Appendix I at Table M-4A. Preliminary results of our survey indicate that pretrial management by magistrate judges is viewed as efficient by the vast majority of those responding.

H. Impact of Statistical Data

From these data, the Advisory Group concludes that the problems of unnecessary delay and expense in civil litigation within the Eastern District are not the fault of the Court. Nor overall can these problems be attributed in major measure to the litigants or their attorneys. They are systemic problems. The statistical information, as well as our own experience and observations, strongly support the Advisory Group's fundamental conclusion that the demands placed on the Court by the criminal justice system are the principal cause of problems in the civil justice system. Because of the pervasive impact of the criminal justice system on the civil side, we begin our discussion with that topic. We then proceed to discuss issues in order of magnitude as they arise during litigation. We conclude our Report with an examination of the state of automation at the courthouse and an assessment of physical facilities within the Eastern District.

II. Impact of the Criminal Docket

In the view of the Advisory Group, the criminal docket is the principal cause of unnecessary delay and expense in the civil justice system within the Eastern District. We address this issue at the threshold because, unless Congress allocates resources sufficient to allow the Eastern District to meet the needs of its burgeoning civil caseload and rising backlog of civil cases, the Advisory Group's recommendations will result in at best marginal improvements and will not have a significant impact on the root causes of unnecessary delay and expense.

By treating the criminal justice system as a favored child, Congress has effectively orphaned the civil justice system. The Advisory Group concludes that the criminal justice system has contributed directly to delay and expense within the Eastern District in the following ways: (1) increasing federalization of crime as manifested by the dramatic increase in the capacity of federal investigative agencies; (2) the near doubling in size in recent years of the United States Attorney's office in the Eastern District, and the concomitant increase in federal prosecutions within the District, (3) to a lesser extent, changes in procedure engendered by the Sentencing Guidelines; and (4) implementation of the Speedy Trial Act.

A. Federalization of Criminal Law Enforcement

All statistical indicators show that the criminal docket in the Eastern District has grown dramatically in the last five years.

1. The Size of the Criminal Docket

The preliminary data show that criminal litigation occupies a substantial amount of the Court's time. The number of trial hours devoted to criminal matters by judges in the Eastern District in 1990, 4,391, far exceeded the number of trial hours in civil cases in the same period, 3,353.5. Judges within the Eastern District also spent 4,869 hours in 1990 on the bench handling ancillary criminal proceedings involving arraignment, sentencing, motions, pretrial conferences, and grand jury proceedings.

a. Criminal Defendants Named in Filings

According to the Administrative Office of the United States Courts, the number of defendants named in criminal indictments is a valid indicator of the burdens created by the criminal docket. In 1986 court year, 1,215 defendants were named in criminal filings in the Eastern District. By 1990, this figure had risen to 1,645 defendants. If misdemeanors, petty offenses and out-of-district transfers are excluded, the increase is even more striking. In 1986, 1,037 defendants were named in felony filings. By 1990, 1,565 were named in such filings -- a jump of more than 50 percent. Since felony indictments lead to lengthier trials and

more time-consuming proceedings than non-felony matters, these numbers may actually understate the real increase in the burden experienced by the Eastern District Court.

b. Criminal Case Filings

The number of criminal cases filed, some of which involve more than one defendant, increased from 785 in 1989 to 1,000 in 1990. This jump of 27.4 percent in one year is nearly four times the national average. Likewise, the number of triable defendants has risen from 547 to 1,005 in the same period, a jump of approximately 84 percent.

c. Felony Filings Per Judge

The number of felony filings per judge increased from 46 in 1985 to 80 in 1990. As discussed below, this is because while the number of criminal cases was expanding and the size of the United States Attorney's Office virtually doubled, the number of judges remained comparatively static.

d. Number of Trials

In 1985, 192 criminal trials were conducted in the Eastern District. In 1990, there were approximately 250 such trials. However, the percentage of all trials in the Eastern District represented by criminal trials (approximately 40%) has remained roughly the same throughout this period.

2. The Nature of the Criminal Docket

Statistics detailing the frequency with which various crimes have been prosecuted in the Eastern District help to explain why the criminal docket has been increasing. These statistics show that prosecutions for narcotics and fraud offenses, which dominate the criminal docket, have increased dramatically.

a. Narcotics

Narcotics cases comprise by far the largest single component of the Eastern District criminal docket. The number of defendants named in criminal filings in narcotics cases rose from 510 in 1986 to 825 in 1990. Narcotics defendants represented almost 50 percent of the total number of felony defendants in net filings in 1986 (510 out of 1,037) and over 50 percent of the total in 1990 (825 out of 1,565). The number of narcotics cases filed also increased, from 289 in 1986 to 466 in 1990.

b. Fraud

Fraud cases commonly generate complex pretrial proceedings and lengthy trials. There is some discrepancy in the statistics available at this point. By some measures, fraud prosecutions have also increased dramatically, with 197 defendants being named in fraud filings in 1986, and 381 in 1990. The United States Attorney's Office records do not appear to corroborate this level of increase, perhaps because those statistics focus on number of indictments rather than number of defendants.

c. Other Cases

The number of prosecutions for most other general offenses, like homicide, robbery, forgery and counterfeiting, has remained fairly constant. There are some notable increases in other areas, such as immigration and other special offenses, while a few areas, such as larceny, show a decrease in number of prosecutions.

B. The Reasons For The Growth And Impact Of The Criminal Docket

1. Increase in Federal Law Enforcement Agents and Prosecutors

The number of federal prosecutors in the Eastern District has risen dramatically. The recent growth of the United States Attorney's Office in the Eastern District is a result of an overall commitment by Congress and the Department of Justice to combat major criminal activity in the region, particularly organized crime and narcotics smuggling rings. The regional offices of federal law enforcement agencies and task forces have grown significantly in the past three years, and more prosecutors have been needed to handle the work produced by these expanded law enforcement agencies.

In the last three years, the New York offices of the Federal Bureau of Investigation, Drug Enforcement Administration, Secret Service and Bureau of Alcohol, Tobacco and Firearms, among others, saw a significant growth in their agent and staff alloca-

tions. For example, the Drug Enforcement Administration increased its strength from 280 special agents in 1988 to 352 in 1991, primarily to support the Department's Organized Crime Drug Enforcement Task Force and High Intensity Drug Trafficking Area initiatives. The Secret Service saw its New York office increase in size from 55 agents in 1988 to 159 in 1991, due in substantial part to increased law enforcement efforts in the areas of bank fraud and credit card fraud. Between 1988 and 1991, 25 agents were added to the New York office of the Bureau of Alcohol, Tobacco and Firearms, bringing its total complement of agents up to 133. Approximately one half of this increase was devoted to staffing the Joint Firearms Task Force with the New York City Police Department. During the same time period, the Federal Bureau of Investigation's agent allocation was increased from 1084 to 1135.

During the five-year tenure of United States Attorney Andrew Maloney alone, the number of attorneys on staff at the U.S. Attorney's Office has doubled from 79 to 158. Since September 1988, the U.S. Attorney has received 57 additional Assistant U.S. Attorney positions.[5] These position increases were authorized by the Department of Justice to address specific national and regional

---

[5] This is in addition to the 15 attorney positions that the Criminal Division of the U.S. Attorney's Office gained in 1989 when the Brooklyn Organized Crime Strike Force was merged into that office.

law enforcement initiatives, as indicated by the following breakdown:

Date of Authorized Increase	Increase	Source of Increase	Division
11/29/88	3	Omnibus Drug Initiative Act of 1988;	Criminal
	8	Asset Forfeiture and Civil Enforcement Actions	Civil
1/11/89	5	Omnibus Drug Initiative Act of 1988	Criminal
7/19/89	2	Asset Forfeiture and Civil Enforcement Actions	Civil
12/7/89	3	Financial Institution Fraud Initiative	1 Civil 2 Criminal
3/16/90	25	1989 Violent Crime Initiative - High Intensity Drug Trafficking Area Program	4 Civil 21 Criminal
12/12/90	3	Non-Traditional Organized Crime Group Initiative	Criminal
2/13/91	3	Financial Institution Fraud Initiative;	Criminal
	3	Organized Crime Drug Enforcement Task Force Initiative	Criminal
6/19/91	2	Financial Institution Fraud Initiative	Criminal
Sub Total	15 42		Civil Criminal
Grand Total	57		

The law enforcement programs reflected in this breakdown of position increases are implemented principally by the specialized units of the U.S. Attorney's Office: The Narcotics/OCDETF Section; the Organized Crime and Racketeering Section; the Business and Securities Fraud Section; and the Special Prosecutor's Section. In general, these sections work on complex and resource-intensive cases involving long-time investigations.

The Narcotics/OCDETF Section is responsible for prosecuting sophisticated narcotics and related money laundering cases. In recent years, the focus of this Section has included the South American Drug Cartels and Southeast Asian heroin kingpins.

The Business and Securities Fraud Section investigates and prosecutes complex fraud cases, including securities frauds, mail frauds, insurance and bank frauds, military procurement fraud and federally-funded program fraud. Most recently, there has been a significant increase in the number of bank fraud cases that are being investigated and prosecuted.

The Organized Crime and Racketeering Section is responsible for investigating and prosecuting labor racketeering offenses and organized crime cases. During our interviews, supervisors of this Section emphasized that the Section's investigation and resulting trials are becoming increasingly more complex. This point was also made by the Chief of the Special Prosecutors Section,

which focuses on civil rights cases and certain types of white collar crime cases, including public corruption cases.

The various law enforcement initiatives described above can also be implemented by the Long Island Branch of the U.S. Attorney's Office. The Long Island Branch, with its additional resources, has been working on the investigation and prosecution of a variety of national and regional law enforcement priorities, including organized crime cases, major narcotics cases, bank fraud cases, defense contractor cases, public corruption cases and tax cases.

We note that the decisions to target certain types of criminal activities need not lead to an expansion in the overall criminal docket if resources remain constant and other prosecutions therefore are decreased. That, however, has not been the case.

As for resources, the doubling of the number of Assistant U.S. Attorneys in the Eastern District is having a dramatic impact on the Court's criminal docket. Not only have new prosecutorial positions been created, but the Civil Division is now utilized to file cases which further the federal strategy of crime control, such as drug-related asset forfeiture cases.

With regard to the federal prosecutions that are not related to these recent, major law enforcement initiatives, the U.S. Attorney's Office has advised us that it has not relaxed its criminal intake guidelines during the past five years of growth.

It was also explained that the U.S. Attorney's Office is sensitive to the case load problem, and is redirecting many types of cases for prosecution by the district attorneys' offices, such as bank robbery cases, bank embezzlement cases, and postal theft cases. Pursuant to an agreement that the Office has with the Queens District Attorney's Office, many of the so-called mule drug smuggling cases emanating from JFK International Airport, which are subject to federal jurisdiction, are tried in state court.

Nevertheless, there remains a perception among at least some judges in the District that the United states Attorney is now prosecuting crimes that could, and should, be handled by local prosecutors. With respect to the narcotics "swallower" cases, which is of some substantial concern, the U.S. Attorney's Office advised us that the Queens District Attorney's Office will not accept any of these cases for prosecution because the State's speedy arraignment rules come into play before the evidence of the crime is produced. Thus, all of these cases are handled federally. To the extent that the perception is based upon the prosecution of other types of criminal cases which are subject to concurrent state and federal jurisdiction we have not been able to draw any firm conclusions on the basis of our analysis of the statistical data and our interviews. We shall continue to scrutinize this matter. We believe that the increased number of federal law enforcement agents and federal prosecutors, in conjunction with recent major

federal law enforcement programs, have, and will continue to have, a substantial impact on the size and nature of the Court's criminal docket. The U.S. Attorney's Office and federal law enforcement officials are using increasingly sophisticated investigative techniques on long-term investigations that are resulting in more complex cases. These cases are taking up more of the Court's time, increasingly at the expense of the civil docket.

2. National Criminal Procedure

The increased volume of criminal cases in the Eastern District is by far the most important factor explaining the amount of time the Court spends on criminal cases. All phases of the process are affected by the sheer size of the criminal docket: the amount of time spent on ancillary proceedings, sentencing and the like, and the extent to which the dictates of the Speedy Trial Act pose scheduling problems for the Court in some cases.

Several decisions made at the national level about federal criminal procedure also seem to enhance the burden criminal litigation places on the Court, to which we now turn.

a. The Federal Sentencing Guidelines

The Sentencing Guidelines, at least in the short term, appear to have led the courts to spend more time with the sentencing process and, in addition, generated satellite litigation over the appropriateness of certain sentences. See, e.g., United States v. Royer, 895 F.2d 28, 30 (1st Cir. 1990) (noting the potential for

satellite litigation under the Guidelines); United States v. Ruiz-Garcia, 886 F.2d 474, 477 (1st Cir. 1989) (same); see also United States v. White, 893 F.2d 276 (10th Cir. 1989) (detailing the time-consuming process of passing sentence under the Guidelines). While statistical data regarding the time devoted to passing sentences under the Guidelines are not yet available, it is the view of the United States Attorney's Office as well as other attorneys familiar with procedures under the Guidelines that the sentencing process is more complicated and time-consuming than ever. Hearings now consume far more time than pre-Guidelines proceedings did.

Those interviewed at the U.S. Attorney's office said that the guidelines have not, despite predictions to the contrary, increased the number of defendants who go to trial.

b. Speedy Trial Act

The Speedy Trial Act puts all criminal cases on the fast track from day one. Large and small criminal cases are pushed through the system if defendants wish them to be. The Speedy Trial Act does not pose a problem in most cases because there are so many provisions for exclusions (including an exclusion for complex cases) and because defendants commonly waive the protections of the Act for reasons of their own. The Act, however, can pose a problem in "reactive" cases, where the defendant is incarcerated following arrest, is not released on bail, and defense counsel seeks an immediate trial because of the relatively straightforward nature of the

charges and the expected trial evidence. These jail cases create scheduling problems because judges are forced to adjust the trial dates of previously scheduled cases in order to get these cases tried in the appropriate time period. This, in turn, can wreak havoc with the civil docket. Moreover, the civil calendars of those judges assigned to criminal mega-trials, such as those involving alleged organized crime figures, are placed in limbo. A few judges in the District do not view mega-trials as a major problem but the impact of mega-trials should not be underestimated. Even though there were less than ten mega-trials in the Eastern District last year, a District with only twelve sitting judges faces serious disruption from that number of mega-trials.

We note the observations of Judge Aspen in United States v. Andrews, 754 F. Supp. 1161, 1173, n.12 (N.D. Ill. 1990), regarding criminal mega-trials:

> The requisite expenditure of judicial time for a trial of the scope requested by the government also does violence to the mandate of Congress that all litigation before the District Court proceed promptly and without undue delay. See Speedy Trial Act, 18 U.S.C. § 3161 (1988); Civil Justice Reform Act, H.R. 5316, 101st Cong., 2d Sess. (1990) (passed by Congress and awaiting President's approval as of date of this opinion). Not only will litigants be unable to go to trial on other pending criminal and civil cases in this court during the pendency of the mega-trial, but the off-the-bench time this court would normally devote to other traditional judicial responsibilities will be significantly decreased. These responsibilities are not limited to presiding over jury trials. The judge must preside as well at motion and status calls and at sentencing hearings. He conducts emergency hearings for temporary restraining orders and preliminary injunctions. He decides motions and writes

opinions, resolves discovery disputes, and negotiates settlements in civil cases. To fulfill these obligations, the judge requires non-courtroom time to read cases, statutes, pre-sentence reports, motions, briefs and other pleadings, magistrate reports, and law clerk memoranda and draft opinions. The judge is also expected to have a passing familiarity with the hundreds of pages of slip sheet opinions he receives from the Clerks of the United States Supreme Court and Seventh Circuit each month. He must additionally reserve time to read and answer mail, return telephone calls, confer with his staff and, yes, simply to contemplate the many legal questions he must resolve. There is a finite amount of hours in the day to meet these demands. So the impact of a mega-trial on judicial routine can be disastrous.

During a mega-trial involving a multitude of defendants and more than 250 criminal acts, all the judge's non-jury hours would be consumed with managing the mega-trial. Off-the-bench time would be used primarily to resolve the inevitable motions in limine, discovery disputes, and "housekeeping" problems generated by the approximately two dozen trial lawyers, all of whom, unlike the judge, will have put aside all other legal commitments and will be spending every professional hour in single-minded activity involving only the mega-trial. For the judge, there would be little time or energy left for his other responsibilities. Thus, lawyers and parties in the other three hundred criminal and civil cases pending on the judge's calendar would suffer the immediate fall-out from decreased judicial activity and the inevitable impaired judicial performance resulting from an all consuming mega-trial. But the long term damage to our justice system, although more subtle, would be just as debilitating. Failed efforts to succeed in the impossible task of managing a mega-trial and a full caseload at the same time can only lead to judicial "burnout," which in turn will result in impaired judicial performance lasting long after the mega-trial's conclusion.

C. Projections for the Future

We have no reason to anticipate that the activity in the criminal docket will subside. As long as federal policy calls for extensive use of federal prosecution in new areas, the number of

cases to be litigated is not likely to decrease. The crime bill recently approved by the Senate and now pending in the House of Representatives, if enacted, could increase enormously the time the federal courts spend on criminal cases by adding a variety of federal capital crimes. Unless there is a commitment to increasing the resources of the Court to meet these new demands, the criminal docket may well come close to overwhelming the civil justice system, notwithstanding the best efforts of the Court.

In addition, since the ultimate decisions about the content of criminal law, charging policies and assignment of resources made at the national level define much of the agenda of local prosecutors, it is not probable that recommendations about local policies and practices will have a major impact on the criminal docket. As long as federal prosecution is seen as a major tool in the control of such a vast array of criminal activity, the criminal docket will remain a formidable competitor for the limited time of the Court. Therefore, unless the resources of the Court are substantially and promptly increased, it appears probable that any procedures that the Advisory Group recommends are likely to have only a slight impact on the amount of time the Court is able to devote to the civil docket.

Three factors have led the Advisory Group to conclude that any procedures that can be recommended and implemented will

make only a slight difference in the amount of time that the Court must devote to the criminal docket.

First, the Criminal Litigation Committee engaged in an extensive study of the Eastern District's criminal procedures several years ago and made recommendations to the Court at that time about how to reduce unnecessary delay. These recommendations resulted in the formulation of a model pretrial order for criminal cases, and some refinements in the Court's procedures. Because this study was so recent, it does not seem likely that there are now significant areas of unnecessary delay on the part of the Court which could be ameliorated by procedural changes. The Advisory Group and the Court's Criminal Litigation Committee will continue to explore procedures which might result in even a modest savings of time.

Second, some of the constraints on the Court are mandated by the Speedy Trial Act and the Constitution. Criminal defendants, particularly those in custody while awaiting trial, are entitled to prompt resolution of the charges against them. If the Court does not have adequate resources to afford the full time and consideration every litigant deserves, the Court has little choice but to give priority to the disposition of criminal cases. This preference is not a matter of judicial favoritism, but of the governing statutes and constitutional provisions.

Third, both the Advisory Group and the Criminal Litigation Committee are limited in their ability to formulate meaningful recommendations about the charging policies and practices of the United States Attorney's Office. American prosecutors are traditionally allowed a great deal of discretion in deciding how to use their resources. The Eastern District United States Attorney's Office, like other responsible prosecutors' offices, formulates internal guidelines so that individual prosecutors will exercise this discretion consistently and in accordance with office priorities. These guidelines are kept confidential. The public should not be informed that individuals will not be federally prosecuted if they embezzle up to a certain amount of money, for example. These guidelines result in the United States Attorney's Office declining to prosecute certain categories of cases considered to be less serious than other cases which are prosecuted. These policy decisions cannot be questioned to the extent that the guidelines are not known or cannot be publicly disclosed.

Nevertheless, the Advisory Committee believes that certain steps may produce some short-run efficiencies in the criminal docket.

First, we applaud the efforts of the United States Attorney's Office to redirect street crime cases to state court and urge that the federal prosecutors continue to focus their efforts and resources on complex cases where federal prosecution is neces-

sary and appropriate. As discussed, the United States Attorney's Office is currently sending some narcotics mule cases, bank robbery cases, embezzlement cases and theft cases to the district attorneys' offices. We further recommend that the Office frequently review its criminal intake policies with a view towards ensuring that cases which can be effectively handled by the district attorneys' offices do not clutter up the federal courts.

Second, the Court and the United State Attorney's Office should utilize magistrate judges more effectively. Those cases which can be appropriately prosecuted as misdemeanors should be tried before magistrate judges. Magistrate judges should be used more frequently to accept guilty pleas and thereby relieve judges of a time consuming burden. See United States v. Khan, 91 Cr. 666 (E.D.N.Y.) (Korman, J.). To assure that additional utilization of magistrate judges in the criminal realm will not adversely impact their civil duties, we recommend the creation of two additional magistrate judge positions for the Eastern District.

Third, the Advisory Group encourages the Court to set and adhere to firm trial dates in criminal matters. We further recommend the use of a uniform pretrial order in criminal cases which sets fixed time limits for motions and for completing discovery. See Report of Eastern District of New York Criminal Procedure Committee on Case Management & A Uniform Pre-Trial Order, 111 F.R.D. 311 (1986).

Fourth, the Advisory Group recommends that the Criminal Litigation Committee establish a subcommittee on the criminal trial docket. The subcommittee would work with the United States Attorney's Office, the Clerk's Office, the judges and their law clerks and courtroom deputies, the Federal Defender Service and the defense bar to address various problems and issues attendant to the criminal docket, such as eve-of-trial guilty pleas; superseding indictments; adjournments of trial dates; transferring cases from one judge to another; "related case" issues; the setting of "unrealistic" trial dates; eve-of-trial motions; and the scheduling of multiple trials for the same day. The subcommittee also would work closely with the Advisory Group and the Civil Litigation Committee which could set up parallel committees to assure an ongoing dialogue on these issues from which solutions hopefully would emerge.

We have considered and rejected the suggestion that each judge should specifically allocate a certain percentage of time to criminal matters and a certain percentage to civil cases. We will, however, continue to monitor the situation as we monitor the effect of those of our recommendations as are adopted by the Court and may be required to reconsider this suggestion if the condition of the civil docket does not significantly improve.

III. Discovery And Motion Practice, Including Rule 16 Conferences, Local Rules And Standing Orders, Final Pretrial Conferences, Including Client Participation, And Special Problems Relating To Complex Litigation

Many of the issues considered by the Advisory Group during its deliberations regarding the pretrial phase of a lawsuit have been the subject of debate and recommendation by predecessor committees. Nevertheless, the Advisory Group revisited the entire gamut of issues arising in pretrial proceedings. In some instances, the Advisory Group reaffirmed the conclusions of predecessor committees; in other cases, it suggested new approaches. Much of civil litigation is carried on outside of the Court and usually without the intervention of the Court. It is important that when intervention is sought it is done in as streamlined a manner as circumstances permit and the dispute be resolved as expeditiously as possible so that the litigation does not stall.

A. Local Rules And Standing Orders

The Advisory Committee notes that Local Rules within the federal civil system have been the subject of intense scrutiny in the past several years. The Local Rules of all of the United States District Courts, including those of the Eastern District of New York, were evaluated extensively in April 1989 by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. The Report of this "Local Rules Project" contained proposed Model Local Rules and a section listing the Eastern

District's Local Rules and Standing Orders on Effective Discovery in Civil Cases ("Standing Orders") that the Local Rules Project found to be "questionable," i.e., repetitive or inconsistent with the Federal Rules of Civil Procedure.

The proposed Model Local Rules and the "questionable" rules were considered by the Committee on Civil Litigation of the Eastern District of New York (the "Committee"). On April 27, 1990, the Committee issued its Report on the Local Rules Project. The Committee reviewed each Model Local Rule proposed by the Judicial Conference, determined whether it had a counterpart in the Eastern District's Local Rules or Standing Orders and recommended whether it should be adopted or rejected, in whole or in part, or adopted with revisions. In addition, the Committee reviewed each of the Eastern District's local rules and Standing Orders designated as "questionable" and the reasons for classifying the rule that way. Finally, the Committee recommended whether the questionable rule should be repealed or retained.

On June 18, 1990, the Board of Judges of the Eastern District adopted amendments to the Joint Local Rules of the Southern and Eastern Districts based upon the Committee's Report. Following the Committee's recommendations, the Board repealed the following joint local rules: Civil Rules 3(a,k); 4(a,b,c,d); 9; 14; 16; 17(a,b); 19(c); 25(a) and 41; Rules for Proceedings Before Magistrates 7, 8.

In addition, the June 18 Order amended Civil Rules 1 and 8, retained Civil Rules 11(c) and 31 as Eastern District variations only, and amended and retained Magistrates Rule 14 as an Eastern District variation only.

Considering the extensive review and analysis of the local rules, including the Standing Orders, recently undertaken by the Judicial Conference and the Committee, as well as the work of predecessor Eastern District committees with respect to the Standing Orders,[6] it is the view of the Advisory Group that further consideration of the local rules and Standing Orders at this time is not necessary. We do note the desirability of promoting uniformity between the local rules of the Eastern and Southern Districts of New York. We also urge that efforts to educate the bar to the existence of the Standing Orders continue. The Advisory Group therefore recommends (1) that the Standing Orders be incorporated into the local rules and that the Standard Referral Order, now routinely used to refer pretrial matters to the randomly selected magistrate judge, reference the Standing Orders, and (2) that compliance with them be mandatory. The Advisory Group further recommends that the magistrate judge remind the parties at the initial

---

[6] See Revised Report of the Special Committee on Effective Discovery in Civil Cases for the Eastern District of New York, 102 F.R.D. 357 (1984) and Report of the Discovery Oversight Committee to the United States District Court for the Eastern District of New York, June 10, 1986.

Rule 16(b) conference to comply with the Standing Orders. The Standing Orders should also be referenced in the New York Law Journal's report of local rules and individual judges' practices.

B. Discovery Procedures

1. General Points

At the outset, the Advisory Group notes two positive aspects of discovery practice in the Eastern District. First, as indicated in the Report of the Statistical Subgroup the median time to complete discovery in a civil case in the Eastern District compares favorably with the national average time as reflected in the Annual Report of the Administrative Office of the United States Courts.

Second, the Standing Orders have gained favorable acceptance by members of the bar, and have been particularly successful in fostering greater cooperation among counsel, providing easy access to and prompt disposition by the Court of discovery disputes, and decreasing the cost of and length of time for discovery. Especially significant are the provisions under the Standing Orders for telephone conferences to resolve discovery disputes. Survey results indicate that over 75% of those responding believed that increased use of telephone conferences with the court would have a substantial effect or a moderate effect in expediting litigation or reducing costs.

Although the discovery procedures currently in place appear to be operating well, the Advisory Group considered several modifications that might further reduce the delay and expense sometimes associated with discovery. The Advisory Group also considered the proposed changes to the Federal Rules of Civil Procedures that would affect the discovery process. The recommendations of the Advisory Group with respect to discovery are outlined below.

2. Recommendations

a. Automatic Required Disclosure

The Advisory Group notes that in certain jurisdictions, such as the Southern District of Florida and the Central District of California, the parties are required automatically to exchange certain basic information at the outset of an action without a formal request or court order. The proposed amendments to Fed. R. Civ. P. 26 provide a similar requirement.

The Advisory Group recommends that a provision for automatic disclosure, except for good cause shown, be adopted in the Eastern District on an experimental basis. For a period of eighteen months, every civil case filed, other than social security, habeas corpus, and pro se cases, as well as civil rights cases where an immunity defense is available, would be designated

as subject to automatic disclosure. [7] After nine months, a study would be commenced to determine whether the automatic disclosure provisions should be revoked, modified, expanded, or adopted as permanent local rules.

The subjects of such automatic disclosure follow:[8]

(1) Categories of Disclosure

- The identity, including name, address and telephone number, of all persons likely to have information that bears significantly on the claims and defenses (Fed. R. Civ. P. 26(a)(1)(A));
- A general description, including the location, of all documents in the possession, custody or control of the parties that are likely to bear significantly

---

[7] The Advisory Group recognizes that this approach is at variance with the proposed amendments to the Federal Rules. However, the proposed amendment to Federal Rule 83(b) would allow inconsistent local rules that are time-limited and approved by the Judicial Conference. We believe that this approach is too narrow and contrary to the purpose of the Civil Justice Reform Act of 1990. We propose that any local rule proposed by an advisory group and adopted by the court as part of a delay and cost-reduction plan pursuant to 28 U.S.C. § 473 should be valid for an experimental period of five years or less without approval of the Judicial Conference.

[8] Following each category is a parenthetical indication of whether the particular requirement appears in the proposed amendment to Fed. R. Civ. P. 26. The Advisory Group recommends that automatic disclosure be adopted on the experimental basis proposed without regard to whether the proposed amendments to the Federal Rules of Civil Procedure are adopted.

on the claims, defenses and damages claimed (Fed. R. Civ. P. 26(a)(1)(B));

- The documents in possession of the parties that were relied upon in preparing the pleadings or are contemplated to be used in support of the parties' allegations, including those documents that relate to the computation of damages;
- Authorizations to obtain medical, hospital, no faults and worker's compensation records.
- The existence and contents of any insurance agreement under which an insurer may be liable (Fed. R. Civ. P. 26(a)(1)(D)).

It is the view of the Advisory Group that parties should not be permitted to opt out of the automatic disclosure requirements, except for good cause shown. Therefore, Standing Order 2, which permits parties to stipulate to modifying any practice with respect to discovery, unless contrary to a prior order of the court specifically in the action, should not apply to the automatic disclosure requirements. According to survey results, nearly two-thirds of the respondents believe that automatic disclosure of witnesses would have a positive effect in expediting litigation. Nearly 60% believed that providing a general description of documents relied on in preparing the pleading would have a beneficial effect on

litigation, and almost 60% felt that automatic disclosure of insurance agreements would expedite litigation and reduce costs.

(2) Timing and Supplementation

Under the proposed amendments to Fed. R. Civ. P. 26, the automatic disclosures are required to be made by plaintiff within 30 days after service of an answer; by a defendant within 30 days of service of an answer; and, in any event, by any party who has appeared in the case, within 30 days after receiving written demand for automatic disclosure accompanied by the demanding parties' disclosures. A continuing duty to supplement disclosure is imposed by proposed Fed. R. Civ. P. 26(e)(1). The Advisory Group recommends the adoption of both the time frames and supplementation duties set forth in the proposed revisions to Rule 26. The Advisory Group also notes that any time periods which may be prescribed may be altered by stipulation of the parties. See Standing Order 2. In any event, however, automatic disclosures should take place prior to the initial Rule 16 conference and any differences arising with respect to automatic disclosure should be resolved, if possible, at the conference.

(3) Sanctions for Failure Automatically to Disclose

Proposed Rule 37(c) provides for an automatic sanction for failure to make a disclosure under proposed Rule 26(a). The Advisory Group disagrees with this proposal because it believes that the sanctioning procedures already in place are sufficient to

ensure compliance with the automatic disclosure requirements. The Advisory Group does urge, however, that the parties, or their counsel, be required to sign and file a document confirming that they have complied with the automatic disclosure requirements before they may engage in their own discovery.

b. Expert Discovery

The Advisory Group recommends that certain basic information about experts be subject to automatic disclosure similar to the procedures referred to above. Such disclosure is provided for in the proposed revision to Fed. R. Civ. P. 26(a)(2). The Advisory Group recommends requiring the following automatic disclosures with respect to experts' reports:

- a statement of all opinions expressed and the basis and reasons for each opinion;
- the information relied upon in forming the opinion;
- tables, charts, graphics or other exhibits to be used as a summary of data or support for the expert's opinions;
- the qualifications of the expert including a curriculum vitae detailing the expert's education, employment history, professional affiliations, and all articles authored by the expert;

- a listing of any other cases in which the witness has testified as an expert at trial or on deposition within the preceding four years.

The Advisory Group recommends that the expert disclosure be signed under oath by the expert.

Proposed Rule 26 requires disclosure of the information referred to above at least 90 days prior to the trial date, unless the court designates a different time. The Advisory Group is of the opinion that the date of compliance should be set by the judicial officer. Our survey indicates that nearly 63% of the respondents favor this approach.

c. Limitations on Discovery

(1) Scope of Discovery

It is the consensus of the Advisory Group that discovery is often excessive. The proposed amendments to the Federal Rules limit the scope of permissible discovery by providing that requested discovery will not take place if the "burden or expense of the proposed disclosure outweighs its likely benefit." This balancing concept would replace the current provision in Rule 26 which allows the court to limit the scope of discovery if the discovery sought

is "unduly burdensome or expensive." The Advisory Group approves of the proposed balancing concept.[9]

Survey results indicate that there is strong sentiment among respondents for limitations on discovery. Over 70% believed that the conditioning of grants of broader discovery upon the shifting of costs in the instances where the burden of responding to additional discovery appears to be out of proportion to the amounts or issues in dispute would have a substantial or moderate effect on expediting civil litigation or reducing its cost. Nearly two-thirds of those responding felt that the permissible scope of discovery should be defined by balancing the burden or expenses of discovery against its likely benefit. Some 60% favored assessing the costs of discovery motions on the losing party as a means of expediting litigation. A number of respondents to the survey questionnaire believe that providing less time for the completion of discovery would expedite litigation.

(2) Limits on Number of Interrogatories and Number and Length of Depositions

The proposed Federal Rules place presumptive limits on the number of interrogatories and the number and length of depositions. Specifically, proposed Rule 33(a) presumptively limits the

---

[9] Some members of the Advisory Group believe that the adoption of cost/benefit criteria to replace the proportionality standard will lead to needless and expensive satellite litigation and hence is unwise.

number of interrogatories that may be served to fifteen including all subparts. This limit may be enlarge by leave of court or stipulation of the parties. Proposed Rule 30(a)(2)(A) limits each side in the litigation to the taking of 10 depositions unless the court, upon application, grants permission to take more. Proposed Rule 30(d) limits the time allotted to depose any single witness to six hours.

The Advisory Group recommends that the presumptive limitations on the number of interrogatories and the number of depositions embodied in the proposed Federal Rules be effective in the District for a period of eighteen months. The Advisory Group considered the possibility of placing limits on the number of interrogatories that may be used in a civil action even though a similar proposal had been raised, debated at length, and rejected by a predecessor committee during the drafting of the Standing Orders.

As noted in the Commentary to the Standing Orders, placing limits on the number of permissible interrogatories was viewed by the committee as unfairly prejudicial to parties of limited means who could not afford to take depositions and initially the Advisory Group rejected numerical limits. However, in light of public comment, the survey response in which nearly two-thirds of the respondents expressed the view that numerical limits on interrogatories would expedite litigation, and the proposed amend-

ments to the Federal Rules, the Advisory Group has reconsidered its view.

The Advisory Group recommends that limitations on the number of interrogatories be established by agreement of the parties or by order of a judicial officer at the initial pretrial conference. In the absence of such agreement or court order in a given case the number of interrogatories shall be presumptively limited to fifteen, including subparts. This limitation shall not apply to actions brought by the United States under 28 U.S.C. § 3101, 18 U.S.C. § 981 and 21 U.S.C. § 881, where interrogatories are served with the complaint. In actions brought under these statutes, the United States must establish a chain of title. Accordingly, ownership must be attested to as soon as possible. By serving interrogatories with the complaint, the United States can determine ownership expeditiously and inexpensively. Any limitation would necessitate additional motion practice and would, in the Advisory Group's view, be inefficient.

Similarly, with respect to depositions, the Advisory Group was initially reluctant to place numerical limits on the number and length of depositions to be taken principally because of its concern that placing a numerical limit on the number or length of depositions might have the undesirable and unintended effect of encouraging a party to take more or longer depositions than the party might otherwise have taken. The Advisory Group revisited the

issue of limits on depositions in light of public comment of survey responses, and the proposed amendments to the Federal Rules of Civil Procedure.

The Advisory Group recommends that any limitations on the number of depositions in an action be established by agreement of the parties or by order of the judicial officer at the initial pretrial conference. In the absence of such agreement or court order on the number of depositions in a given case, the number of depositions shall be presumptively limited to ten per side (plaintiffs, defendants and all other parties). With respect to the length of depositions, the majority of the Advisory Group is of the view that this is a matter on which counsel can usually agree and need not be the subject of specific rule.

These limitations would also be the subject of the study referred to at page 58, supra, to determine whether they should be revoked, modified, expanded, or adopted as permanent local rules.

d. Discovery Conferences

The proposed amendment to Fed. R. Civ. P. 16 states that scheduling and control of discovery is a matter that may be considered at the mandatory Rule 16 conference. The Commentary notes that discussion of discovery at such conferences is a "major objective" of the conference. If proposed Rule 16 were adopted, current Rule 26(f) would be revoked.

The Advisory Group agrees that scheduling and control of discovery is a matter that is appropriate for discussion at the initial Rule 16 conference and should not be left for a possible Rule 26(f) discovery conference and recommends a requirement that scheduling and control of discovery be considered at the initial Rule 16 conference.

e. Non-Stenographic Recording of Depositions

Proposed Rule 30(b)(3) would change prior law by providing that parties may notice and take depositions by non-stenographic means without obtaining prior leave of court. The Advisory Group notes that this proposal is in harmony with Standing Order 7. That Standing Order, drafted under the current Federal Rules, states that requests pursuant to Fed. R. Civ. P. 30(b)(4) to record depositions by non-stenographic means "shall be presumptively granted." The Advisory Group recommends that this practice continue.

f. Mandatory Pretrial Disclosures

Proposed Rule 26(a)(3) provides that the following disclosures pertaining to evidence that may be presented at trial be made at least 30 days prior to trial:

- The name, address and telephone number of each witness, separately identifying those witnesses the party expects to call and those that may be called if the need arises;

- Designation of those portions of testimony that are to be presented by deposition or non-stenographic means (including a transcript);
- An identification of each document or exhibit, separately identifying those that the party expects to offer and those that may be offered if the need arises, other than for impeachment or rebuttal.

The proposed revision to Rule 26 provides that within 14 days of disclosure of the information referred to above other parties must serve and file any objections to the admissibility of deposition testimony and documents. Objections not so raised, other than objections on grounds of relevancy, are deemed waived absent a showing of good cause.

The Advisory Group favors these requirements and notes that such disclosure is appropriately addressed at a pretrial conference. The Advisory Group further notes that many of the disclosures referred to in proposed Rule 26(a)(3) are already required by some judges within the District in their standard pretrial orders. Although the Advisory Group considered the merits of requiring a uniform pretrial order, it concluded that because the individual judges' pretrial orders reflect their individual preferences it would be undesirable, and probably impracticable, to require a uniform pretrial order.

The Advisory Group believes that the parties should exchange proposed orders and discuss their proposals until they arrive at a joint pretrial order which specifies what is agreed to and what is not.

g. Discovery Disputes

The proposed amendments to Rules 26(c) and 37, regarding protective orders and motions to compel, require the parties to engage in a good faith effort to resolve their discovery disputes prior to seeking judicial intervention. The Advisory Group notes that Standing Order 6(a) incorporates the same requirement. Some 72% of those answering our survey expressed the view that this procedure is effective in expediting resolution of discovery disputes.

C. Motion Practice

Based upon the report of the Statistics and Assessment Subgroup, the Advisory Group concludes that motion practice in the Eastern District does not represent a problem area. No avoidable delay or expense was identified in that report. Anecdotally, however, members of the Advisory Group have related several instances of substantial delay in obtaining decisions on substantive motions. Accordingly, the Advisory Group proposes the following refinements to motion practice in the Eastern District.

1. Scheduling of Motions

a. Dates by Which Motions are to be Filed

The normal practice in the Eastern District is to issue a Scheduling Order at the initial Rule 16(b) conference. That order usually sets forth (i) a date by which additional parties are to be added or the pleadings amended and (ii) a date by which any substantive motions are to be filed, typically after the discovery cut-off date that is also usually established at the initial conference. When there are other potential motions raised by the parties at the initial Rule 16 conference, the Scheduling Order normally provides for these as well.

b. Return Dates and Hearings

Individual practices of judges and magistrate judges vary as to the scheduling of return dates on motions. Presumably, each judicial officer schedules hearings or arguments on days and for times that are most efficient. For example, some judges schedule motion arguments on Fridays at 10:00 a.m., thereby stacking all motions during that week for that time. Other judges schedule motions for every day of the week. Still others hear no argument, and all motions are submitted. With regard to those judges and magistrate judges who stack motions for a particular time each week, the Advisory Group considered whether some cost and perhaps some delay would be eliminated by scheduling motions at ten minute intervals instead, but rejected this proposal on two grounds:

first, even if attorneys were required to appear at least ten minutes early to fill any gaps that may occur, there would be judicial down time; second, there may be some benefits -- settlement, issue narrowing, scheduling, for example -- to having counsel for the adverse parties together in one room available to discuss the case. Notwithstanding the foregoing, the Advisory Group urges that if motions are stacked the number of motions scheduled for a particular time should not be more than can be heard within a reasonable period. Counsel should not be required to sit in court for several hours awaiting their matters to be called. Moreover, a schedule of the matters to be heard, indicating the order in which they will be heard, should be available for counsel's review at the motion session. The Advisory Group also observes that telephone conference calls are often an efficient and effective means of bringing the Court and the parties together for conferences and even arguments, particularly where counsel and the judicial officer have engaged in a face to face conference(s).

2. Monitoring the Filing of Motions and Responses

The Advisory Group has no recommendations with respect to the monitoring of the filing of motions and responses, except to note that the Civil Justice Reform Act of 1990 (§ 476) now requires the Administrative Office to prepare public reports disclosing, inter alia, the number of submitted motions pending for more than six months and the number of bench trials that have been under

submission for more than six months. In this regard, it will be necessary for the Clerk's Office to institute appropriate data collection efforts to provide the data that the Administrative Office must include in its report.

The Advisory Group acknowledges that the Board of Judges has unanimously approved a resolution to the Judicial Conference calling for a return to the prior practice of reporting motions that have been submitted and not decided for more than 60 days. The Advisory Group shall continue to monitor pending motions and may in the future make specific recommendations in this area.

3. Method of Ruling on Motions

The Advisory Group recognizes that some judges and magistrate judges are comfortable ruling orally from the bench while others prefer drafting written opinions or orders on each motion. Again, this is an individual practice that is appropriately left to the discretion of the individual judicial officer. To the extent, however, that judicial officers can rule from the bench on appropriate motions, such a procedure will obviously save a certain amount of time.

4. Timing of Rulings

The 60 day list, referred to in the Statistics and Assessment Subgroup's report, provides incentive for judges and magistrate judges to rule promptly on matters that they have under consideration. According to the latest 60 day list, the Eastern

District has relatively few matters under consideration beyond 60 days after submissions of briefs and oral arguments. Nevertheless, the Advisory Group is concerned that in rare cases motions are lost in the system and proposes that a mechanism be established to identify these cases. Accordingly, for those apparently unusual occasions when motions are pending for a significant period of time, i.e., more than six months from the date of final submission, the Advisory Group recommends the adoption of a local rule that would require the Clerk of the Court to inquire of the judicial officer's chambers as to the status of the motion and report the status to all parties. This procedure would also be a useful reminder to judicial officers and/or their clerks that a matter has been sub judice for a lengthy period. It also would eliminate the obvious dilemma faced by parties who want to inquire as to the status of a languishing motion but are fearful of offending the Court.

5. Use of Proposed Orders

The Eastern District judges and magistrate judges do not uniformly require proposed orders. Some judicial officers do ask for proposed orders if they have ruled from the bench or if there is no opposition to a motion. The Advisory Group does not believe that proposed orders, submitted prior to decisions on motions, are useful. Post-decision submissions of such orders could relieve the Court of some burden, but whether they should be required depends upon the particular circumstances and therefore should be left to

the discretion of the judicial officer. In this regard, the Advisory Group is aware of a practice of the District of Puerto Rico in which the court requests the victorious party to do a first draft of the court's opinion. This practice was noted and rejected by the Advisory Group.

6. Use of Magistrate Judges

The judges within the Eastern District are referring more and more motions, including substantive motions, to magistrate judges for reports and recommendations. We recognize that this practice initially relieves the judge of certain burdens. On balance, however, this practice may be expensive and time consuming. Judges may be able to handle these matters more expeditiously because they can rule from the bench, whereas magistrate judges must prepare a written report. Moreover, greater judicial time is expended if these litigants choose to appeal the magistrate judge's order to the judge. See 28 U.S.C. § 636(b)(1)(A). A majority of the Advisory Group believes that in light of possible delay and duplication of effort, caution should be exercised in referring substantive motions to magistrate judges. However, this is a useful practice in cases where the magistrate judge has extensive prior experience in the case.

7. Additional Suggestions Relating to Motion Practice

a. The Advisory Group notes that some Eastern District judges require premotion conferences for non-discovery motions in an effort to screen such motions before they are filed. The Advisory Group recommends that the judges in this District require premotion conferences where dispositive issues are raised. If a premotion conference is not scheduled within four weeks from the date requested, the party is free to make the motion without a conference. This practice not only helps separate those motions which are of marginal utility from those which deserve serious consideration, but also discourages frivolous motions from being filed. Additionally, it serves to bring the parties together and thereby enhances settlement possibilities. While we recognize that this procedure imposes costs on the judicial system, we believe that on balance, at least where dispositive issues are involved, the benefits of the procedure may exceed any costs. We also note that our survey results show strong support for required premotion conferences. Nearly 60% of those responding to the survey believed that required premotion conferences would have a substantial or moderate effect on expediting litigation.

With respect to non-dispositive motions in general and discovery motions in particular the Advisory Group questions whether the premotion conference is cost effective. Given the existing procedures for prompt resolution of discovery disputes embodied

in the Standing Orders, which appear to be working well, we see little benefit to creating additional barriers to a judicial hearing.

b. The Advisory Group urges expanding the letter motion practice, currently used for discovery disputes, see Standing Order 6, to procedural motions, such as motions for leave to amend complaints, to add third parties, or to add additional parties. These motions are generally routine and usually do not require lengthy briefing. As with discovery disputes, the moving parties would have to certify that they have conferred in good faith with opposing counsel and that they have been unable to come to an agreement.

c. The Advisory Group also considered the possibility of a page limitation for memoranda of law submitted in connection with motions in the Eastern District. Some judges impose page limitations by individual rules. Judge Wexler, for example, has a thirty page limit.

The Advisory Group recommends that rather than imposing any general page limitation, judges and magistrate judges should deal with abuses caused by inordinately lengthy memoranda on a case-by-case basis.

D. Pretrial Conferences (Fed. R. Civ. P. 16)

1. Timing and Frequency of Pretrial Conferences

a. Case Management Conference

The Civil Justice Reform Act of 1990, § 473(a)(1), proposes "individualized and case specific management" as a guiding principle. It also suggests that courts consider including in their Plan a local rule requiring counsel to confer in advance of any Rule 16 conference in order to prepare a case management conference report to be submitted for review by a judicial officer at the initial Rule 16 conference.

Rule 3(b) of the Eastern District's Standing Orders already imposes such a requirement on counsel. It provides:

> (b) Scheduling Order. Prior to any scheduling conference, the attorneys for the parties shall attempt to agree to a scheduling order and if agreed to, shall submit it to the court. If such scheduling order is reasonable, the court will approve it and advise counsel. The court may for any reason convene a conference with counsel by telephone or otherwise to clarify or modify the scheduling order agreed to by counsel. If the attorneys for the parties cannot agree on a scheduling order, they shall promptly advise the court.

The Advisory Group is concerned that some counsel may be unaware of this provision, or interpret it too narrowly, because they assume erroneously that the Standing Orders relate solely to discovery matters. The agenda to be considered by counsel in drafting a case management conference report (or a Scheduling Order) is considerably broader than discovery issues. See discussion in paragraph D.2 below. To solve this concern, to facilitate

access to the Standing Orders, and to continue to educate the bar to their scope and effect, the Advisory Group recommends that the Standing Orders be made part of the local rules.

The Advisory Group considered and rejected a requirement that authorized representatives of the litigants be present at this initial conference conducted by attorneys without the presence of the judicial officer. Mandatory participation by clients at such an early stage of litigation is viewed as largely unproductive and inefficient and unduly intrusive into the attorney-client relationship.

b. The Initial Pretrial Conference

The normal practice in the Eastern District is for the magistrate judge to preside over the initial Rule 16(b) conference. The Advisory Group is in favor of holding such a conference even if the parties have agreed upon a case management conference report that is satisfactory to the magistrate judge. A face-to-face meeting with counsel enables the magistrate judge to have a better feel for the case, and promotes an opportunity for settlement. Where the attorneys are distant from the courthouse, it should be left to the discretion of the magistrate judge to conduct the conference by telephone. The Advisory Group endorses the view that representatives of the litigants, i.e., the parties, their insurers, or both, may be ordered to attend the conference.

c. Subsequent Conferences

The scheduling of subsequent conferences must be left to the discretion of the judicial officer handling the case. The Advisory Group suggests, however, that where discovery is staged or tiered, it probably is useful to hold a conference upon the completion of each stage.

The Advisory Group also suggests that it may often be desirable for the district judge to hold a pretrial conference after the magistrate judge finishes supervising discovery. This occasion will enable the district judge to evaluate the complexity of the case, the positions of the parties, and the feasibility of immediate disposition of some disputed issues. In jury cases where the judge is encouraged to take an active role in settlement discussions, the pretrial conference furnishes an opportune moment for such discussions, particularly if representatives of the parties or their insurers are directed to attend, which the Advisory Group also encourages.

d. Final Pretrial Conference

The Advisory Group endorses the concept that, in general, a final pretrial conference should be held in all cases. Ordinarily, settlement should be an agenda item at that conference. A representative of the parties with authority to settle should be encouraged or ordered to attend. The degree of emphasis placed on settlement at the final pretrial conference should be left to the

court's discretion. A court may, for example, place less emphasis on settlement where the case is one in which there is a legitimate effort to test or shape the law. The Advisory Group recognizes that final pretrial conferences are less valuable when settlement will not be considered. In such cases, a final pretrial order may be a more efficient use of the judge's and counsel's time than an in-person conference. There may be other situations in which a final pretrial conference would constitute an inefficient use of a court's resources or counsel's time.

The Advisory Group notes that the inability to try a civil case immediately after discovery ends is a significant cause of unnecessary delay and expense that should be avoided. Delay in trying the case may mean that additional discovery will have to be ordered at the final pretrial conference because of changed conditions, such as the availability of additional data on which an expert's opinion had been based. Furthermore, parties may list witnesses who have not yet been deposed. Accordingly, the final pretrial conference needs to be set close enough to a realistic trial date so that matters relating to the trial can be finally resolved but also with an eye to providing sufficient time for additional discovery and possible motions, given the circumstances of the particular case.

2. Subjects for Discussion at the Pretrial Conference

a. Rule 16

Rule 16 presently provides that a number of subjects be considered at a Rule 16(b) conference.

Proposed amendments to Rule 16(c) would require that ". . . consideration may be given, and appropriate action taken" with regard to a number of additional subjects. These are:

> (4) . . . limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence;
>
> (5) the appropriateness of summary judgment under Rule 56, which may include an order disposing of claims or issues under Rule 56 if all parties have had reasonable opportunity to discover and present material pertinent to the disposition;
>
> (6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rules 26 and 29 through 37;
>
> (9) the possibility of settlement and the use of special procedures to assist in resolving the dispute;
>
> (13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue of fact arising in the case;

(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could on the evidence be the basis for a judgment as a matter of law entered pursuant to Rule 50(a) or a judgment on partial findings pursuant to Rule 52(c); and

(15) an order establishing a reasonable limit on the length of time allowed for the presentation of evidence or on the number of witnesses or documents that may be presented.

b. The Federal Judicial Center's Memorandum

The Federal Judicial Center's Memorandum of January 16, 1991 on the Implementation of the Civil Justice Reform Act of 1990 sets forth a number of items that should be considered at pretrial conferences including the following:

(1) identifying, defining and clarifying issues of fact and of law genuinely in dispute (see § 483(a)(3)(B));

(2) making stipulations of fact and law and otherwise narrowing the scope of the action to eliminate superfluous issues;

(3) scheduling cutoff dates for amendment of pleadings;

(4) scheduling filing and, if necessary, hearing dates for motions, and where appropriate, providing for the management of motion practice . . .;

(5) scheduling discovery cutoff dates and, where appropriate, providing for management of discovery . . .;

(6) scheduling dates for future management and final pretrial conferences, . . . (see § 473(a)(3)(B));

(7) scheduling trial date(s) and providing, where appropriate, for bifurcation, . . .

(8) adopting procedures, where appropriate, for management of expert witnesses, . . .;

(9) exploring the feasibility of initiating settlement negotiations or invoking alternate dispute resolution procedures, . . .;

(10) determining the feasibility of reference of the case, or certain matters, to a magistrate judge or master;

(11) providing that all requests for continuances of deadlines for the completion of discovery or trial dates be signed by counsel and communicated to the client, unless such communication is impracticable (see § 473(b)(3)); and

(12) considering and resolving such other matters as may be conducive to the just, speedy, and inexpensive resolution of the case.

c. The Advisory Group's Recommendation

The Advisory Group agrees that all of the topics suggested by the proposed amendments to Rule 16 and in the Federal Judicial Center's memorandum are appropriate for discussion but may not be appropriate for implementation in every case. Obviously, some of the items cannot meaningfully be considered at the initial stages of a litigation. Consequently, they need not be discussed by counsel when negotiating a case management conference report, or at the initial pretrial conference.

The Advisory Group does not approve of setting a trial date within eighteen months of the filing of the complaint at the initial pretrial conference. The Advisory Group believes that such a target date would be unreachable in so many cases, given the realities of the criminal calendar in the Eastern District, that it is meaningless to schedule firm trial dates at the beginning of a litigation.

3. Pretrial Orders

Under current practice in the Eastern District, some proposed pretrial orders are submitted directly to chambers either by facsimile or mail and therefore may not be docketed. In order to facilitate reviewing the progress of a case, the Advisory Group recommends that all proposed pretrial orders submitted by counsel should be docketed at the time of submission. Accordingly, the Advisory Group recommends that attorneys be directed to file a copy

of a proposed pretrial order with the Clerk's Office whenever they submit a proposed order to the chambers of a magistrate judge or judge.

E. Issues Relating Particularly To Complex Litigation

1. Nature of Complex Litigation in the Eastern District of New York

The Civil Justice Reform Act of 1990 contemplates that advisory groups begin their tasks by assessing the court's workload. Consequently, the first question to be addressed is the nature of the complex cases that are on the Eastern District's docket.

a. Multidistrict Litigation

The Statistics and Assessment Subgroup Report reported that nine MDL cases were pending in the Eastern District as of March 19, 1991. These include Agent Orange, four cases stemming from air disasters, two securities fraud cases, one tax fraud case, and a tax refund litigation. The Clerk of the Court reported that none of these cases is particularly massive with the exception of Agent Orange and the air crash disasters, which include the Lockerbie Pan American airline bombing, and the crash of the Colombian airliner near Cove Neck, Long Island.

b. Other Complex Cases

Other types of cases, regardless of whether they are multidistrict litigations proceeding on a consolidated or coordinated basis pursuant to an order of the Judicial Panel on Multi-

district Litigation, are uniformly perceived as being complex. Foremost in this category are the asbestos cases which are being handled by Judges Sifton and Weinstein. As of June 30, 1991, Judge Sifton had 194 cases, and is, in addition, handling pretrial matters with regard to some 900 asbestos cases in the Southern District. Judge Weinstein has a docket of 202 asbestos cases at this time. Hazardous waste cases, environmental clean-up proceedings, and antitrust litigation also fall into this category.

c. Defining a Complex Case

The Manual for Complex Litigation (Second) ("MCL") does not contain a definition of complex cases although it mentions characteristics that complex cases often display, such as numerous parties and attorneys (MCL § 20.121), two or more separate but related cases (MCL § 20.123), enormity of the amounts or values at stake (MCL § 20.21), and extensive discovery and prolonged trial (MCL § 20.21). Part III of the MCL also makes suggestions for handling several types of cases that are frequently treated as complex litigation. [10] These categories are for the most part consistent with the views of the Advisory Group. The Manual's inclusion of employment discrimination litigation and omission of

[10] Class actions (MCL § 30), multiple litigation (MCL § 31), antitrust cases (MCL § 33.1), mass disasters and other complex torts (MCL § 33.2), securities litigation (MCL § 33.3), takeover litigation (MCL § 33.4), employment discrimination litigation (MCL § 33.5), and patent litigation (MCL § 33.6).

environmental actions may be attributable to substantive law shifts since the second edition of the Manual was issued in 1985.

If the Eastern District determines that special rules are needed to deal with complex cases, the cases to be governed by the special rules would have to be identified. The Advisory Group is of the view that complex cases share certain characteristics, although not all complex cases contain all of the features that generally point to complexity. For instance, even though most complex cases contain multiple parties, an obvious exception is the litigation leading to the break-up of AT&T. The following factors could be incorporated into a definition of a "complex" case or operate as a checklist for a judicial officer determining whether the case should be classified as "complex":

1. Demands on resources of the court
2. Number of parties
3. Whether it is a class action
4. Amount of discovery needed
5. Whether it is massively fact-based
6. Number of experts
7. Related litigation, actual or potential
8. Expected number of trial days
9. Cost to litigate

2. Judicial Assignments with Regard to Complex Cases

a. Assignments of Judges

The Manual for Complex Litigation provides that the Judicial Panel on Multidistrict Litigation has the choice of assigning a case to a judge through the ordinary procedures used in the district in question, i.e., random selection through the wheel in the Eastern District, or by taking into account other factors and making an assignment to a particular judge. (MCL § 20.12). The Advisory Group considered whether non-multidistrict complex cases should be taken out of the wheel. There is an obvious tension between efficiency concerns, such as the opportunity to take advantage of a particular judge's expertise or managerial skills, and the desire for impartiality and even-handedness that underlies the random selection mechanism. The Advisory Group is also concerned that the method of choosing judges for complex cases not unfairly burden particular judges, although the Advisory Group recognizes that the present rules do authorize the Chief Judge to take an overburdened judge out of the wheel for a period of time. E.D.N.Y. Div. of Bus. Rule 50.2(h). On balance, the Advisory Group favors retention of the random selection process, including for complex cases.

b. Assignments of Magistrate Judges

The same issues arise regarding the assignment of complex cases to magistrate judges. Magistrate judges are currently as-

signed to MDL cases through random selection. If a particular magistrate judge is overburdened, that magistrate judge or the parties could request a reassignment. The Advisory Group recommends no change in the current practice.

3. Judicial Management

a. Applicability of the Standing Orders to Complex Cases

The Standing Orders do not differentiate between complex and non-complex litigation. At this point, the almost uniform practice in the Eastern District is for a judge to use a standard referral order (see Form A attached to Standing Orders) to assign all cases (other than those in particular categories) to a magistrate judge for all purposes, including the Rule 16 conference, until discovery is complete. (See Preliminary Report on Settlement Practices in the Eastern District at 4-5.) A judge has discretion under the present system to handle referrals in complex cases differently. The judge could, for example, use a special referral order, or require the magistrate judge to provide periodic status reports about the case, a practice rarely used according to the Preliminary Report on Settlement Practices. With respect to referring cases to magistrate judges, the Advisory Group believes that this discretionary referral practice should continue, leaving the judge free to select techniques suggested by the Manual for Complex Litigation or to improvise when presiding over complex cases.

b. Special Techniques for Complex Cases

The Advisory Group offers a variety of techniques which may be of particular use in judicial management of complex cases. Some of the suggestions, such as stipulating to non-disputed testimony of experts and lay witnesses, are equally applicable to non-complex cases and should be coordinated with recommendations regarding the final pretrial conference.

(1) Exercising Greater Control During the Discovery Phase

In the usual case in the Eastern District, the assigned judge will have no contact with the litigation until discovery is complete, except for dispositive motions and appeals from the decisions of magistrate judges. When a case is characterized as complex by either the judge or magistrate judge, the Advisory Group suggests that more control by the judge would be helpful. Greater control could be exercised by requiring periodic status reports from the magistrate judge, by the judge holding periodic status conferences at six month intervals for discussion of motions and discovery, and by scheduling periodic settlement conferences after each "tier" of discovery. The Advisory Group endorses the concept of requiring clients to attend these conferences where the court would find this useful.

(2) Special Discovery Techniques

The Advisory Group also endorses the concept of staged, tiered or milestone discovery for complex cases. Under this approach, discovery would be prioritized and channelled to cover certain issues but not others. For example, discovery might be limited in the first instance to matters that would be dispositive, such as jurisdictional defects or particular defenses that would either terminate the litigation or eliminate particular parties (e.g., statutes of limitation, governmental immunity). Discovery on liability issues might be separated from discovery on damages issues, and fact discovery could be ordered prior to expert discovery. Time limitations could be specified for each tier of discovery. Expediting the pace of discovery is one of the most effective ways for eliminating delay and reducing cost.

Savings in time and expense may also be achieved through requiring automatic disclosure (see Discovery Procedures, supra), and the production of discovery materials from related litigation.

(3) Greater Organization of Counsel

The Advisory Group notes that the common practice of appointing lead counsel for plaintiffs in multi-plaintiff actions generally works to eliminate duplication of effort and reduce cost and delay. The Advisory Group believes that appointing lead counsel for co-defendants as well, and specifying their duties consis-

tent with the requirements of due process, would also serve the interests of efficient litigation.

(4) Experts

It is the consensus of the Advisory Group that use of experts raises many problems in complex litigation; there is less unanimity about how the problems should be addressed. From plaintiffs' point of view, there is a concern that any change in present practice -- such as demanding more information from experts prior to trial, or expanding the pretrial screening of expert testimony -- would tip the present balance by benefitting defendants more than plaintiffs.

(a) Obtaining Additional Information

From the standpoint of efficiency, the Advisory Group urges that more detailed information relating to experts should be obtainable during discovery. We suggest: authorizing the taking of experts' depositions without the need for a court order or stipulation (which appears to be a common practice in any event); requiring experts to furnish detailed information about their qualifications; requiring experts to exchange reports; requiring experts to consider agreeing to a joint report specifying their areas of agreement and disagreement or requiring parties to mark their experts' reports indicating areas of agreement and disagreement; requiring certain kinds of experts, such as statisticians, to

follow specified protocols in writing their reports,[11] requiring experts to produce materials or access to materials in their control on the basis of which the expert claims expertise, such as reprints of articles written by the expert; and furnishing the proposed direct testimony of the expert to the noticing party prior to the expert's deposition. Some of these suggestions we recommended generally with respect to experts as discussed above.

(b) Screening Expert Testimony Prior to Trial

The availability of more information about the expert and the basis for the expert's opinion could lead to in limine motions challenging expert testimony on the ground that the expert was not properly qualified, was not espousing a valid theory, or was not relying on reliable data. These motions could be made at or in advance of the final pretrial conference. If the court decided to exclude the plaintiff's expert or portions of his or her testimony, the defense might then move for summary judgment on the ground that the plaintiff would be unable to establish a prima facie case without the excluded expert proof. Since the parties would have an effective adversarial mechanism for exploring the significance of the proffered expert testimony at the hearing on the motion in

---

[11] See, e.g, the protocols for statisticians suggested by The Special Committee on Empirical Data in Legal Decision Making of the Association of the Bar of the City of New York, reprinted in The Evolving Role of Statistical Assessments as Evidence in the Courts at 256-67 (Fienberg ed. 1988).

limine, they should not be allowed to supplement the summary judgment motion with affidavits by experts who have not been deposed or other appended materials such as articles.

A motion in limine procedure would be more efficient if, absent good cause, the parties were precluded from selecting another expert in the event their expert proof was excluded and would be fair if: (1) the exclusion occurred after discovery was complete; (2) the court had not altered significantly the legal theory to which the disputed expert proof related; (3) a party had received notice about the intended challenge to the expert proof before the completion of discovery; and (4) thereafter, the notified party was afforded a reasonable opportunity before the close of discovery to obtain another expert.

(c) Videotaping Experts; Depositions

While the use of videotaped depositions at trial might well save time and expense, the Advisory Group is concerned about eliminating the opportunity for the judicial officer to question the expert, as well as eliminating cross-examination at trial.

(d) Expert Testimony at Trial

In the view of the Advisory Group, juries might comprehend complex expert testimony more readily if the defendant's experts testified immediately after the plaintiff's experts. The determination of whether experts should testify back-to-back is best left to the sound discretion of the judge.

IV. Alternative Dispute Resolution ("ADR"); Sanctions; And Attorneys' Fees

The Advisory Group believes that ADR, which has been successful when implemented, particularly in the court-annexed arbitration plan, has been under-utilized in the Eastern District and has significant potential for reducing litigation costs and delays. The Advisory Group finds that sanctions and attorneys' fees proceedings have generally led to additional costs and delays and offers recommendations to minimize these problems.

A. ADR

The availability of a range of ADR mechanisms provides the court with a variety of management tools that can be tailored to meet the needs of a particular case. The Eastern District already uses at least two ADR techniques: the settlement conference and court-annexed arbitration. The Advisory Group believes that improvement of the existing devices and the addition of others is desirable.

1. Court-Annexed Arbitration

Under the Local Arbitration Rule as amended February 1, 1991, all claims for money damages involving $100,000 or less are sent to arbitration, except for social security cases, tax matters, prisoners' civil rights cases, and actions asserting constitutional rights. Other cases may be submitted to arbitration under the program by consent. The arbitrators are selected at random from a panel of modestly compensated volunteer attorneys. Any party dis-

satisfied with the arbitration award may obtain a trial de novo. If the party seeking the trial de novo does not obtain a more favorable result than at arbitration, that party is liable for the arbitrators' fees (unless permission was granted to proceed in forma pauperis).

In the view of the Advisory Group, the arbitration process is running smoothly. Independent evaluation of federal mandatory arbitration programs has been favorable. See Meierhoefer, Court Annexed Arbitration in Ten District Courts, Federal Judicial Center (1990). Survey results indicate that a majority of the respondents believe that the present program of mandatory arbitration serves to expedite litigation but there is no strong sentiment to modify the program. Some 40% would favor mandatory arbitration in cases up to $200,000, but only 30% would favor raising the ceiling to $1,000,000.

We recommend that the arbitration program be continued. While there has been some discussion of raising the amount in controversy of cases subject to mandatory arbitration, current legislation limits the Eastern District program to $100,000. If the legislative cap were increased, we would recommend reconsideration of the amount. We do recommend one change immediately. Currently, the arbitration is conducted by a panel of three arbitrators unless a party requests that a single arbitrator be used. We believe that the rule should be changed to provide for the reverse, i.e., arbi-

tration before a single person unless a party requests three. This would conserve the resources available to the court without affecting the quality of justice.

The Advisory Group also recommends that there be more publicity given to the availability of voluntary submission of claims to the arbitration process. This relates to a broader recommendation regarding public education discussed in subsection (8), infra.

2. Early Neutral Evaluation

Early Neutral Evaluation ("ENE") is a mechanism whereby parties and their attorneys submit their contentions and a summary of the evidence to a volunteer attorney who is an expert in the type of case at issue. ENE was pioneered in the Northern District of California. As structured in that Court, a presentation is made to the neutral evaluator in a relatively brief session held within 150 days of the filing of the complaint. The evaluator then identifies the primary issues in dispute, explores the possibility of settlement, helps the parties plan a discovery and motion program and, if appropriate, gives the parties an assessment of the case. The process is confidential and non-binding.

In the Northern District of California, ENE has been found well-suited to the following types of cases: contract, tort, civil rights, antitrust, RICO and securities. Although the Northern District of California program is no longer considered experi-

mental, due to limited availability of qualified evaluators not every case falling into the above categories is referred to ENE. Cases subject to the mandatory arbitration program of the district are also not chosen for ENE. Approximately ten to fifteen cases per month actually go through the process. An evaluation of the California ENE program found that it was positively received by a majority of the persons who used it. Many felt that it helped lead to settlement and helped counsel identify key issues, a process that could lead to more efficient litigation. See Brazil, A Close Look at Three Court Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, And Whether They Threaten Important Values, 1990 U. Chi. L. Forum 303, 341-344 (1990).

The Advisory Group recommends that an experimental ENE program be established in the Eastern District. We are not prepared at this time to detail the precise format or dimension of the experiment. We believe that it is imperative that the evaluators be selected with care and properly trained. To this end, we suggest that the Eastern District seek out talented attorneys to serve as evaluators and to provide evaluators with some tangible form of recognition, such as certificates, for their efforts. Our survey results reveal that approximately 46% of those responding favored ENE.

3. Trials before Magistrate Judges

Magistrate judges have authority to conduct civil trials only with the consent of the parties. We understand that the magistrate judges' current schedules could accommodate additional trials if parties consented, and that they could, with more certainty than can a district judge, offer a firm trial date. We recommend that this availability be more widely publicized to the bar.

4. Settlement Conferences

The Advisory Group has found that there is considerable variation among the judicial officers of the Eastern District regarding settlement practices. (See "Settlement Practices in the Eastern District," a compilation of interviews done by members of the Court's Committee on Civil Litigation in 1989.) Not all district judges then interviewed were enthusiastic about judicial involvement in settlement talks, notwithstanding the fact that Fed. R. Civ. P. 16(c)(7) specifically includes settlement discussions as an appropriate agenda item for pretrial conferences. Anecdotal evidence in this District, and survey results in others indicate, however, that most attorneys believe that judicially assisted efforts to promote settlement are salutary, so long as care is maintained to avoid influencing the decision making process if settlement talks fail. See Brazil, supra, at 308-311. Moreover,

all of the magistrate judges interviewed in 1989 believed that they could and should be helpful with settlement efforts.

Chairman Wesely, in his remarks on settlement at the workshop for Judges of the Second Circuit in Mystic, Connecticut on November 9, 1989, emphasized the powerful evidence that exists for lawyers wanting judges to initiate settlement discussions; they want judges to suggest a settlement number or a range within which a case should settle; that an extensive survey in 1985 among litigators in four diverse federal judicial districts noted that 85% of the respondents said that involvement by a federal judge in settlement discussions is likely to significantly improve the prospects for achieving settlement; and that nearly three out of every four of the lawyers felt that a settlement conference hosted by a judge should be mandatory in most cases in federal court. Similar views were expressed by many respondents in the survey conducted by the Advisory Group. The Advisory Group recommends that the court establish a presumption that a settlement conference, hosted by a judge or magistrate judge, will be held in every case except those in which it appears to the judicial officer to be unwarranted.

5. Special Masters

Rule 53 of the Federal Rules of Civil Procedure authorizes the court, in its discretion, to appoint a special master to assist in the resolution of disputes before the court. A special

master is a private attorney to whom a judge refers a specific task within the context of litigation, such as presiding over settlement negotiations or discovery. This technique is used rarely in the Eastern District, typically only in especially complex cases. Nevertheless, the use of special masters in some situations has proven to be very useful in conserving the time of the court while advancing the litigation. The Advisory Group recommends that the current practice governing the use of special masters be maintained. It has been suggested, and the Advisory Group will consider, that the use of special masters be expanded to additional cases, within the limitations of Rule 53(b), when in the court's judgment a special master is likely to play a useful role.

6. Court-Annexed Mediation

Mediation, long practiced in the labor area, has during the past decade come into wide use to help resolve a much broader range of disputes, including a variety of business controversies, personal injury claims against motorists and their insurers, landlord-tenant disputes, domestic relations problems, and, of course, labor-management disputes.

Attorneys and clients will typically agree to mediation precisely because it is non-binding, i.e., the mediator is not empowered to impose a solution, and thus they have little to lose. Implicit in the agreement to engage in mediation is a willingness to search for a fair compromise, reached promptly at modest cost,

in preference to suffering the costs, delays, uncertainties, and aggravation of proceeding with full-scale litigation through trial, judgment and perhaps appeal.

Time and again, skillful mediators have assisted parties in bridging substantial gaps between their positions. Where success rates are reported, they are usually in the range of 80 percent. A mediator also can be instrumental in improving the quality of a settlement, particularly if negotiations need not be limited to the amount of a lump sum settlement.

Mediation services are offered by a growing number of neutral organizations, national, regional and local, for profit and non-profit. As is to be expected, quality varies and may not be easy to ascertain. Volunteers must be selected with care.

Several federal district courts, as well as some state courts, have taken the lead in offering mediation services to litigants. These include the Western District of Washington, the District of Kansas, the District of Hawaii and the United States District Court for the District of Columbia. The consensus of the Advisory Group is that a program of voluntary court-annexed mediation be approved on an experimental basis under which results would be reviewed periodically by the court. Initial survey results indicate that nearly three-fourths of those responding believe that court-annexed mediation would facilitate resolution of disputes.

The Advisory Group recommends that the Court select a panel of volunteers well-qualified to serve as mediators and that litigants be offered the options of (a) using a mediator from the court's panel, (b) selecting a mediator on their own, or (c) seeking the assistance of a reputable neutral ADR organization in the selection of a mediator.

7. Summary Jury Trial

Summary jury trials, which are used in some federal districts, involve the presentation of a summary of the evidence to a panel of jurors who then give a verdict that is advisory only. This device has been employed infrequently in the Eastern District, and we do not encourage its use. We also note that use of this mechanism has generated strong views both pro and con. Some observers have found that the parties, informed by the advisory jury's reaction to their case, are better able to negotiate a settlement, thus avoiding the need for an actual trial. Critics of the summary jury have questioned whether the use of the time of counsel and of the jurors is justified by the likely results. It is also arguable that there is no legal mandate for the court to require persons to serve on "advisory" juries. The Advisory Group concludes that the case for summary jury trial has not been established with a sufficient degree of clarity to justify its use as an official part of the functioning of the court.

8. Publicizing Alternatives to Trials

As the panoply of adjudicative mechanisms grows, we believe that it becomes more important to educate the legal community and its clients as to what is available and how it may be helpful. The Advisory Group recommends that the Eastern District publish and distribute to plaintiff's counsel, with a direction to send to all counsel, a pamphlet describing the various ADR methods and their use by the court. We further recommend that the judicial officer hosting the initial pretrial conference advise the litigants of the availability of possible alternatives to litigation.

9. ADR Administrator

The Advisory Group proposes that an administrator be assigned to supervise court-annexed ADR programs, and it recommends that such a position be established. Responsibilities would include educating the bench and bar as to the availability and advantages of ADR, as well as oversight of all ADR programs, including training, maintenance of volunteer panels, and other necessary administration.

B. Sanctions

Since the adoption of the 1983 Amendments to the Federal Rules of Civil Procedure, sanctions have played an increasingly prominent role in federal civil litigation. The 1983 Amendments contained an array of weapons designed to attack abusive practices in pleadings (Rule 11) at pretrial conferences (Rule 16) and on

discovery (Rule 26(g)). Ironically, the drafters had envisioned that sanctions would be used primarily to combat abusive discovery tactics, but most of the sanctions activity has arisen at the pleadings stage under Rule 11.

Rule 11 is designed to ensure the integrity of pleadings and other papers filed in federal district court. The Rule was amended in 1983 in response to the widely held perception that its provisions, as originally promulgated, had proven ineffective in deterring strike suits, litigation abuses, and lawsuits used as instruments of delay and oppression. Amended Rule 11 introduces more stringent standards designed to make attorneys stop and think about their legal obligations before signing pleadings and motions. These obligations are reinforced by imposing mandatory sanctions upon violation of the standards. The drafters had a twofold purpose in amending Rule 11 and adding its "stop and think" provisions: (1) to deter dilatory or abusive behavior; and (2) to streamline litigation. In addition, the amended Rule 11 is aimed at increasing a judge's willingness to hold attorneys accountable for their misconduct by encouraging courts to impose sanctions. Once a violation of Rule 11 has been found, sanctions are mandatory. Judges, however, have broad discretion in choosing the appropriate penalty and are explicitly authorized to award attorneys' fees to the abused party. See generally, Cavanagh, Develop-

ing Standards Under Amended Rule 11 Of The Federal Rules Of Civil Procedure, 14 Hofstra L. Rev. 501 (1986).

Rule 11, however, is not the only source of authority for regulating abusive pleading and pretrial tactics. The Supreme Court has recognized that federal courts have inherent equitable power to impose sanctions where a party has acted oppressively, vexatiously, or in bad faith. See, e.g., Roadway Express Inc. v. Piper, 447 U.S. 752, 765-66 (1980). The breadth of the court's inherent equitable power to police the behavior of counsel was reaffirmed by the Supreme Court this year in Chambers v. Nasco Inc., 111 S.Ct. 2123 (1991). In addition, the court has power pursuant to 28 U.S.C. § 1927 to shift costs, including attorneys' fees, to an attorney whose conduct multiplies the proceedings "unreasonably and vexatiously."

Nevertheless, Rule 11 has received the most attention from courts and litigants. Not surprisingly, the Rule has also been subject to much criticism. The Advisory Committee on Civil Rules of the Judicial Conference of the United States has recently circulated a report on Rule 11 dated June 13, 1991, which summarizes the conflicting positions on sanctions. The Committee concluded that "the widespread criticisms of the 1983 version of [Rule 11], though frequently exaggerated or premised on faulty assumptions, are not without merit." Specifically, the Advisory Committee on Civil Rules found support for the following propositions:

(1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants;

(2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence;

(3) it has too rarely been enforced through non-monetary sanctions, with cost-shifting having become the normative sanction;

(4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law; and

(5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel.

The Advisory Group proposes that with respect to Rule 11 sanctions, the following procedures be adopted:

(1) A party claiming to have been victimized by a Rule 11 violation should give timely notice to the alleged violator at the time the alleged Rule 11 violation is committed. If the purported violation is called to the adversary's attention immediately, the attorney may conduct himself or herself so as to avoid incurring large attorneys' fees. Thomas v. Capital Security Services, Inc., 836 F.2d 866, 884 (5th Cir. 1988). Moreover, the parties may be able to resolve the sanctions issue without need to seek judicial intervention.

(2) A Rule 11 motion must be a separate application to the court and not merely a sanctions request tacked on to

another motion. The Advisory Group views with dismay the increasingly common practice of tacking on Rule 11 motions to discovery or other pretrial applications to the court. [12] Our survey results indicate that 44% of those responding favor a requirement that Rule 11 sanctions motions be separately filed and not simply appended to other motions. In the Advisory Group's view, elimination of this practice would lead to more thoughtful consideration before sanctions are sought.

Apart from Rule 11, the Advisory Group notes that some judges impose sanctions on parties who settle cases after juries have been impanelled but prior to trial. The consensus of the Advisory Group is that, in some instances, circumstances leading to a settlement after a jury has been impanelled are out of the lawyer's control, and imposition of sanctions in such cases would be harsh. The appropriateness of sanctions should turn on the particular facts of each case.

C. Attorneys' Fees

Members of the Advisory Group were critical of the lodestar multiplier approach to awarding fees in common fund cases, which is used typically in federal litigation under the decision in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), on remand, 1976-1 Trade Cas. (CCH) ¶ 60,913 (S.D.N.Y. 1976), modi-

---

[12] The Advisory Group was not unanimous in this view.

fied, 560 F.2d 1093 (2d Cir. 1977), as the sole measure of fees. Among other things, we note that the lodestar approach (1) contains a strong disincentive to settle cases early in the litigation; (2) is too costly because of the detailed record keeping that is required; (3) is administratively cumbersome; and (4) fosters delay. At the same time, some members were also wary of awarding fees in common fund cases solely on the basis of a percentage of recovery. The Advisory Group agreed on the following formula for determining fees in common fund cases:

(1) Where matters settle early in the life of the action and before significant attorney time has been expended, a percentage recovery, determined by the court, should be awarded. The percentage would be calibrated to encourage early settlements but at the same time avoid both undue burdens on the fund and windfalls to attorneys.

(2) In cases that settle after significant attorney time has been expended, the fee award would still be based on a percentage of recovery but the attorneys would be required to submit time records, as is required under the lodestar approach, which would serve as a guideline for the court in setting the percentage recovery. See Cavanagh, Attorneys' Fees In Antitrust Litigation: Making The System Fairer, 52 Ford. L. Rev. 51, 106 (1988).

In statutory fee cases, the Advisory Group is less concerned with the measure of the awards than with the lengthy delay in awarding fees caused by the manner in which fee applications are submitted to the court and the manner in which they are contested. It is not unusual for courts to take months to award fees. The Advisory Group believes that parties should attempt to settle issues relating to the size of fee awards. Plaintiffs' attorneys should be directed to forward their fee applications, including documentary support, to the defendants' counsel within 30 days of a final judgment, no longer subject to appeal, or as directed by the court. Documentary support should include the number of hours worked and a description of the work performed, excluding any materials that would breach the attorney-client and work-product privileges. The parties should then meet, and defense counsel should identify those portions of the fee application that are being contested. Those portions of the award that are not disputed should be settled promptly. Only disputed matters should be taken to court.

The fee award in statutory cases should approximate the fees paid by clients in non-statutory fee matters. Accordingly, the court, in gauging an hourly rate, should be guided by the rate that plaintiffs' counsel charge their private clients in non-contingent matters. This standard would serve as presumptive evidence regarding a reasonable hourly rate.

V. Prefiling; Pleading; Assignment; Reassignment

On the whole, the Advisory Group has found few problems in these areas. The most significant concern, discussed below, is the development of an efficient mechanism to reassign trial-ready cases which are on hold because the assigned judge is not available to try them.

A. Prefiling Requirements

With respect to prefiling requirements, the Advisory Group considered whether attorneys should be required, prior to filing, to (1) predict their ability to staff a case; (2) contact the opposing party or counsel; or (3) advise clients of the availability of ADR procedures.

The Advisory Group does not view the ability to adequately staff a case to be a significant cause of delay or unnecessary expense. Some members believe that it might be useful to require counsel to certify, perhaps by checking a box on the civil coversheet, that counsel have thought through the staffing requirements and are satisfied that they have the ability to prosecute an action. Nevertheless, it is generally agreed that any requirement would be difficult to enforce and that, as a practical matter, there is a limit to what should reasonably be required on a civil coversheet.

Second, the Advisory Group considered whether litigation would be reduced if parties were required to contact their adversa-

ries before filing a complaint. The Advisory Group recognizes that in certain instances, such as cases involving temporary restraining orders, a prefiling notice requirement serves an important function. The Advisory Group further recognizes as salutary the practice of meeting informally with a prospective adversary to try to resolve a dispute prior to any lawsuit. On the other hand, the Advisory Group also believes that there are circumstances in which counsel properly may wish not to make any prefiling contacts: (1) in instances where the contact may lead to secreting assets outside of the jurisdiction; (2) where the contact may lead to a race to the courthouse to obtain a favorable venue, thereby denying plaintiff its right to select the forum; (3) in certain cases, such as civil rights cases, where attorneys' fees are awarded to prevailing plaintiffs, and these awards cannot be made without a lawsuit; and (4) in instances where the commencement of the lawsuit itself is what produces the result sought.

Moreover, the requirement may prove onerous where counsel is not known to plaintiff, particularly in cases against the government. Finally, the Advisory Group is concerned that, in practice, any prefiling contact requirement might be reduced to a meaningless formality. Accordingly, the Advisory Group opposes any hard and fast rule that would require prefiling contact.

Nevertheless, the Advisory Group believes that there is significant merit in the practice of giving prefiling notice to an

adversary and recommends that the Eastern District adopt a practice guideline which would encourage prefiling contact. The guideline would be precatory and non-binding but would serve to create an atmosphere conducive to prelitigation negotiation and resolution of disputes. This approach is borrowed from the ADR Pledge developed by the Center for Public Resources under which signatories pledge to explore ADR before commencing a lawsuit. The Pledge is intended to be an expression of corporate policy and not a legally enforceable obligation.

With respect to Alternative Dispute Resolution, the Advisory Group does not believe that counsel should be required to certify that the client was advised of the availability of ADR prior to filing suit. However, consistent with the foregoing discussion, we believe that an aspirational guideline, along the lines of the Law Firm Policy Statement of the Center for Public Resources, would serve a useful purpose in encouraging resolution of disputes outside of the federal court system.

B. Pleading

In connection with pleadings, the Advisory Group considered two broad areas of inquiry: (1) limitations on legal theories in claims and defenses and (2) amendment to delete insubstantial claims or defenses.

1. Limitations on Legal Theories in Claims or Defenses. The Advisory Group believes that any attempt to alter the liberal pleading standards inherent in the notice pleading concept adopted by the Federal Rules of Civil Procedure would be unwise. The Advisory Group recognizes that notice pleading may be abused by some litigants and their counsel. Particularly troublesome are cases in which simple garden variety tort or contract claims are repackaged by a party as treble damage RICO or antitrust claims or as actions for securities fraud. However, the Advisory Group believes that there are mechanisms in place that deal adequately with this problem. Specifically, the court may deter this kind of litigation gamesmanship through sanctions under Fed. R. Civ. P. 11, 28 U.S.C. § 1927, or the court's inherent power to control the proceedings before it. Moreover, because fraud claims must be pleaded with specificity in any event, adequate procedures exist under Fed. R. Civ. P. 9(b) to test the merit of securities fraud claims or other types of fraud at the outset of the case.

Equally important, the Advisory Group believes that any limitations on claims that could be asserted by a plaintiff would force de facto election of remedies at the pleading stage. To compel a plaintiff to elect a remedy at the pleading stage is neither fair nor prudent, and would represent a step backward, a reversion to fact pleading. On the one hand, election of remedies may discourage plaintiffs from prosecuting meritorious claims. On the

other hand, restrictive pleading may result in a proliferation of separate single-issue lawsuits. One of the great strengths of the pleading practices under the Federal Rules of Civil Procedure is that any number of claims can be joined in one complaint. Restrictive pleading requirements could force plaintiffs artificially to divide one large claim into a series of smaller claims, a result that would be both costly and inefficient.

2. Amendments to Delete Insubstantial Claims and Defenses. Under Rule 15(a) of the Federal Rules of Civil Procedure, amendments to the pleadings should be "freely given when justice so requires." Pursuant to this standard, the parties may, upon motion, delete insubstantial claims and defenses. A court would have little reason to deny a request to drop an insubstantial claim or defense. Nevertheless, some attorneys are reluctant to drop insubstantial claims or defenses for fear that in so doing they will trigger sanctions motions by their opponents. In the view of the Advisory Group, the voluntary dismissal of a claim or a defense should not serve as a basis for Rule 11 motions and applications for sanctions under these circumstances should be frowned upon by the court.

C. Assignment

The Advisory Group strongly endorses the retention of the individual assignment system because it promotes efficiency and the speedy resolution of litigated disputes. Under this system, the district judge and magistrate judge are assigned to a case at random at the outset of the action. This practice permits these judicial officers to take control of the litigation from the outset and utilize managerial tools authorized by Rule 16 of the Federal Rules of Civil Procedure. The judicial officers are thus in a position to move the case toward trial from the date of filing. The individual assignment system is also more efficient than a master calendar system because it avoids the need to continually re-educate judges and magistrate judges assigned to hear various pretrial motions. Moreover, the individual assignment of judges and magistrate judges benefits litigants because they know from day one the judicial officers with whom they will be dealing.

In the course of its deliberations, the Advisory Group ascertained that a significant percentage of all cases filed are disposed of without any judicial intervention. This statistic suggests that any significant investment of judicial time in cases that have a high probability of settlement in any event is inefficient. The Advisory Group therefore considered whether to propose a modified master calendar system for adoption within the Eastern District under which cases that have a high likelihood of settle-

ment would not be assigned to an individual judge. We conclude that the adoption of a modified master calendar system would be unwise. We see little real benefit in the modified master calendar system. First, the Advisory Group questions whether a reliable and efficient system for identifying cases that have a high probability of settlement can be successfully developed. Second, the individual assignment system is not inefficient in instances where cases are likely to settle without judicial intervention because even under this system, judges are likely to invest little time in cases that have a high probability of settlement. Moreover, the general practice among judges within the Eastern District is to assign cases to magistrate judges for all non-dispositive pretrial purposes. Consequently, cases that settle frequently do not come back to the judge after reference to the magistrate judge. This system is working well and the Advisory Group is reluctant to interfere with it.

The Advisory Group pursuant to 28 U.S.C. § 473(a)(1) has considered the desirability of creating a formal system of differentiated case management under which different classes of cases would be assigned to different tracks, such as "expedited," "normal," or "complex." There is within the District already in place an informal sytstem of differentiated case management which provides for: (1) special treatment or tracking of social security cases and habeas corpus petitions; (2) court-annexed arbitration

of cases involving $100,000 or less; and (3) special treatment of complex litigation according to the needs of a particular case. In the view of the Advisory Group, the present system is working well, and any modification might lead to significant delay or create inefficiencies. The Advisory Group, however, will continue to monitor the status of the docket and periodically re-evaluate the desirability of implementation of a formalized tracking system for further differential treatment of categories of cases.

Pursuant to 28 U.S.C. §473(a)(2)(B), the Advisory Group also has considered the desirability of requiring all cases filed to be tried within 18 months from the date of filing of the complaint. We believe that such a requirement is neither desirable nor consistent with the goal of differentiated case management. In some cases, 18 months is too long a period; in other cases 18 months does not allow the parties sufficient time to prepare for trial. The setting of a trial date is best left to the determination of the judicial officer in each individual case.

Finally, the Advisory Group reaffirms that it is very important for litigants to know the identity of the assigned judge and the magistrate judge from the outset. Where the identity of both judges is known, rulings are more predictable, litigating disputes is less likely, and the chances of settlement are enhanced.

D. Reassignment

A major cause of delay with the civil system, as well as frustration for trial attorneys, is the fact that trial-ready cases are frequently not heard because the assigned judge is previously committed to the trial of criminal matters in accordance with the Speedy Trial Act or to complex civil cases. There is presently no formal system for the transfer of trial-ready cases from an assigned judge to a judge who is available to try cases. However, there does exist an informal "buddy system" by which a judge may reassign a trial-ready case for immediate trial to another judge by mutual consent of the judges.

The Advisory Group concludes that the present system of informal reassignment works only to a limited degree. A principal reason is the reluctance on the part of some judges to reassign their trial-ready cases. Joint applications for reassignment of trial-ready cases are routinely rejected by judges. Accordingly, the Advisory Group recommends that the present system be modified. The Advisory Group, in proposing a change, considered several alternatives:

1. An immediate trial before a magistrate judge if the parties consented;

2. Reassignment on an interdistrict basis to an available visiting judge within the Southern District;

3. Automatic reassignment of trial-ready cases if not reached by the assigned judge within a specified period, perhaps six months or one year; and

4. If a trial-ready case were not reached by the assigned judge within a specified period, the parties may request a conference with the clerk's office at which they would inform the clerk of their ability to try a matter on one or two days' notice. The clerk would then seek to ascertain the availability of a judge through the Chief Judge to hear a particular matter.

The Advisory Group recognizes that each alternative has its strengths and weaknesses. Reassignment to a magistrate judge raises the practical hurdle of obtaining consent. Similarly, legal limitations on where federal judges and juries may sit create serious impediments to the second proposal. With respect to the third alternative, the Advisory Group is simply unwilling to accept a "solution" that would permit a delay of one year -- or even six months -- for the hearing of a trial-ready case. On balance, it favors the fourth approach. While that alternative would add to the workload of the Clerk's Office, it does offer a mechanism to re-route cases on short notice to judges with available time at a minimum of cost.

In addition, the Advisory Group believes that additional law clerks should be hired to assist the judges and magistrate

judges within the District. These additional law clerks would not be assigned to a specific judge or magistrate judge but would function as pool clerks. To make these new positions attractive, we suggest that law clerks at their option be employed on a part-time basis with flexible hours, and with the understanding that they would work longer terms than the one- to two-year period customary for law clerks.

VI. Trial And Appeals Practices

This section focuses on five specific areas: (1) expert witnesses; (2) jury selection; (3) bench trials; (4) preliminary injunctions; and (5) appeals.

A. Expert Witnesses

The Advisory Group reiterates that use of expert witnesses may give rise to a delay during the discovery and trial phases of a case and has outlined proposals for improving the handling of expert testimony on discovery. See III.E.3.b. supra. In addition, the Advisory Group proposes that at bench trials direct testimony of experts be submitted in writing and only the cross-examination be done before the fact-finder, except in the case of medical testimony. Moreover, the court should not hesitate to take expert testimony out of order if to do so would avoid delay or facilitate better understanding of the issues. In bench trials, where appropriate, expert testimony could be done by deposition so as to free up trial time. The Advisory Group recognizes that in

certain instances live cross-examination before the judge may be critical; in other cases, the need for the judge to be present during cross-examination is not essential. The decision as to whether there should be live cross-examination is best left to the individual judicial officer.

B. Jury Selection

The Advisory Group has found that there are wide variations in the procedures judges in the Eastern District use in the selection of a jury in a civil case. Some judges allow the litigants virtually no role, while other judges take time with the process, encourage counsel to suggest questions, and may even allow them to ask certain questions.

The Advisory Group welcomes greater participation of counsel in the jury selection process. At the same time, it does not advocate adoption of the New York State court practice allowing counsel for the parties to conduct voir dire. The Advisory Group believes that limited participation by counsel would be beneficial to the trial process and would leave it to the discretion of the court to determine the nature and extent of counsel's participation in the process. Any questions submitted to the court by a party should be shown to opposing counsel at least 24 hours prior to submission.

The Advisory Group also believes that it would be helpful for the court to provide the potential jurors a general description

of the trial system prior to initiating the selection process. In addition, the Advisory Group recommends that all judges within the District implement the practice already utilized by some judges of having prospective jurors complete a questionnaire prior to voir dire. Among other things, the questionnaire would serve to identify the jurors to counsel and would provide the same data with respect to each juror. The questionnaire should also contain questions from counsel approved by the court, such as whether the prospective jurors have any predispositions with respect to drugs or alcohol. The format of the questionnaire would be standardized.

C. Bench Trials

The Advisory Group recognizes that bench trials are fundamentally different from jury trials. In particular, bench trials offer the court, the lawyers and the parties greater flexibility in the hearing and presentation of evidence which can result in cost savings as well as time savings and lead to more expeditious resolution of disputes. Many judges recognize the potential for more efficient use of time and money that bench trials offer and have implemented many of the practices which the Advisory Group proposes here. However, the practices used in bench trials vary from chambers to chambers, and the Advisory Group believes that too much is left to the adversary process. The system would function much more effectively if the judges in the Eastern District were to adopt uniform practices in bench trials as set forth below.

The key ingredient to improving the conduct of bench trials is judicial control of the proceedings. Where the court is on top of the case, it can effectively winnow the facts to be tried, thereby limiting court-time and shortening the length of the trial. On the other hand, where the court is less familiar with the case, it tends to entertain much evidence that is either cumulative or of marginal value, often wasting time and money. We recognize that the course we propose is very labor intensive and further taxes an already burdened judiciary but the Advisory Group believes that the time spent on these tasks is time well spent because, in the end, time and money can be saved.

We recommend that parties who consent to a trial before a magistrate judge be given a prompt trial date. The Advisory Group considered at length how the magistrate judge should be assigned for trial. Because magistrate judges are randomly assigned for pretrial purposes to each civil case filed within the Eastern District, considerations of efficiency and fairness favor assigning the magistrate judge designated for pretrial purposes to serve as trier of fact. Some members of the Advisory Group were concerned that this approach might chill meaningful settlement negotiations because the magistrate judge who will have undoubtedly conducted settlement conferences will also sit as trier of fact. Others were concerned that the parties, knowing the identity of the magistrate

judge designated for trial, may, for whatever reason, elect not to seek a prompt trial before that magistrate judge.

The Advisory Group therefore recommends that the magistrate judges be assigned to try the case be the same person who initially had been assigned to the matter for pretrial purposes, provided the parties agree on that person. However, if any party objects to the assigned magistrate judge as trier of fact, the parties may obtain another magistrate judge by random selection. The parties then must accept as trier of fact the magistrate judge designated upon reassignment. This procedure should be limited to cases venued in Brooklyn.

In addition, the Advisory Group recommends the adoption of the following practices many of which are now used by individual judges, on a district-wide basis:

1. Pretrial statement of stipulated facts and of facts that are disputed. Attorneys and parties should utilize this pretrial statement to notify the court and each other precisely the issues to be tried. This process limits the number of contingencies faced by attorneys and eliminates the need for marginal proof.

2. Stipulations regarding the admissibility of documents. Any objections to documentary evidence should be made by in limine motions. All documents offered at trial can then be received routinely, and proceedings will not be slowed by objections.

3. Premarking of exhibits. All exhibits should be marked prior to trial. Again, this process will prevent waste of time at trial.

4. Written direct examination. Courts should consider broader use of direct examinations submitted in writing for witnesses other than experts. The witness would then testify live only on cross-examination. This procedure offers obvious time-saving potential. The downside is that the court does not have an opportunity to observe the witness on direct examination; the witness is seen only when under attack. On balance, the Advisory Group believes that efficiency-creating aspects of this procedure outweigh the possible disadvantages.

The Advisory Group also considered mandating broader use of deposition testimony to replace live testimony at trial but concludes that ultimately this approach would discourage discovery depositions and possibly chill settlement discussions.

D. Government Litigation

The Eastern District of New York has developed procedures for handling social security disability cases that have been extremely efficient. We recommend that they be used as a model for other districts. Two of the important features of the procedures are that the cases are not automatically referred to magistrate judges, as these references simply add to delay by interposing a hearing that rarely, if ever, finally determines the dispute. (The

losing party has an absolute right to a hearing de novo before a district judge.) The procedures also impose time limits within which required actions must be completed, for example, requiring the government to obtain and file the administrative record within 120 days of the commencement of the action. The Advisory Group has learned that recently some judges have begun again to refer social security matters to magistrate judges. We suggest that this practice be utilized with discretion by judges, and recommend that the judges of the Eastern District continue to hear social security cases themselves and not refer them to magistrate judges.

In addition, settlement of claims against the federal government differs from ordinary tort settlement in that the need for approval by Department of Justice officials requires more lead time for the proposals to receive realistic consideration. Consequently, offers made on the eve of trial may be ineffective. In the short term, we recommend that the United States Attorney publicize this fact to sensitize litigants so that offers are communicated well in advance of trial, thus making settlement more feasible. In the long term, we recommend that the Department of Justice streamline its structure for approving settlements so as to provide greater flexibility so that its settlement practices mirror more closely those of the private sector.

E. Pro Se Litigation

On the whole, we find that the mechanics for handling pro se cases within the District work well. The addition of a second pro se clerk to screen cases should prove beneficial and effective in eliminating frivolous claims. The system for assigning counsel to pro se parties from a panel of volunteer attorneys has been successful due in large part to the willingness of panel members to donate their time. Nevertheless, there is room for improvement. We suggest a more careful screening of cases by the court before they are assigned to counsel. We fear that where frivolous cases are assigned to volunteer counsel, the desire to perform pr bono service may be lessened. The Advisory Group recommends that the pro se clerk assist the court in determining whether counsel should be assigned to a particular case. In this connection, the pro se clerk may develop and serve on defendants form interrogatories and document requests. We also suggest that the resources devoted to pro se cases could be used more efficiently if pro se clerks were used utilized to draft opinions and bench memoranda.

F. Preliminary Injunctions

The Advisory Group explored the question of whether there was sufficient access to the bench to obtain injunctions in emergency situations. It was noted that a miscellaneous judge is always designated to hear emergency applications. The Advisory Group is

of the view that the availability of the miscellaneous judge is adequate and that no changes in the present system are needed.

G. Appeals

The Advisory Group notes that the clerk's office within the Eastern District has virtually no involvement in the appeals process. The responsibility for assembling and certifying the record falls on the parties. After considering proposals for greater involvement by the clerk's office in the appellate process, the Advisory Group concluded that no change in present practice is warranted.

VII. Visiting Judges; Senior Judges; Magistrate Judges; Buildings And Facilities; Automation.

The Advisory Group concludes that the use of visiting judges, senior judges and magistrate judges to try cases in the Eastern District has significantly lessened the workload of an already overburdened court. However, the shortage of courtroom space limits the role played by visiting judges and may limit the utility of magistrate judges. The need for the services of visiting judges, senior judges and magistrate judges will persist as long as the Eastern District must operate with less than the fifteen judges allotted to it. The Advisory Group urges the President and Congress to hasten the designation and approval of suitable judgeship candidates.

A. Visiting Judges

The assignment of a visiting judge to serve in a district involves a process of approval that reaches the level of the Chief Justice of the United States. The assignment of visiting judges to serve in a district is based on an assessment of need by the Administrative Office in consultation with the Judicial Conference of the United States. Because there are currently three vacancies on its bench, the Eastern District has a strong need for visiting judges.

Notwithstanding that need, the assignment of visiting judges to serve in the Eastern District of New York has fallen off dramatically from a peak of 30 visiting judges' trials in the year ended June 30, 1988 to six trials in the year ended June 30, 1990. Moreover, as the current vacancies are filled, no material increase in the contribution of visiting judges can be expected. However, in the near term the need for assistance of visiting judges remains acute, given the glacial pace at which the appointment process proceeds.

Even if visiting judges were available to assist with the work of the court, the severe space limitations, which, as more fully discussed below, led the Judicial Conference to declare a judicial space emergency, clearly limit the Eastern District's ability to utilize visiting judges. In fact, the Eastern District rarely qualifies for visiting judges because seldom can the court

guarantee the availability of a courtroom for the minimum of two weeks required by Administrative Office guidelines. There are presently ten suitable courtrooms in the Brooklyn courthouse serving nine district judges stationed in that courthouse. While this circumstance might appear to indicate that there is extra available space, it does not account for the fact that judges assigned to the Uniondale and/or Hauppauge courthouse have on occasion had the need to try cases in Brooklyn. Magistrate judges whose courtrooms lack jury rooms and other amenities for the efficient trial of jury cases have on occasion used district judges' courtrooms to try cases, thus leaving the court, even with the addition of four new courtrooms to accommodate the one recent and three expected judicial appointments, with a net space deficit.

While the Advisory Group acknowledges that the future needs for visiting judges are difficult to predict, given the uncertainties as to when vacancies will have been filled, it is also true that even if visiting judges were assigned, the facilities in Brooklyn are inadequate to house them. However, we do not believe that space limitations totally foreclose the ability of the Eastern District to utilize visiting judges. As an interim measure, the Advisory Group proposes that visiting judges be used to try non-jury civil cases or function as settlement judges in space leased outside the courthouse. Use of visiting judges for these limited purposes would lessen, if not obviate, concerns about proximity,

security, and convenience to jurors that might otherwise arise. At the same time, the visiting judge would perform significant services for the court.

B. Senior Judges

Two senior judges presently serve this district -- Judge Bartels and Judge Mishler. Court activity reports for the period ending March 31, 1991 reflect that the senior judges are presently assigned to a total of 453 cases representing a significant contribution to the management of the court's caseload. Senior judges tried 84 cases for the year ended June 30, 1989 compared to 371 cases tried by active judges during that time; and for the year ended June 30, 1990, senior judges tried 76 cases compared to 448 trials for active judges.[13] Clearly, senior judges have served and continue to serve as a valuable resource. While it is clear that the senior judges of this court have made and continue to make a vital contribution to the function of the court, it is unlikely that additional duties can be delegated to those judges.

C. Magistrate Judges

There are presently seven full-time magistrate judges appointed to serve in the Eastern District of New York. Five magistrate judges serve in the Brooklyn courthouse, one magistrate judge serves in the Uniondale courthouse, and another serves in the

[13] It should be noted that the 1989 and 1990 figures include the contributions of the late Judge Costantino.

courthouse in Hauppauge. As of the end of February 1991, 1,781 cases were referred to magistrate judges to supervise pretrial proceedings. When a civil case is referred to magistrate judges for this type of supervision, they issue the scheduling orders required by Rule 16(b) of the Federal Rules of Civil Procedure, decide all disputes regarding nondispositive matters such as discovery and ultimately, when the time is right, assist the parties in attempting to reach a settlement. Magistrate judges also try misdemeanor cases, handle preliminary matters in criminal cases, prepare reports and recommendations on matters referred to them by district judges such as summary judgment motions, inquests, applications for preliminary injunctions, and motions to suppress evidence in criminal cases.

Magistrate judges can make a significant contribution to the speedy resolution of civil cases through the power granted them under 28 U.S.C. § 636(c) to try civil cases with the consent of the litigants. By virtue of a recent amendment to Title 28 U.S.C. § 636 (c)(2), a magistrate judge or a district judge can advise the parties of the availability of a trial before the magistrate judge provided the judicial officer advises the parties that they are free to withhold consent to such jurisdiction without adverse substantive consequences. It is the view of the Advisory Group that additional trials by magistrate judges may contribute to the just, speedy, and efficient resolution of cases. There are

advantages to litigants in having cases tried by a magistrate judge. A magistrate judge, not encumbered by a significant number of criminal cases involving the Speedy Trial Act, is in a position to set and keep a firm trial date, whereas a district judge may have to adjourn a long-standing civil trial commitment to accommodate a criminal case. The availability of a firm trial date may eliminate problems in arranging the attendance of witnesses and address the many other logistical problems that attend the scheduling of attorneys' trial calendars. The parties may be more susceptible to the thought of a magistrate judge's trial when seeking a trial de novo after arbitration.

Magistrate judges in the Eastern District of New York have contributed significantly to the trial of civil cases. Of the 161 consensual civil cases terminated pursuant to 28 U.S.C. § 636(c) in the Second Circuit during fiscal year 1990, 74 of these matters were terminated by United States magistrate judges in the Eastern District of New York. As of March 31, 1991, only 88 out of 6,275 open civil matters (which include 403 asbestos cases) represent cases referred to magistrate judges for trial. Inasmuch as two new magistrate judge positions have been recently created and filled, it is the view of the Advisory Group that the court can and should continue to refer civil matters to magistrate judges for pretrial proceedings, and that a greater effort should be made to secure the consent of counsel to the trial of civil cases.

D. Automation

The Advisory Group concludes that the Eastern District lacks sufficient resources to keep pace with technological developments and advances in office automation. Although the Clerk's Office has made great strides in recent years with automation for naturalizations, jury payments, financial records, civil cases -- since April, 1990 only -- and a planned new criminal case system by July, 1991, it is still operating approximately 5 to 10 years behind advances in the private sector.

Set forth below is an itemized list of automated equipment that would bring the district court into modern times. Several of these items, like additional fax machines, point up easily corrected deficiencies due to lack of funding.

Fax Machines

Presently, this District has only six fax machines, one in each of the three Clerk's Offices and three others in the chambers of judicial officers. Each of the 15 authorized judgeships, two present senior judges, and 7 magistrate judges would benefit from the availability of a fax machine in chambers.

Imaging Devices with Monitors

The ability to scan all documents introduced into evidence in both civil and criminal cases and stored on a database immediately upon their submission would produce significant cost savings and storage economics. These court exhibits would become

part of the court file, without taking up any additional file room space; would be readily retrievable as needed; and could be played back for jurors on monitors installed in the courtroom. Imaging devices would be especially useful for storing factual information produced at non-jury trials where the court must issue detailed findings of fact and conclusions of law.

"Real Time" Transcript Production and Filing

The technology exists to produce simultaneous court transcripts on video monitors. These monitors can be viewed in the courtroom by the judicial officer, all counsel and parties, and the jurors, if any, as the testimony is being given. Read (or play) backs are quick and readily accessible. The transcripts also can be printed the same day. Records for the Court of Appeals would never be incomplete, nor would an appeal panel or counsel have to order and wait for transcript production from the original stenographic notes.

VCRs

Additional equipment funding should be supplied to the Clerk's Office to provide at least one VCR and monitor for each courtroom to facilitate the viewing of depositions and other video evidence. Frequently, due to the limited equipment available, counsel must bring their own or rented VCRs and monitors to the courthouse. This is an embarrassing and inefficient situation.

Master Daily Court Calendar on Video Monitor

For decades, airports have used video monitors to provide passengers with current flight information on arrivals and departures. The court still posts daily paper calendars on lobby bulletin boards. Those paper calendars are not readily corrected for last minute changes. If all courtroom deputies had a PC terminal equipped to dial-in to a master PC monitor in the Clerk's Office, a monitor screen with all current daily calendar information could be provided in the courthouse lobby.

PC Staffing Resources and Replacement Equipment Funding

The present grade/salary structure for PC and LAN automation staff members and especially programmers is inadequate to attract and retain employees with the necessary experience, especially here where the cost of living is high and the opportunity for private sector employment is great. Greater geographic pay flexibility and local hiring authority that allows clerks to start someone, in their discretion, at a salary level adequate to obtain their services is necessary. Present personnel restrictions often limit hiring choices and require approval for the initial salary level based upon rigid position descriptions in the present Judicial Salary Plan administered by the Administrative Office of the Courts.

The Advisory Group recommends that funds be allotted for the replacement of antiquated computer equipment in a timely man-

ner. Many judicial officers were provided with personal computers and other computer equipment during the last few years. This was a positive step, and significant funds were expended. However, this equipment is aging, and additional technological advances have occurred, and will continue to occur, making this equipment obsolete. Adequate funding must be available each fiscal year to upgrade and replace chambers' equipment. Equally important, funds must be allotted to automate the Clerk's Office and to upgrade and replace obsolete equipment in the Clerk's Office periodically. The Advisory Group recognizes that its proposal calls for significant expenditures but believes that the outlays will be more than justified by the efficiencies they will create.

Tracking Motions

Although present technology implemented in some federal districts allows for the monitoring of pending motions, the current ICMS civil system does not have the ability to track motions that have multiple issues pending decision. Since reporting on all pending motions will be mandatory under the Civil Justice Reform Act of 1990, the ability for all federal courts to track all motions readily via an automated system is crucial. Additional improvements in the software program are needed to improve monitoring.

Satellite Video Monitor Capabilities

It is not uncommon for private industry to hold conferences or meetings where live presentations can be made in one place, for example, California, and seen in another place, New York City. The ability to utilize this technology for witness testimony would save significant transportation costs to the parties in civil litigation as well as be extremely convenient to the witnesses, who may be busy or unavailable surgeons or other professionals. Clearly, the convenience also would extend to the court because trial time could be managed more efficiently and scheduling problems largely avoided.

The Advisory Group recommends that the Eastern District receive sufficient funding to utilize the foregoing technological developments so as to equate the courthouse with the up-to-date law office.

VIII. Buildings and Facilities

The colloquial impression is last, but not least. In this Report, last has been identified by the Advisory Group as a major, substantial, root cause of unnecessary cost and delay in litigation in the court. The Eastern District currently faces a space shortage of monumental proportions. The shortage of space and inability to house visiting judges in Brooklyn is so acute that, in September of 1989, the Judicial Conference of the United States for the first and so far only time declared a "judicial

space emergency" in the Eastern District of New York. The pertinent part states:

> Whereas, the District Court for the Eastern District of New York at Brooklyn is faced with a judicial housing crisis which is seriously impeding the administration of justice in spite of congressional authorization to resolve the shortage of court facilities;
>
> Whereas, space is not available to accommodate adequately all judgeships authorized for the court;
>
> Whereas, effective use of visiting judges to assist the court with its burgeoning workload is not possible because of a lack of facilities for use by such judges;
>
> Whereas, the court is unable to function efficiently due to the poor alignment of space between judiciary and Department of Justice units, such as the U.S. Probation Office and the U.S. Attorney;
>
> * * *
>
> Be it resolved, the housing situation in the Eastern District of New York constitutes a judicial space emergency . . . .

In addition, the Administrative Office of the United States Courts ("AO") has projected that the Eastern District's space needs will continue to increase in the future. In 1989, the AO collected data upon which to prepare a long-range plan for space needs of the federal judiciary. The plan was based on projections of the number of judicial officers in five years, 10 years and 30 years. As of December 1990, the Eastern District was authorized 15 judges and seven magistrate judges. If the projections hold true, by the end of 1995, the Eastern District would be authorized eighteen judges and ten magistrate judges; by the end of 2000, the

court would have 22 judges and 12 magistrate judges; and by 2020, the court would have 31 judges and 15 magistrate judges.

The judges in the Eastern District of New York have carried above-average case loads for years. The AO statistics show that for the year ended June 30, 1991, there were 453 "weighted" filings per judgeship in the Eastern District of New York while the national average was 386. Yet, the Eastern District is literally bursting at the seams.

There are 10 courtrooms for nine active judges and one senior judge in Brooklyn. [14] The Eastern District does have 12 Brooklyn chambers for judges, and therefore there are chambers for a visiting judge. The problem is the lack of a courtroom which can be assigned to a visiting judge for the two-week minimum period the AO requires in order to name a visiting judge.

In addition to the eleven courtrooms in the present Brooklyn courthouse, four courtrooms with the attendant chambers are under construction in the adjoining IRS building. The four courtrooms, while functional, are not ideal. They will have inadequate ceiling heights and the use will be restricted by four structural columns in each of the courtrooms. The courtrooms are expected to be completed before the judges for the three new positions

---

[14] This does not include the ceremonial courtroom which is not suitable for normal court business and regularly used for other purposes, such as naturalization proceedings.

are sworn in. Therefore, there will be sufficient space to house the new judges; but, even after the four new courtrooms and chambers are finished, any judge who takes senior status thereafter would be without a courtroom.

The space crunch is squeezing not only judges and magistrate judges, but also bankruptcy judges as well as allied federal services, including the United States Attorney's Office, Federal Probation Office and the Federal Defender's Office. The short-term solution to this problem has been to lease off-site space.

All of the six bankruptcy judges assigned to the Eastern District are in rental space; only one sits at a (leased) federal courthouse. Three bankruptcy judges are housed above a drug store in Brooklyn; two others are in leased space in Westbury. The Federal Probations Office has approximately 1,000 square feet in the Brooklyn courthouse, but leases 23,500 square feet at two other sites in Brooklyn and 3,500 square feet on Long Island. The Federal Defender's Office leases some 4,000 square feet in Brooklyn and expects to double its space in the immediate future; that Office also leases 300 square feet on Long Island.

After the AO sent its long-range plan for the Eastern District of New York to the General Services Administration ("GSA"), GSA hired a consulting firm to study the 30-year space needs of the Court, its components and allied agencies. GSA and

the Court decided the consultants should consider four possibilities for Brooklyn and two for Long Island. At its December 13, 1990 meeting, the EDNY Board of Judges considered the report and recommendations of GSA's consulting firm and decided that, for Long Island, the Court, its components and allied agencies should be housed in a new federal building on a site within walking distance of a mass transit station near the Nassau/Suffolk County line; for Brooklyn, it preferred the construction of a new 20-story tower to be built behind the exterior walls of the 1930 section of the Brooklyn Post Office. The primary reasons for the Board's position are safety and the economic use of time which results from having all of the agencies within an elevator ride away from the courtrooms. The proposed buildings would be built to accommodate the 30-year needs of the Court, its components, and allied agencies; any excess space could be leased to federal or local government agencies or to the private sector until it is needed by the Court or allied agencies.

New courthouses would make it possible to have adequate jail space for prisoners who are brought in from as far as 80 miles away on a daily basis for arraignment or trial, and the marshal would have the prescribed exercise room with showers. The new courthouses would provide other ancillary facilities now lacking, such as courtrooms for visiting judges and the two recommended conference/witness rooms per courtroom. At the present time, the only

Brooklyn conference/witness room is the robing room which serves the Ceremonial Courtroom. The heating, ventilating, and air conditioning systems would be adequate, unlike the present systems. We note that last spring several major jury trials had to be recessed because of the heat.

The Chief Judge has informed the Advisory Group that GSA has asked the Office of Management and Budget ("OMB") for approval of a plan for the Post Office to construct a 20-story tower to house the Court, its components and allied agencies under a long-term lease arrangement with the Post Office retaining the land and GSA eventually acquiring the building. The Chief Judge further advises that, as of October 1991, OMB had not ruled on the matter but that it philosophically opposes long-term leases, especially for courthouses.

The Advisory Group endorses the proposal to build two new courthouses. Adequate space and facilities to house the judicial officers, support staff and allied agencies in the Eastern District are indispensable to the long-range plan to reduce unnecessary delay and expense in civil litigation.

The Advisory Group urges Congress quickly to remove impediments to the immediate construction of the 20-story tower to house the Brooklyn division of the EDNY. The removal of one impediment may require legislation which would transfer the unencumbered

use of the Brooklyn Post Office to the courts. The Advisory Group strongly endorses any special legislation which may be required.

Conclusion

While the work of the Advisory Group is ongoing, our study of the various aspects of civil litigation within the Eastern District has clearly pointed us to the key root cause of unnecessary delay and expense in civil cases -- the increase in federal criminal law enforcement without adequate consideration of the impact on the Court and the civil justice system -- together with the other root causes: the Court's housing crisis and the failure to fill judicial vacancies in a timely manner.

The United States Attorney, his Assistants and other law enforcement officers have duties they must perform in accordance with their oaths of office. The District Judges and Magistrate Judges have their duties to perform in accordance with their oaths of office. These are well meaning people. We do not wish to interfere with them, but we must find a realistic reconciliation that does not leave civil litigants as orphans of the process and that provides equal justice for civil litigants.

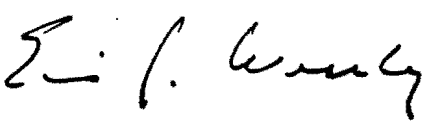
Long term, we believe the matter can be dealt with by the implementation of our recommendations, particularly with respect to housing the Court, adequate support personnel, and providing the Court with technology that matches that available to the bar and otherwise, filling the judicial vacancies in timely

manner, and adding to the cadre of Magistrate Judges. We are, however, deeply concerned with the mid-term and the short-term. The improvements we recommend in the civil justice system will help, but they do not provide the answer. That is why we shall continue to monitor and grapple with the matter.

Until the Court is provided the resources sufficient to meet the needs that the system has placed on the Court, our recommendations, as strongly as we feel about them, are likely to effectuate only marginal improvements.

Finally, as a point of personal pride, the chair extends his great gratitude to the Advisory Group, and those who have supported and assisted it, for their magnificent efforts. The Group has worked intelligently, professionally, intensively, seemingly with tirelessness, and always with good spirit and collegiality, in the knowledge that it is engaged in an opportunity holding the prospect of substantial reform in the civil justice system in the Court particularly if the needs of the Court are understood and met by those who have the power to do so. It has been a privilege to chair the Group.

December 9, 1991 Respectfully submitted,



ADVISORY GROUP

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Edwin J. Wesely
Chair
Winthrop, Stimson, Putman & Roberts

Stephen P. Hoffman
Deputy Chair
Pomerantz Levy Haudek Block & Grossman

Paul Allen
Chairman
ALTA Limited Partners, L.P.

Robert L. Begleiter
Chief, Civil Division
United States Attorney's Office

Joel Berger
Senior Litigator
Corporation Counsel
City of New York

Margaret A. Berger
Brooklyn Law School

Robert J. Berkow
National Director Legal Consulting
Ernst & Young

Bertram Bronzaft
Garwin, Bronzaft, Gerstein & Fisher

Dr. Richard L. Carlson
Director
University Health Service
Columbia University

Raymond L. Casey

Edward D. Cavanagh
Reporter
St. John's University School of Law

Oscar G. Chase
New York University School of Law

Thomas F. Clauss, Jr.
Winthrop, Stimson, Putnam & Roberts

Thomas Concannon
Legal Aid Society

Jo Davis
Kaye, Scholer, Fierman, Hays & Handler

Thomas L. Genovese
Vice President and General Counsel
Grumman Corporation

John C. Gray, Jr.
Project Director
Brooklyn Legal Services Corp. B.

Peter Herbert
Cowan, Liebowitz & Latman, P.C.

George F. Hritz
Davis, Markel & Edwards

Peter H. Kaskell
Senior Vice President
Center for Public Resources

James K. Killelea
Senior Vice President - Group General Counsel
United States Fidelity and Guaranty Company

V. Anthony Maggipinto

Peter Reilly, Jr.

Paul D. Rheingold
Rheingold & McGowan

Sol Schreiber
Milberg, Weiss, Bershad, Specthrie & Lerach

Anne Y. Shields
Skadden, Arps, Slate, Meagher & Flom

Guy Miller Struve
Davis Polk & Wardwell

Ex Officio:

Honorable Thomas C. Platt
Chief Judge

Honorable A. Simon Chrein
Chief Magistrate Judge

Bruce Barton
District Executive

Robert C. Heinemann
Clerk of Court

Lawrence J. Zweifach
Gordon, Hurwitz, Butowsky, Weitzen, Shalov & Wein

APPENDIX A - Statistical Tables

I. Judicial Workload Profile - National (SY '91-'86)

II. Judicial Workload Profile - EDNY (SY '91-'86)

III. Tables of Trials/Trial Hours and Tables of Total Proceeding Hours/Number of Proceedings

IV. Comparison of Pending Cases to Terminations (SY '91-'88)

United States District Courts — National Judicial Workload Profile

TABLE I

			ALL DISTRICT COURTS					
			1991	1990	1989	1988	1987	1986
OVERALL WORKLOAD STATISTICS	Filings[1]		241,420	251,113	263,896	269,174	268,023	282,074
	Terminations		240,952	243,512	262,806	265,916	265,727	292,092
	Pending		274,010	273,542*	265,035	268,070	264,953	262,637
	Percent Change in Total Filings — Current Year			-3.9	-8.5	-10.3	-9.9	-14.4
	Number of Judgeships		649	575	575	575	575	575
	Vacant Judgeship Months		988.7	540.1	374.1	485.2	483.4	657.9
ACTIONS PER JUDGESHIP	FILINGS	Total	372	437	459	467	466	491
		Civil	320	379	406	417	416	444
		Criminal Felony	52	58	53	51	50	47
	Pending Cases		422	476*	461	466	461	457
	Weighted Filings		386	448	466	467	461	461
	Terminations		371	423	457	462	462	508
	Trials Completed		31	36	35	35	35	35
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	5.7	5.3	5.0	4.3	4.1	3.9
		Civil	9	9	9	9	9	9
	From Issue to Trial (Civil Only)		15	14	14	14	14	14
OTHER	Number (and %) of Civil Cases Over 3 Years Old		28,421 11.8	25,207 10.4	22,391 9.2	21,487 8.8	19,782 8.1	19,252 7.9
	Average Number of Felony Defendants Filed per Case		1.6	1.4	1.4	1.4	1.4	1.4
	Jurors	Present for Jury Selection	36.79	35.84	35.89	32.7	31.1	32.0
		% Not Selected, Serving, or Challenged	34.0	34.2	35.8	33.7	32.1	34.3

1990 CIVIL AND FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

TOTAL CIVIL	207,742	TOTAL CRIMINAL FELONY[1]	32,928
A-Social Security	7,892	A-Immigration	2,020
B-Recovery of Overpayments and Enforcement of Judgments	7,933	B-Embezzlement	1,805
C-Prisoner Petitions	42,462	C-Weapons and Firearms	2,872
D-Forfeitures and Penalties and Tax Suits	8,227	D-Escape	732
E-Real Property	9,794	E-Burglary and Larceny	1,769
F-Labor Suits	14,686	F-Marihuana and Controlled Substances	3,768
G-Contracts	34,485	G-Narcotics	7,576
H-Torts	37,309	H-Forgery and Counterfeiting	998
I-Copyright,Patent, and Trademark	6,235	I-Fraud	6,218
J-Civil Rights	19,340	J-Homicide and Assault	669
K-Antitrust	681	K-Robbery	1,677
L-All Other Civil	19,898	L-All Other Criminal Felony Cases	3,194

Filings in the "Overall Workload Statistics" section include criminal felony transfers, while filings "by nature of offense" do not.

TABLE II

U.S. DISTRICT COURT -- JUDICIAL WORKLOAD PROFILE

NEW YORK EASTERN

			TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN U.S. CIRCUIT	
			1991	1990	1989	1988	1987	1986		
OVERALL WORKLOAD STATISTICS	Filings*		5,857	5,382	5,084	5,058	5,204	5,210		
	Terminations		4,551	4,687	5,080	5,127	4,749	5,159		
	Pending		8,401	7,068	6,366	6,352	6,416	5,961		
	Percent Change In Total Filings Current Year	Over Last Year. . .		8.8					9	2
		Over Earlier Years. . .			15.2	15.8	12.5	12.4	8	2
	Number of Judgeships		15	12	12	12	12	12		
	Vacant Judgeship Months		31.0	17.5	24.0	15.8	10.8	20.3		
ACTIONS PER JUDGESHIP	FILINGS	Total	390	449	424	422	434	434	36	2
		Civil	316	369	362	364	378	378	47	3
		Criminal Felony	74	80	62	58	56	56	20	1
	Pending Cases		560	589	531	529	535	497	11	3
	Weighted Filings**		453	495	481	465	459	456	11	3
	Terminations		303	391	423	427	396	430	74	4
	Trials Completed		30	43	37	40	40	38	47	2
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	7.1	6.7	6.7	5.8	5.1	4.4	76	3
		Civil**	10	9	10	10	10	8	46	2
	From Issue to Trial (Civil Only)		24	19	16	21	22	22	80	5
OTHER	Number (and %) of Civil Cases Over 3 Years Old		809 11.9	762 13.1	548 10.3	450 8.3	428 7.8	443 8.6	74	2
	Average Number of Felony Defendants Filed per Case		1.5	1.7	1.8	1.8	1.6	1.6		
	Jurors	Avg. Present for Jury Selection	65.53	45.13	56.61	44.29	41.08	49.42	94	6
		Percent Not Selected or Challenged	48.1	32.2	45.0	35.7	32.2	41.9	94	6

FOR NATIONAL PROFILE AND NATURE OF SUIT AND OFFENSE CLASSIFICATIONS SHOWN BELOW -- OPEN FOLDOUT AT BACK COVER

1991 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	4741	188	155	608	227	95	578	740	1161	171	328	10	480
Criminal*	1103	17	31	42	6	45	7	572	22	201	13	17	130

Filings in the "Overall Workload Statistics" section include criminal transfers, while filings "by nature of offense" do not.
*See Page 167.

TABLE III

SY 1991 TRIALS/TRIAL HOURS

	TOTAL		TRIALS		JURY		NON-JURY		NON - TRIAL	
	HOURS	TRIALS	CIVIL	CRIMINAL	HOURS	TRIALS	HOURS	TRIALS	HOURS	PROCEEDINGS
Active Judges	7198.5	443	223	220	5861.1	202	1337	241	4471	10475
Senior Judges	669	50	21	29	499.5	26	169.5	24	439.5	1026
Visiting Judges	186	7	1	6	183	6	3	1	20.5	34
TOTALS	8053.5	500	245	255	6543.6	234	1509.5	266	4931	11535

SY 1991 - Number of Non-Trial Hours and Proceedings

	Non-Trial Total							
	Hours	Proceedings	Arraignments	Sentencing	Motions	Pre-Trial Conference	Grand Jury Proceedings	Other Proceedings
Active Judges	4471	10475	2252	1405	2300	3899	41	578*
Senior Judges	439.5	1026	213	130	148	484	8	43
Visiting Judges	20.5	34	2	2	1	29	0	0
GRAND TOTALS	4931	11535	2467	1537	2449	4412	49	621

(*Some law clerk use has been reported in this number)

SY 1990 NUMBER OF PROCEEDINGS *

	Total Hours	Arraignments	Sentencing	Motions	Pre-Trial Confs.	Grand Jury Proceedings	Other Proceedings
Active Judges	3,815.5	1,604	1,167	2,180	3,539	68	* 584
Senior Judges	555	219	156	280	995	25	212
Visiting Judges	3.5	0	1	1	1	0	0

* Some law clerk use has been reported in this numbers.

	Total		Total Civil		Total Criminal	
	Trials	Hours	Trials	Hours	Trials	Hours
Active Judges	447	6,642.5	232	2,916.5	210	3,726
Senior Judges	76	982.5	43	437	35	545.5
Visiting Judges	4	119.5	0	0	4	119.5

Note: Second Circuit Judges sitting by designation were treated as "visiting" judges.

SUMMARY TABLES from Administration Office Detailed Judge Statistics - E/NY

SY1989 Number of Proceedings

	Total Procedural Hours	Arraignments	Sentencing	Motion	Pre-Trial Conference	Grand Jury Proceedings	Other* Proceedings
·ve ·ges	4,189	1,248	1,030	2,140	3,628	17	1,120
nior dges	655	215	214	354	1,468	15	220
·ting dges	29	0	8	1	0	0	13

* Some law clerk use has been reported in this number

	Total Trials / Hours		Total Civil Trials / Hours		Total Criminal Trials / Hours	
·tive ·dges	367	6,288.5	183	2,345	184	3,943.5
·ior ·dges	81	1,412.5	52	630	29	782.5
isiting udges*	5	154.5	1	0	4	154.5

Note: Second Circuit Judges sitting by designation were treated as "visiting" judges.

SUMMARY TABLES from Administration Office Detailed Judge Statistics - E/NY

SY 1988 Number of Proceedings

	Total Procedural Hours	Arraignments	Sentencing	Motion	Pre-Trial Conferences	Grand Jury Proceedings	Other* Proceedings
ive ges	4,196	1,166	936	2,272	3,889	45	1,351
r** ges	600.5	341	177	314	1,609	0	86
siting dges	23	2	12	4	13	0	3

ome law clerk use has been reported in this number.

** Includes 3 months when a senior judge had been an active judge. There was no way to break this down statistically, so 12 months re all reported under senior judge.

	Total Trials	Total Hours	Total Civil Trials	Total Civil Hours	Total Criminal Trials	Total Criminal Hours
tive dges	394	6,713	191	2,489	203	4,224
ior** ges	83	1,624.5	45	517.5	38	1,107
siting* dges	18	413.5	9	255.5	9	158

*Note: Second Circuit Judges sitting by designation were treated as "visiting" judges.

** Includes 3 months when a senior judge had been an active judge. There was no way to break this down statistically, so 12 months ere all reported under senior judge.

SUMMARY TABLES From Administration Office Detailed Judge Statistics - E/NY

SY 1987 Number of Proceedings

	Total Procedural Hours	Arraignments	Sentencing	Motion	Pre-Trial Conferences	Grand Jury Proceedings	Other* Proceedings
ctive Judges	4,218	1,326	962	2,546	5,478	77	1,450
enior* dges	302	109	79	104	245	2	51
isiting udges	94	0	15	22	21	3	1

*Some law clerk use has been reported in this number.

	Total Trials / Hours		Total Civil Trials / Hours		Total Criminal Trials / Hours	
ctive Judges	413	7,820.5	227	3,188.5	184	4,632
Senior udges	54	804	40	601.5	14	202.5
Visiting* Judges	21	760.5	11	213	10	547.5

*Note: Second Circuit Judges sitting by designation were treated as "visiting" judges.

SUMMARY TABLES From Administrative Office Detailed Judge Statistics - E/NY

SY 1986 Number of Proceedings

	Total Procedural Hours	Arraignments	Sentencing	Motion	Pre-Trial Conferences	Grand Jury Proceedings	Other* Proceedings
·ive	4,785	1,260	782	2,760	5,799	140	2,245
·ior dges	304.5	83	52	97	241	3	22
·iting s	79	25	61	10	52	0	6

*Some law clerk use has been reported in this number.

	Total Trials / Hours		Total Civil Trials / Hours		Total Criminal Trials / Hours	
tive dges	374	7,613.5	187	2,911	187	4,702.5
·r dges	73	1,021	48	773	25	248
siting* ·es	21	528	10	156.5	11	371.5

*Note: Second Circuit Judges sitting by designation were treated as "visiting" judges.

TABLE IV

EASTERN DISTRICT OF NEW YORK

CIVIL CASES
(July 1st to June 30th - statistical year)

CASES	1991	1990	1989	1988
Filed	4741	4432	4341	4372
Terminated	3809	3956	4435	4467
Pending	6779	5806	5322	5406

APPENDIX B - Statement of Compliance Under 28 U.S.C. § 472

The Report of the Eastern District of New York Advisory Group complies with 28 U.S.C. §472, which provides:

§472. Development and implementation of a civil justice expense and delay reduction plan

(a) The civil justice expense and delay reduction plan implemented by a district court shall be developed or selected, as the case may be, after consideration of the recommendations of an advisory group appointed in accordance with section 478 of this title.

(b) The advisory group of a United States district court shall submit to the court a report, which shall be made available to the public and which shall include-

(1) an assessment of the matters referred to in subsection (c)(1);

(2) the basis for its recommendation that the district court develop a plan or select a model plan;

(3) recommendation measures, rules and programs; and

(4) an explanation of the manner in which the recommended plan complies with section 473 of this title.

(c)(1) In developing its recommendations, the advisory group of a district court shall promptly complete a thorough assessment of the state of the court's civil and criminal dockets. In performing the assessment for a district court, the advisory group shall-

(A) determine the condition of the civil and criminal dockets;

(B) identify trends in case filings and in the demands being placed on the court's resources;

(C) identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation; and

(D) examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts.

(2) In developing its recommendations, the advisory group of a district court shall take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys.

(3) The advisory group of a district court shall ensure that its recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys toward reducing costs and delay and thereby facilitating access to the courts.

(d) The chief judge of the district court shall transmit a copy of the plan implemented in accordance with subsection (a) and the report prepared in accordance with subsection (b) of this section to-

(1) the Director of the Administrative Office of the United States Courts;

(2) the judicial council of the circuit in which the district court is located; and

(3) the chief judge of each of the other United States district courts located in such circuit.

APPENDIX C - The Advisory Group Survey

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
Attorney Survey
August 1991

Address Correction Requested

The following survey is being conducted by the Advisory Group of the E.D.N.Y., a body appointed pursuant to the Judicial Reform Act of 1990 to study whether there are unnecessary costs and delays associated with civil litigation in this district and, if so, how they can be reduced. The Group is seeking your opinions as a practicing attorney in the E.D.N.Y. in order to assist it in making recommendations for improving the management of civil litigation. The survey should take no longer than fifteen minutes to complete. Please return it no later than August 16, 1991, in the enclosed postage prepaid envelope. We appreciate your taking the time to participate in this study. Confidentially will be maintained.

Background Information

1. For how many years have you been practicing law? ___ ___ years.

2. What percentage (estimated) of your practice (of time spent) is devoted to civil litigation? ___ ___ ___ %

3. During the past three years, what percentage (estimated) of your civil litigation practice was in the E.D.N.Y.? ___ ___ ___ %

4. During the past three years, what percentage (estimated) of your civil litigation practice was in the S.D.N.Y.? ___ ___ ___ %

5. How would you best describe your practice setting?
   - [ ] Private law firm
   - [ ] Federal government
   - [ ] State government
   - [ ] Local government
   - [ ] Corporate counsel
   - [ ] Independent non-profit organization
   - [ ] Other_____

6. How many practicing lawyers are there in your firm or organization? ___ ___ ___

7. What percentage (estimated) of your civil litigation practice consists of representing plaintiffs? ___ ___ ___ %

The following questions pertain to your civil litigation experience in the Eastern District of New York during the past three years.

8. Have you encountered unreasonable delays? [ ] yes [ ] no

If yes, how much have each of the following contributed to these delays ?

	No contribution	Slight contribution	Moderate contribution	Substantial contribution
Tactics of opposing counsel	[ ]	[ ]	[ ]	[ ]
Conduct of clients	[ ]	[ ]	[ ]	[ ]
Conduct of insurers	[ ]	[ ]	[ ]	[ ]
Personal or office practice inefficiencies	[ ]	[ ]	[ ]	[ ]
Judicial inefficiencies	[ ]	[ ]	[ ]	[ ]

9. Have you found such litigation to be unnecessarily costly? [ ] yes [ ] no
If yes, how much have each of the following contributed to the unnecessary costs ?

	No contribution	Slight contribution	Moderate contribution	Substantial contribution
Conduct of counsel	[ ]	[ ]	[ ]	[ ]
Conduct of clients	[ ]	[ ]	[ ]	[ ]
Conduct of insurers	[ ]	[ ]	[ ]	[ ]
Personal or office practice inefficiencies	[ ]	[ ]	[ ]	[ ]
Judicial inefficiencies	[ ]	[ ]	[ ]	[ ]

10. To what extent have tactics of counsel contributed to unreasonable delays or unnecessary cost?
[ ] None [ ] Slight [ ] Moderate [ ] Substantial

If you selected moderate or substantial, please indicate the extent to which each of the following tactics of counsel contributed to your assessment

	Substantial cause	Moderate cause	Slight cause	Not a cause
Unnecessary use of interrogatories	[ ]	[ ]	[ ]	[ ]
Too many interrogatories	[ ]	[ ]	[ ]	[ ]
Too many depositions	[ ]	[ ]	[ ]	[ ]
Too many deposition questions	[ ]	[ ]	[ ]	[ ]
Overbroad document requests	[ ]	[ ]	[ ]	[ ]
Overbroad responses to document production requests	[ ]	[ ]	[ ]	[ ]
Unavailability of witness or counsel	[ ]	[ ]	[ ]	[ ]
Raising frivolous objections	[ ]	[ ]	[ ]	[ ]
Failure to attempt in good faith to resolve issues without court intervention	[ ]	[ ]	[ ]	[ ]
Unwarranted sanctions motions	[ ]	[ ]	[ ]	[ ]
Lack of professional courtesy	[ ]	[ ]	[ ]	[ ]
Other_____	[ ]	[ ]	[ ]	[ ]
Other_____	[ ]	[ ]	[ ]	[ ]
Other_____	[ ]	[ ]	[ ]	[ ]

11. To what extent has ineffective case management by **magistrate judges** contributed to unnecessary delays or unreasonable costs?

[ ] None [ ] Slight [ ] Moderate [ ] Substantial

If you selected moderate or substantial, please select the appropriate response for the following court activities:

Number of status conferences	Pre-motion conferences	Deadlines	Extension of deadlines
[ ] Far too many	[ ] Far too many	[ ] Far too restrictive	[ ] Far too many
[ ] Somewhat too many	[ ] Somewhat too many	[ ] Somewhat too restrictive	[ ] Somewhat too many
[ ] Reasonable number	[ ] Reasonable number	[ ] Reasonable	[ ] Reasonable number
[ ] Somewhat too few	[ ] Somewhat too few	[ ] Somewhat permissive	[ ] Somewhat too few
[ ] Far too few	[ ] Far too few	[ ] Far too permissive	[ ] Far too few

Please indicate the extent to which each of the following possible instances of ineffective case management by **magistrate judges** contributed to your assessment:

	Substantial cause	Moderate cause	Slight cause	Not a cause
Delays in entering scheduling orders	[ ]	[ ]	[ ]	[ ]
Excessive time periods provided for in scheduling orders	[ ]	[ ]	[ ]	[ ]
Failure to resolve discovery disputes promptly	[ ]	[ ]	[ ]	[ ]
Failure to resolve other motions promptly	[ ]	[ ]	[ ]	[ ]
Scheduling too many motions on different cases concurrently	[ ]	[ ]	[ ]	[ ]
Failure to tailor discovery to needs of the case	[ ]	[ ]	[ ]	[ ]
Failure by magistrate judge to initiate settlement discussions	[ ]	[ ]	[ ]	[ ]
Inadequate supervision of settlement discussions	[ ]	[ ]	[ ]	[ ]
Inadequate judicial preparation for conferences or proceedings	[ ]	[ ]	[ ]	[ ]
Other_____	[ ]	[ ]	[ ]	[ ]
Other_____	[ ]	[ ]	[ ]	[ ]
Other_____	[ ]	[ ]	[ ]	[ ]

12. To what extent has ineffective case management by **judges** contributed to unnecessary delays or unreasonable costs?

[ ] None [ ] Slight [ ] Moderate [ ] Substantial

If you selected moderate or substantial, please select the appropriate response for the following court activities:

Number of status conferences	Pre-motion conferences	Deadlines	Extension of deadlines
[ ] Far too many	[ ] Far too many	[ ] Far too restrictive	[ ] Far too many
[ ] Somewhat too many	[ ] Somewhat too many	[ ] Somewhat too restrictive	[ ] Somewhat too many
[ ] Reasonable number	[ ] Reasonable number	[ ] Reasonable	[ ] Reasonable number
[ ] Somewhat too few	[ ] Somewhat too few	[ ] Somewhat permissive	[ ] Somewhat too few
[ ] Far too few	[ ] Far too few	[ ] Far too permissive	[ ] Far too few

Please indicate the extent to which each of the following possible instances of ineffective case management by judges contributed to your assessment:

	Substantial cause	Moderate cause	Slight cause	Not a cause
Delays in entering scheduling orders	[ ]	[ ]	[ ]	[ ]
Excessive time periods provided for in scheduling orders	[ ]	[ ]	[ ]	[ ]
Failure to resolve discovery disputes promptly	[ ]	[ ]	[ ]	[ ]
Failure to resolve other motions promptly	[ ]	[ ]	[ ]	[ ]
Scheduling too many motions on different cases concurrently	[ ]	[ ]	[ ]	[ ]
Failure to tailor discovery to needs of the case	[ ]	[ ]	[ ]	[ ]
Failure by judge to initiate settlement discussions	[ ]	[ ]	[ ]	[ ]
Inadequate supervision of settlement discussions	[ ]	[ ]	[ ]	[ ]
Inadequate judicial preparation for conferences or proceedings	[ ]	[ ]	[ ]	[ ]
Failure by judge to assign reasonably prompt trial dates	[ ]	[ ]	[ ]	[ ]
Failure of judge to meet assigned trial dates	[ ]	[ ]	[ ]	[ ]
Failure by judge to give sufficient advance notice of trial	[ ]	[ ]	[ ]	[ ]
Other_____	[ ]	[ ]	[ ]	[ ]
Other_____	[ ]	[ ]	[ ]	[ ]
Other_____	[ ]	[ ]	[ ]	[ ]

The following questions describe solutions which have been implemented in other districts or are under active consideration in this or other districts to address concerns regarding unnecessary delays and unreasonable costs in federal civil litigation. With respect to each proposed solution, please indicate your opinion as to its effectiveness in expediting civil litigation or reducing its cost.

		Substantial effect	Moderate effect	Slight effect	No effect at all	No opinion
13.	Shorter time limits for completing the various stages of litigation	[ ]	[ ]	[ ]	[ ]	[ ]
14.	Requiring counsel to attempt to resolve issues before court intervention	[ ]	[ ]	[ ]	[ ]	[ ]
15.	Permitting pre-motion conferences with the court on any motion at the request of any party	[ ]	[ ]	[ ]	[ ]	[ ]
16.	Requiring pre-motion conferences with the court for the following categories of motions:					
	Dispositive motions (dismissal, summary judgment)	[ ]	[ ]	[ ]	[ ]	[ ]
	Discovery motions	[ ]	[ ]	[ ]	[ ]	[ ]
	Other motions	[ ]	[ ]	[ ]	[ ]	[ ]
17.	Permitting the filing of procedural, non-dispositive motions (for example, motions to amend and motions to add parties) by letter rather than formal motion and brief	[ ]	[ ]	[ ]	[ ]	[ ]
18.	Providing a 30 page limitation for memoranda of law, except for good cause shown	[ ]	[ ]	[ ]	[ ]	[ ]
19.	Requiring mandatory arbitration of all disputes in which the amount in controversy is less than:					
	$100,000	[ ]	[ ]	[ ]	[ ]	[ ]
	$200,000	[ ]	[ ]	[ ]	[ ]	[ ]
	$1,000,000	[ ]	[ ]	[ ]	[ ]	[ ]

		Substantial effect	Moderate effect	Slight effect	No effect at all	No opinion
20.	Providing court-annexed mediation upon mutual consent of parties for some or all issues in dispute	[ ]	[ ]	[ ]	[ ]	[ ]
21.	Making available attorneys who are experts in the subject matters in dispute to evaluate claims and defenses and to assist parties in settlement negotiations ("early neutral evaluation")	[ ]	[ ]	[ ]	[ ]	[ ]
22.	Requiring attendance of parties and/or their insurers at court settlement conferences	[ ]	[ ]	[ ]	[ ]	[ ]
23.	Requiring Rule 11 sanctions motions to be separately filed and not appended to another motion	[ ]	[ ]	[ ]	[ ]	[ ]
24.	Increased availability of telephone conferences with the court	[ ]	[ ]	[ ]	[ ]	[ ]
25.	Requiring automatic disclosure of the following information shortly after joinder of issue:					
	The identity of witnesses reasonably likely to have information which bears significantly upon claims, defenses or damages	[ ]	[ ]	[ ]	[ ]	[ ]
	General description of documents relied upon in preparing pleadings or contemplated to be used in support of the parties' allegations or calculation of damages	[ ]	[ ]	[ ]	[ ]	[ ]
	Existence and contents of insurance agreements	[ ]	[ ]	[ ]	[ ]	[ ]
26.	Requiring automatic disclosure prior to the final pre-trial conference of the qualifications, the opinions and the basis for those opinions of experts intended to be called as trial witnesses	[ ]	[ ]	[ ]	[ ]	[ ]
27.	Conditioning grants by the court of broader discovery upon the shifting of costs in instances where the burden of responding to such requests appears to be out of proportion to the amounts or issues in dispute	[ ]	[ ]	[ ]	[ ]	[ ]
28.	Defining the scope of permissible discovery by balancing the burden or expenses of the discovery against its likely benefit	[ ]	[ ]	[ ]	[ ]	[ ]
29.	Assessing the costs of discovery motions on the losing party	[ ]	[ ]	[ ]	[ ]	[ ]
30.	Providing less time for completion of discovery	[ ]	[ ]	[ ]	[ ]	[ ]
31.	Requiring discovery relating to particular issues (e.g., venue, class certification) or a specified stage of the case (e.g., liability) to be completed before permitting discovery respecting other issues or another stage (e.g., damages, experts)	[ ]	[ ]	[ ]	[ ]	[ ]
32.	Limiting the number of interrogatories presumptively permitted	[ ]	[ ]	[ ]	[ ]	[ ]
33.	Limiting the type of interrogatories (e.g., identification, contention) presumptively permitted at various stages of discovery	[ ]	[ ]	[ ]	[ ]	[ ]
34.	Limiting the number of depositions presumptively permitted	[ ]	[ ]	[ ]	[ ]	[ ]
35.	Limiting the length of depositions presumptively permitted	[ ]	[ ]	[ ]	[ ]	[ ]

	Substantially improved	Moderately improved	Remained unchanged	Moderately worsened	Substantially worsened
36. During the past three years, the cost and time it takes to litigate civil actions has:	[ ]	[ ]	[ ]	[ ]	[ ]

37. During the past three years, how many months (on average) has it taken from the time your civil cases were ready for trial to the time that trial actually commenced? ___ ___ months (or NA, if not applicable)

36. [Optional] If delay is a problem in the E.D.N.Y. for disposing of civil cases, what additional suggestions or comments do you have for reducing those delays.

37. [Optional] If costs associated with civil litigation in the E.D.N.Y. are unreasonably high, what additional suggestions or comments do you have for reducing those costs?

E.D.N.Y. ADVISORY GROUP ATTORNEY SURVEY
PARTICIPANT PROFILE

	1	2-5	6-10	11-20	20+	ALL LEVELS
1. For how many years have you been practicing law?	.2%	6.7%	17.0%	42.9%	33.3%	100.0%
Count	(1)	(29)	(74)	(187)	(145)	(436)

	NONE	1-25%	26-50%	51-75%	76-100%	ALL LEVELS
2. What percentage (estimated) of your practice (of time spent) is devoted to civil litigation?	.5%	9.6%	13.1%	11.5%	65.4%	100.0%
Count	(2)	(42)	(57)	(50)	(285)	(436)
3. During the past three years, what percentage (estimated) of your civil litigation practice was in the E.D.N.Y.?	8.1%	76.0%	8.8%	2.3%	4.8%	100.0%
Count	(35)	(329)	(38)	(10)	(21)	(433)
4. During the past three years, what percentage (estimated) of your civil litigation practice was in the S.D.N.Y.?	15.5%	57.2%	16.7%	7.9%	2.8%	100.0%
Count	(67)	(247)	(72)	(34)	(12)	(432)

	Private law firm	Federal government	State government	Local government	Corporate counsel	Independent non-profit organization	Other	ALL LEVELS
5. How would you best describe your practice setting?	86.3%	3.9%	.7%	3.0%	3.7%	1.1%	1.4%	100.0%
Count	(377)	(17)	(3)	(13)	(16)	(5)	(6)	(437)

	1	2-5	6-10	11-20	21-50	51-100	101+	ALL LEVELS
6. How many practicing lawyers are there in your firm or organization?	12.2%	30.0%	11.9%	11.2%	13.1%	7.7%	13.8%	100.0%
Count	(52)	(128)	(51)	(48)	(56)	(33)	(59)	(427)

	NONE	1-25%	26-50%	51-75%	76-100%	ALL LEVELS
7. What percentage (estimated) of your civil litigation practice consists of representing plaintiffs?	11.1%	25.4%	25.2%	14.3%	24.0%	100.0%
Count	(48)	(110)	(109)	(62)	(104)	(433)

The following questions pertain to your civil litigation experience in the Eastern District of New York during the past three years.

	Yes	No	ALL LEVELS
8. Have you encountered unreasonable delays?	36.4%	63.6%	100.0%
Count	(148)	(259)	(407)

	No contribution	Slight contribution	Moderate contribution	Substantial contribution	ALL LEVELS
If yes, how much have each of the following contributed to these delays?					
Tactics of opposing counsel	4.9%	14.0%	37.1%	44.1%	100.0%
Count	(7)	(20)	(53)	(63)	(143)
Conduct of clients	37.5%	41.4%	17.2%	3.9%	100.0%
Count	(48)	(53)	(22)	(5)	(128)
Conduct of insurers	49.1%	14.9%	15.8%	20.2%	100.0%
Count	(56)	(17)	(18)	(23)	(114)
Personal or office practice inefficiencies	38.6%	46.5%	12.6%	2.4%	100.0%
Count	(49)	(59)	(16)	(3)	(127)
Judicial inefficiencies	10.6%	31.0%	35.9%	22.5%	100.0%
Count	(15)	(44)	(51)	(32)	(142)

	Yes	No	ALL LEVELS
9. Have you found such litigation to be unnecessarily costly?	47.9%	52.1%	100.0%
Count	(190)	(207)	(397)

	No contribution	Slight contribution	Moderate contribution	Substantial contribution	ALL LEVELS
If yes, how much have each of the following contributed to the unnecessary costs ?					
Conduct of counsel	1.6%	12.0%	35.3%	51.1%	100.0%
Count	(3)	(22)	(65)	(94)	(184)
Conduct of clients	22.3%	41.4%	29.3%	7.0%	100.0%
Count	(35)	(65)	(46)	(11)	(157)
Conduct of insurers	41.5%	18.5%	20.0%	20.0%	100.0%
Count	(56)	(25)	(27)	(27)	(135)
Personal or office practice inefficiencies	36.5%	48.1%	13.5%	1.9%	100.0%
Count	(57)	(75)	(21)	(3)	(156)
Judicial inefficiencies	22.2%	38.0%	28.1%	11.7%	100.0%
Count	(38)	(65)	(48)	(20)	(171)

	None	Slight	Moderate	Substantial	ALL LEVELS
10. To what extent have tactics of counsel contributed to unreasonable delays or unnecessary cost?	16.8%	23.7%	33.0%	26.6%	100.0%
Count	(63)	(89)	(124)	(100)	(376)

	Substantial cause	Moderate cause	Slight cause	Not a cause	ALL LEVELS
If you selected moderate or substantial, please indicate the extent to which each of the following tactics of counsel contributed to your assessment.					
Unnecessary use of interrogatories	23.9%	36.2%	20.2%	19.7%	100.0%
Count	(45)	(68)	(38)	(37)	(188)
Too many interrogatories	31.8%	36.5%	12.5%	19.3%	100.0%
Count	(61)	(70)	(24)	(37)	(192)
Too many depositions	29.2%	28.2%	22.6%	20.0%	100.0%
Count	(57)	(55)	(44)	(39)	(195)
Too many deposition questions	34.2%	30.6%	16.6%	18.7%	100.0%
Count	(66)	(59)	(32)	(36)	(193)
Overbroad document requests	46.3%	33.8%	12.4%	7.5%	100.0%
Count	(93)	(68)	(25)	(15)	(201)
Overbroad responses to document production requests	15.8%	20.3%	32.8%	31.1%	100.0%
Count	(28)	(36)	(58)	(55)	(177)
Unavailability of witness or counsel	15.0%	27.8%	40.1%	17.1%	100.0%
Count	(28)	(52)	(75)	(32)	(187)
Raising frivolous objections	18.5%	42.5%	26.0%	13.0%	100.0%
Count	(37)	(85)	(52)	(26)	(200)
Failure to attempt in good faith to resolve issues without court intervention	36.4%	35.4%	19.4%	8.7%	100.0%
Count	(75)	(73)	(40)	(18)	(206)
Unwarranted sanctions motions	8.5%	20.2%	26.1%	45.2%	100.0%
Count	(16)	(38)	(49)	(85)	(188)
Lack of professional courtesy	22.1%	29.5%	31.1%	17.4%	100.0%
Count	(42)	(56)	(59)	(33)	(190)
Other	78.3%	21.7%			100.0%
Count	(18)	(5)			(23)
Other	83.3%	16.7%			100.0%
Count	(10)	(2)			(12)
Other	88.9%	11.1%			100.0%
Count	(8)	(1)			(9)

	None	Slight	Moderate	Substantial	ALL LEVELS
11. To what extent has ineffective case management by magistrate judges contributed to unnecessary delays or unreasonable costs?	56.3%	26.9%	12.7%	4.1%	100.0%
Count	(218)	(104)	(49)	(16)	(387)

	Far too many	Somewhat too many	Reasonable number	Somewhat too few	Far too few	ALL LEVELS
If you selected moderate or substantial, please select the appropriate response for the following court activities:						
Number of status conferences	21.1%	19.3%	42.1%	12.3%	5.3%	100.0%
Count	(12)	(11)	(24)	(7)	(3)	(57)
Pre-motion conferences	16.0%	24.0%	46.0%	8.0%	6.0%	100.0%
Count	(8)	(12)	(23)	(4)	(3)	(50)
Deadlines	21.7%	26.7%	16.7%	13.3%	21.7%	100.0%
Count	(13)	(16)	(10)	(8)	(13)	(60)
Extension of deadlines	16.4%	34.5%	30.9%	7.3%	10.9%	100.0%
Count	(9)	(19)	(17)	(4)	(6)	(55)

	Substantial cause	Moderate cause	Slight cause	Not a cause	ALL LEVELS
Please indicate the extent to which each of the following possible instances of ineffective case management by magistrate judges contributed to your assessment:					
Delays in entering scheduling orders	7.2%	11.6%	18.8%	62.3%	100.0%
Count	(5)	(8)	(13)	(43)	(69)
Excessive time periods provided for in scheduling orders	8.5%	11.3%	18.3%	62.0%	100.0%
Count	(6)	(8)	(13)	(44)	(71)
Failure to resolve discovery disputes promptly	22.9%	24.3%	24.3%	28.6%	100.0%
Count	(16)	(17)	(17)	(20)	(70)
Failure to resolve other motions promptly	25.4%	20.9%	23.9%	29.9%	100.0%
Count	(17)	(14)	(16)	(20)	(67)
Scheduling too many motions on different cases concurrently	4.5%	12.1%	27.3%	56.1%	100.0%
Count	(3)	(8)	(18)	(37)	(66)
Failure to tailor discovery to needs of the case	13.9%	38.9%	19.4%	27.8%	100.0%
Count	(10)	(28)	(14)	(20)	(72)
Failure by magistrate judge to initiate settlement discussions	24.6%	30.4%	18.8%	26.1%	100.0%
Count	(17)	(21)	(13)	(18)	(69)
Inadequate supervision of settlement discussions	19.1%	25.0%	22.1%	33.8%	100.0%
Count	(13)	(17)	(15)	(23)	(68)
Inadequate judicial preparation for conferences or proceedings	14.7%	14.7%	23.5%	47.1%	100.0%
Count	(10)	(10)	(16)	(32)	(68)
Other	85.7%	14.3%			100.0%
Count	(6)	(1)			(7)
Other	85.7%	14.3%			100.0%
Count	(6)	(1)			(7)
Other	100.0%				100.0%
Count	(2)				(2)

	None	Slight	Moderate	Substantial	ALL LEVELS
12. To what extent has ineffective case management by judges contributed to unnecessary delays or unreasonable costs?	41.5%	33.9%	17.8%	6.8%	100.0%
Count	(159)	(130)	(68)	(26)	(383)

	Far too many	Somewhat too many	Reasonable number	Somewhat too few	Far too few	ALL LEVELS
If you selected moderate or substantial, please select the appropriate response for the following court activities:						
Number of status conferences	8.6%	12.3%	38.3%	24.7%	16.0%	100.0%
Count	(7)	(10)	(31)	(20)	(13)	(81)
Pre-motion conferences	9.2%	17.1%	38.2%	14.5%	21.1%	100.0%
Count	(7)	(13)	(29)	(11)	(16)	(76)
Deadlines	14.8%	21.0%	35.8%	17.3%	11.1%	100.0%
Count	(12)	(17)	(29)	(14)	(9)	(81)
Extension of deadlines	11.8%	22.4%	53.9%	7.9%	3.9%	100.0%
Count	(9)	(17)	(41)	(6)	(3)	(76)

	Substantial cause	Moderate cause	Slight cause	Not a cause	ALL LEVELS
Please indicate the extent to which each of the following possible instances of ineffective case management by judges contributed to your assessment:					
Delays in entering scheduling orders	6.0%	15.7%	18.1%	60.2%	100.0%
Count	(5)	(13)	(15)	(50)	(83)
Excessive time periods provided for in scheduling orders	4.8%	15.7%	22.9%	56.6%	100.0%
Count	(4)	(13)	(19)	(47)	(83)
Failure to resolve discovery disputes promptly	17.6%	27.1%	15.3%	40.0%	100.0%
Count	(15)	(23)	(13)	(34)	(85)
Failure to resolve other motions promptly	41.8%	22.0%	15.4%	20.9%	100.0%
Count	(38)	(20)	(14)	(19)	(91)
Scheduling too many motions on different cases concurrently	12.3%	18.5%	13.6%	55.6%	100.0%
Count	(10)	(15)	(11)	(45)	(81)
Failure to tailor discovery to needs of the case	17.3%	30.9%	16.0%	35.8%	100.0%
Count	(14)	(25)	(13)	(29)	(81)
Failure by judge to initiate settlement discussions	26.1%	28.4%	19.3%	26.1%	100.0%
Count	(23)	(25)	(17)	(23)	(88)
Inadequate supervision of 'settlement discussions	25.6%	30.2%	16.3%	27.9%	100.0%
Count	(22)	(26)	(14)	(24)	(86)
Inadequate judicial preparation for conferences or proceedings	10.8%	22.9%	22.9%	43.4%	100.0%
Count	(9)	(19)	(19)	(36)	(83)
Failure by judge to assign reasonably prompt trial dates	34.9%	27.9%	16.3%	20.9%	100.0%
Count	(30)	(24)	(14)	(18)	(86)
Failure of judge to meet assigned trial dates	29.3%	29.3%	14.6%	26.8%	100.0%
Count	(24)	(24)	(12)	(22)	(82)
Failure by judge to give sufficient advance notice of trial	20.2%	28.6%	17.9%	33.3%	100.0%
Count	(17)	(24)	(15)	(28)	(84)
Other	66.7%	33.3%			100.0%
Count	(2)	(1)			(3)
Other	66.7%	33.3%			100.0%
Count	(2)	(1)			(3)
Other	60.0%	40.0%			100.0%
Count	(3)	(2)			(5)

The following questions describe solutions which have been implemented in other districts or are under active consideration in this or other districts to address concerns regarding unnecessary delays and unreasonable costs in federal civil litigation. With respect to each proposed solution, please indicate your opinion as to its effectiveness in expediting civil litigation or reducing its cost.

	Substantial effect	Moderate effect	Slight effect	No effect at all	No opinion	ALL LEVELS
13. Shorter time limits for completing the various stages of litigation	18.3%	29.3%	30.6%	18.3%	3.5%	100.0%
Count	(73)	(117)	(122)	(73)	(14)	(399)
14. Requiring counsel to attempt to resolve issues before court intervention	19.8%	33.6%	27.7%	17.0%	2.0%	100.0%
Count	(80)	(136)	(112)	(69)	(8)	(405)
15. Permitting pre-motion conferences with the court on any motion at the request of any party	31.1%	36.1%	17.2%	12.2%	3.5%	100.0%
Count	(125)	(145)	(69)	(49)	(14)	(402)
16. Requiring pre-motion conferences with the court for the following categories of motions:						
16. a. Dispositive motions (dismissal, summary judgment)	32.0%	27.3%	20.7%	17.2%	2.7%	100.0%
Count	(130)	(111)	(84)	(70)	(11)	(406)
16. b. Discovery motions	43.8%	29.4%	14.9%	9.3%	2.6%	100.0%
Count	(170)	(114)	(58)	(36)	(10)	(388)
16. c. Other motions	27.9%	29.8%	20.7%	11.0%	10.5%	100.0%
Count	(101)	(108)	(75)	(40)	(38)	(362)
17. Permitting the filing of procedural, non-dispositive motions (for example, motions to amend and motions to add parties) by letter rather thsn formal motion and brief	49.4%	29.1%	11.2%	8.3%	2.0%	100.0%
Count	(202)	(119)	(46)	(34)	(8)	(409)
18. Providing a 30 page limitation for memoranda of law, except for good cause shown	32.6%	24.3%	21.6%	18.3%	3.3%	100.0%
Count	(130)	(97)	(86)	(73)	(13)	(399)

	Substantial effect	Moderate effect	Slight effect	No effect at all	No opinion	ALL LEVELS
19. Requiring mandatory arbitration of all disputes in which the amount in controversy is less than:						
19. a. $100,000	31.6%	16.6%	13.2%	20.7%	17.9%	100.0%
Count	(122)	(64)	(51)	(80)	(69)	(386)
19. b. $200,000	20.0%	19.1%	14.5%	22.6%	23.8%	100.0%
Count	(69)	(66)	(50)	(78)	(82)	(345)
19. c. $1,000,000	20.5%	9.6%	14.9%	28.7%	26.3%	100.0%
Count	(70)	(33)	(51)	(98)	(90)	(342)
20. Providing court-annexed mediation upon mutual consent of parties for some or all issues in dispute	21.9%	31.4%	26.9%	9.5%	10.2%	100.0%
Count	(88)	(126)	(108)	(38)	(41)	(401)
21. Making available attorneys who are experts in the subject matters in dispute to evaluate claims and defenses and to assist parties in settlement negotiations (early neutral evaluation)	18.8%	27.5%	22.8%	18.8%	12.1%	100.0%
Count	(76)	(111)	(92)	(76)	(49)	(404)
22. Requiring attendance of parties and or their insurers at court settlement conferences	26.4%	27.6%	25.4%	14.9%	5.7%	100.0%
Count	(106)	(111)	(102)	(60)	(23)	(402)
23. Requiring Rule 11 sanctions motions to be separately filed and not appended to another motion	17.9%	26.1%	23.3%	18.6%	14.1%	100.0%
Count	(72)	(105)	(94)	(75)	(57)	(403)
24. Increased availability of telephone conferences with the court	40.8%	36.4%	17.0%	2.9%	2.9%	100.0%
Count	(166)	(148)	(69)	(12)	(12)	(407)

	Substantial effect	Moderate effect	Slight effect	No effect at all	No opinion	ALL LEVELS
25. Requiring automatic disclosure of the following information shortly after joinder of issue:						
25. a. The identity of witnesses reasonably likely to have information which bears significantly upon claims, defenses or damages	33.0%	31.8%	18.4%	11.9%	5.0%	100.0%
Count	(133)	(128)	(74)	(48)	(20)	(403)
25. b. General description of documents relied upon in preparing pleadings or contemplated to be used in support of the parties allegations or calculation of damages	31.1%	27.6%	20.8%	15.3%	5.3%	100.0%
Count	(124)	(110)	(83)	(61)	(21)	(399)
25. c. Existence and contents of insurance agreements	28.8%	28.3%	18.1%	9.7%	15.1%	100.0%
Count	(113)	(111)	(71)	(38)	(59)	(392)
26. Requiring automatic disclosure prior to the final pre-trial conference of the qualifications the opinions and the basis for those opinions of experts intended to be called as trial witnesses	28.2%	34.9%	22.7%	8.0%	6.2%	100.0%
Count	(113)	(140)	(91)	(32)	(25)	(401)
27. Conditioning grants by the court of broader discovery upon the shifting of costs in instances where the burden of responding to such requests appears to be out of proportion to the amounts or issues in dispute	35.3%	35.8%	16.3%	6.3%	6.3%	100.0%
Count	(141)	(143)	(65)	(25)	(25)	(399)
28. Defining the scope of permissible discovery by balancing the burden or expenses of the discovery against its likely benefit	25.4%	38.6%	16.2%	11.2%	6.7%	100.0%
Count	(102)	(155)	(73)	(45)	(27)	(402)
29. Assessing the costs of discovery motions on the losing party	34.2%	25.6%	17.7%	15.4%	7.1%	100.0%
Count	(135)	(101)	(70)	(61)	(28)	(395)

	Substantial effect	Moderate effect	Slight effect	No effect at all	No opinion	ALL LEVELS
30. Providing less time for completion of discovery	13.2%	29.6%	29.4%	23.5%	4.3%	100.0%
Count	(52)	(117)	(116)	(93)	(17)	(395)
31. Requiring discovery relating to particular issues (e.g., venue, class certification) or a specified stage of the case (e.g., liability) to be completed before permitting discovery respecting other issues or another stage (e.g., damages, experts)	24.8%	30.5%	18.3%	17.5%	9.0%	100.0%
Count	(99)	(122)	(73)	(70)	(36)	(400)
32. Limiting the number of interrogatories presumptively permitted	28.1%	34.3%	19.3%	13.5%	4.8%	100.0%
Count	(112)	(137)	(77)	(54)	(19)	(399)
33. Limiting the type of interrogatories (e.g., identification, contention) presumptively permitted at various stages of discovery	29.4%	31.9%	20.7%	13.2%	4.7%	100.0%
Count	(118)	(128)	(83)	(53)	(19)	(401)
34. Limiting the number of depositions presumptively permitted	23.7%	33.2%	22.4%	15.9%	4.8%	100.0%
Count	(94)	(132)	(89)	(63)	(19)	(397)
35. Limiting the length of depositions presumptively permitted	21.9%	30.4%	21.9%	20.6%	5.3%	100.0%
Count	(87)	(121)	(87)	(82)	(21)	(398)

	Substantially improved	Moderately improved	Remained unchanged	Moderately worsened	Substantially worsened	ALL LEVELS
36. During the past three years, the cost and time it takes to litigate civil actions has:						
	2.8%	17.8%	46.6%	23.7%	9.2%	100.0%
Count	(11)	(70)	(183)	(93)	(36)	(393)

37. During the past three years, how many months (on average) has it taken from the time your civil cases were ready for trial to the time that trial actually commenced?

	1.0 Months
Count	(.37)