Appendix 6

ADVISORY GROUP

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

August 28, 1991

Dear Friend of Justice:

Transmitted herewith is the interim report of the Advisory Group appointed by the Court pursuant to the Civil Justice Reform Act of 1990.

We welcome your comments and draw your attention particularly to pages 1-2 of the report as to the importance we attach to your comments.

In order to comply with the requirements of the Act, the Court having elected to be an Early Implementation District, we must ask you to provide your comments by 2 p.m., Friday, October 11th. This deadline with respect to a lengthy report is required so that the Advisory Group may provide the Court with a revised report reflecting public comments with sufficient time for the Court to reflect upon and consider the matter by year-end. At that time the Court must file its plan for reduction of unnecessary delay and expense.

We very much appreciate your prompt and careful attention to this important matter, which bears significantly upon the administration of justice in the Eastern District of New York.

Comments should be directed to the undersigned at Winthrop, Stimson, Putnam & Roberts, One Battery Park Plaza, New York, NY 10004-1490.

Thank you.

Very sincerely yours,

Edwin J. Wesely
Chair

Enclosure

# INTERIM REPORT OF THE EASTERN DISTRICT OF NEW YORK ADVISORY GROUP

TO

HONORABLE THOMAS C. PLATT, CHIEF JUDGE

**This report is being released for public comment prior to submission to the Court. Comments must be received by 2:00 p.m., Friday, October 11, 1991 in the office of Edwin J. Wesely, Chair, Eastern District of New York Advisory Group, Winthrop, Stimson, Putnam & Roberts, One Battery Park Plaza, New York, NY 10004-1490.**

**August 28, 1991**

ADVISORY GROUP

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Ex Officio:
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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

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INTERIM REPORT OF THE EASTERN DISTRICT OF NEW YORK ADVISORY GROUP

## Executive Summary

### Findings

The Advisory Group concludes that the principal problem in the District that impacts severely and adversely on the administration of civil justice in the Court is the enormous and continuing growth of the criminal docket and the volume of criminal litigation, coupled with the growing civil docket. All information that has been accumulated so far confirms that the dominance of the criminal docket is not likely to be significantly affected because the size and status of the criminal docket are dictated in large measure by national federal policy and statutory and constitutional constraints.

Specifically, the dominance of the criminal docket is caused by a national commitment to the federalization of the prosecution of an increasing variety of crimes. 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.

There also has been a signficant 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 the 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.

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 preliminary 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 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, four 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

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[1] Two prospective judges have been nominated to fill positions. One of these nominees is expected to begin his judicial duties in September 1991. However, 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.

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 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 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.

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 a two-year period, in every third civil case filed, or otherwise, excluding social security, habeas corpus and student loan cases, 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;

- 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

-- The Advisory Group opposes limitations on the number and length of depositions and the number of interrogatories, but proposes that the court may, in its discretion, invoke Local Rule 46 of the Southern District of New York regarding the timing of interrogatories.

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, counsel for any party would be required to submit a form to the Clerk's Office seeking an update on the status of the motion. Requesting counsel would not be identified. The Clerk would then ascertain the status of the motion.

-- 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 VCR's

  • 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.

-- 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).

## 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. The work of the Advisory Group is ongoing, and we continue our careful review of the criminal and civil dockets within the Eastern District.

We have released this Report for public comment prior to its presentation to the Court so that we might benefit from the views of lawyers, bar groups, judicial officers, academicians, litigation consumers, and others in formulating our proposals. The predecessor committees of this Advisory Group have characteristically sought widely the views of the public and the bar before making recommendations to the Court. Predecessor committees of the Court have been impressed that no matter how diligently, no matter how expertly, no matter how thoughtfully and intelligently -- or so it seemed to them -- they dealt with a

topic, comment from the public dramatically and significantly elevated the product that they delivered to the Court. We once again welcome that input and, as in the past, promise carefully to consider it in formulating our recommendations.

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 this Interim Report prepared for circulation for public comment.

In addition, 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 was sent to more than 2,200 attorneys who practice in the Court. The results of the survey have not been fully analyzed, but preliminary data provide the Advisory Group with significant insights. For example, an initial tally indicates that only one-third of those responding to the survey say they have encountered unreasonable delays in the District; 58% say that they have not. Preliminary results also show that 42% of those responding to the survey say that civil litigation in the District is unnecessarily costly; 48% 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. We emphasize, however, that these findings are only preliminary, and our analysis of the data continues.

Lawrence J. Zweifach, Chair of the Court's Criminal Litigation Committee, has been an ex officio member of the Advisory 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.

These investigations are not yet complete, despite the fact that the United States Attorney's Office and Administrative Office have been most cooperative, because of the complexity of the information needed and technical difficulties in obtaining data. The Committee will continue to gather data and conduct interviews so that the Advisory Group may gain a deeper understanding of the

matter. This report provides information on what the committee has learned so far about the nature of the criminal docket.

Finally, the Advisory Group is deeply grateful to the judges and magistrate judges in the District for their availability and cooperation in the work of the Advisory Group. We are also deeply grateful to the Clerk of the Court, Robert C. Heinemann, and his staff for their counsel and assistance, particularly in retrieving statistical data.

## 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 September 30, 1990, prepared by the Administrative Office of the United States Courts ("September 1990 Workload Statistics") at 2. 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 1990 Federal Court Management Statistics for year ended June 30, 1990, prepared by Administrative Office of the United States Courts ("June 1990 Management Statistics") at 47; September 1990 Workload Statistics at 20; 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 4,432 civil filings in the Eastern District for the statistical

year ending June 30, 1990. See Appendix I, Detailed Statistical Tables, Annual Report of the Director of the Administrative Office of the United States Courts for Twelve Month period ended June 30, 1990 ("June 1990 Appendix I") at Table C, p. 28. These filings represent slightly more than 2% of the 217,879 civil filings in all United States districts in 1990. See id. The Eastern District, with 12 available or allotted judgeships in 1990, had slightly over 2% of the 575 available judgeships in the United States. See June 1990 Management Statistics at 47 and unnumbered page entitled United States District Courts -- National Judicial Workload Profile (hereinafter "Profile" page). Thus, it would appear that 2% 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 17.5 last year, or the complexity of the cases filed and the demands placed on judicial time by such cases.

With 17.5 vacant judgeship months, the Eastern District had 3.2% of the total of 540.1 vacant judgeship months in all district courts. See id. In short, "available" judicial resources did not equate with actual judicial resources in 1990, 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, 1990, "weighted" filings for each of the 575 available judgeships in the United States district courts averaged 448. In the Eastern District, there were 495 "weighted" case filings for each of the 12 available judgeships. See June 1990 Management Statistics at 47 and Profile. 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.

A detailed breakdown of the data for the 1991 court year is not yet available from the Administrative Office of the United States Courts. However, available data show that civil case filings again increased in the 1991 court year to 4,741, up 7% from the 1990 number of 4,432.

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

For the statistical year ending June 30, 1990, criminal case filings in the district courts increased in 1990 by 6.8% from 44,891 to 47,962. In the Eastern District, there was a 27.4% increase, from 785 in 1989 to 1,000 in 1990. See June 1990 Appendix 1 at Table D, p. 58.

It was not just the number of cases that increased. The number of triable defendants in criminal cases pending in the

Eastern District rose from 547 for the period ending June 30, 1989 to 1,005 for the period ending June 30, 1990. See June 1990 Management Statistics at 47. According to the same report, there were a total of 20,544 triable defendants in pending criminal cases for the whole country. See id. at Profile. This means that the Eastern District, with 2% of the available judgeships and less than that of the actual judgeships, was responsible for approximately 5% (1,005 of 20,544) of the triable criminal defendants in pending cases in the United States.

The Advisory Group notes that the burden of the criminal caseload is expected by some practitioners to increase rapidly during the next years because of the sentencing guidelines and the ancillary criminal litigation that will arise therefrom. Moreover, the increase in multiple defendant criminal cases adds yet another layer of complexity to the already complex problem of balancing the demands of the criminal case with those of the civil.

C. Vacant Judgeships Are Not Being Filled Promptly

The Eastern District had 17.5 vacant judgeships months for 1990. See June 1990 Management Statistics at 47. While this was slightly better than 1989 in which the Eastern District had 24 vacant judgeships months, a comparison with nationwide statistics again shows that the Eastern District bore a disproportionate burden in both of those years. With 2% of the available or allotted judgeships, the Eastern District had 3.2% of the vacant

judgeship months in 1990 (17.5 of 540.1) and 6.4% in 1989 (24 of 374.1). See id. at Profile. 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 four vacancies in the Eastern District.[2]

D. The Eastern District's Termination Rate Has Declined

The Eastern District terminated 4,687 cases for the 12-month statistical year ending June 30, 1990. See June 1990 Management Statistics at 47. It terminated 4,003 cases for the 12 months ending September 30, 1990. See September 1990 Workload Statistics at 22. The June 1990 figures represent 1.9% of the 243,512 terminations by all district courts. The September 1990 figures represent 1.8% of 214,435 terminations by all district courts for that period.

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

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[2] 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 and the current vacancy caused by Judge McLaughlin's appointment to the Court of Appeals 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.

8.3% of the total civil caseload) to 548 in 1989 (13.1%). In 1989, the national average of three-year cases as a percentage of total civil cases was 9.2%. See June 1989 Appendix 1 at Table C-6, p. 40. In 1990, the Eastern District's three-year old civil cases increased to 762, or 13.1% of its total civil caseload. For 1990 national average was 10.4%. See June 1990 Appendix 1 at Table C-6, p. 50. These statistics reveal the 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. See id. Nationally, terminations fell 9.1% for the same period, see id., indicating that the Eastern District was apparently terminating cases at a rate slightly slower than the rest of the country. Recently published statistics indicate that this trend continues. The dramatic decline in civil case terminations in the District continued in 1991, as terminations fell to 3,809, down from 3,956 in 1990, 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 calculations prepared by the Eastern District clerk's office, each active United States District Judge in the country terminated, on average, 476.6 "weighted" cases in 1989 and 462.1 in 1990. During the same perfods, each active Eastern District Judge terminated, on average, 562 "weighted" cases in 1989 and 472 in 1990. These numbers strongly suggest that, notwithstanding its relatively disproportionate burden, the Eastern District outperformed most other districts in handling the disposing of cases.

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.[3] 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.

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[3] Statistics presented in this section reflect calculations of the Eastern District Clerk's office and the Administrative Office of the U.S. Courts based upon specific requests by the Advisory Group.

Although the amount of time spent on the bench decreased slightly, the number of trials each active Eastern District judge handled increased from an average of 37 in 1989 to 42.5 in 1990.

Of the 6,555 hours spent trying cases by all Eastern District judges in 1990, 2,836.5 hours, or 43.3% of all trial time, were spent on civil cases. In 1989, the figures were 6,679.5 total trial hours with 2,345, or 35.1% of all trial time spent on civil cases.

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.

1989 NUMBER OF PROCEEDINGS

| | Total Hours | Arraignments | Sentencing | Motion | Pre-Trial Confs. | Grand Jury Proceedings | Other Proceedings |
|---|---|---|---|---|---|---|---|
| Active Judges | 4,189 | 1,248 | 1,030 | 2,140 | 3,630 | 17 | *1,120 |
| Senior Judges | 654.5 | 215 | 214 | 354 | 1,468 | 15 | 220 |
| Visiting Judges | 29 | 0 | 8 | 1 | 0 | 0 | 13 |

1990 NUMBER OF PROCEEDINGS

| | Total Hours | Arraignments | Sentencing | Motion | 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 number]

These data reveal several interesting trends. First, the efficiency of the active Eastern District judges appears to have increased in 1990 as they handled 9,142 non-trial bench proceedings in 3,816.5 hours as compared to almost the same number, 9,185, of such proceedings in 1989 in slightly more hours, 4,189. Second, the non-trial bench proceedings relating to criminal cases have increased dramatically. Arraignments, sentencings and grand jury proceedings totalled 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 magistrates 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. 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 are they caused by litigants; they are systemic problems. Moreover, this 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 threshhold 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 following developments in the criminal justice system have contributed directly to increased delay and expense within the Eastern District: (1) enactment of the Speedy Trial Act; (2) promulgation of the Sentencing Guidelines; (3) increasing federalization of crime; and (4) 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.

A. Speedy Trial Act

First, the Speedy Trial Act puts all criminal cases on the fast track from day one. Even cases involving small-time criminal operatives are pushed through the system, while civil cases -- important less important -- languish. Moreover, the civil calendars of those judges assigned to criminal mega-trials, such as those involving alleged organized crime figures, are placed in limbo.

B. Sentencing Guidelines

Second, 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, anecdotal evidence from attorneys familiar with procedures under

the Guidelines suggests that sentencing hearings now consume far more time than pre-Guidelines proceedings did.

C. Federalization of Criminal Enforcement

Third, within the past decade, there has been a discernible trend toward federalization of street crimes, such as illegal drug possession and firearms violations, as well as white-collar crimes, notably fraud. A striking example of federalization of crime is the recently inaugurated Operation Triggerlock, a campaign by the federal government to rid the streets of illegal firearms. Firearms violations have traditionally been the province of state and local prosecutors.

All statistical indicators show that the criminal docket 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 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. Prosecutions for narcotics and fraud offenses have increased most dramatically.

a. Narcotics

Narcotics cases comprise by far the largest single component of the Eastern District criminal docket. In addition, by any measure, the number of narcotics prosecutions has grown at a faster rate than prosecutions of any other type of crime. For example, 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 include all or most white-collar criminal matters, which 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.

Thus, the United States Attorney and hence the Court in the Eastern District appear to have become increasingly burdened

with offenses that were once largely the province of local prosecutors. We do not mean to criticize the United States Attorney's office in its law enforcement efforts, but merely point out that the influx of criminal cases has had an adverse impact on the civil justice system.

3. Reasons for Expansion of the Criminal Docket

The nature of the areas where prosecution has increased suggests that the criminal docket has expanded because of a policy decision to federalize the prosecutions of certain categories of offenses, particularly narcotics offenses. This policy may be traced to Congress, which has been creating more federal criminal statutes, with more mandatory federal sentences, and to the Department of Justice, which implemented Operation Triggerlock, discussed above. Weapons and firearms prosecutions in the Eastern District had fallen from 1986 (41) to 1989 (21), but then rose dramatically in 1990 (49). A policy like Operation Triggerlock could lead to additional increases in these prosecutions.

A decision to target a certain type of criminal activity need not lead to an expansion in the overall criminal docket if resources remain constant and other prosecutions therefore are decreased. During the past five years, however, additional resources have been allocated by the federal government to implement new prosecution policies. 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 assets forfeiture cases. Federal agencies have also obtained new personnel, and therefore have the resources to initiate more investigations.

As noted elsewhere in this Report, the increase in the criminal docket and the number of prosecutors has not been matched by a comparable expansion of the capacity of the Court.

4. 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.

D. Increase in Federal Prosecutors

Fourth, the number of federal prosecutors in the Eastern District has risen dramatically. During the tenure of United States Attorney Andrew Maloney alone, the number of attorneys on staff has increased from 79 to 156. With that increase in

prosecutors, criminal case filings have risen from 785 in 1989 to 1,000 in 1990, a jump of 27.4%, nearly four times the nationwide increase. Likewise, the number of triable defendants have risen from 547 to 1,005 in the same period, a jump of nearly 84%.

In short, the needs of the criminal justice system have forced the civil justice system into the back seat. The Advisory Group agrees with the observations of Judge Aspen in United States v. Andrews, 754 F. Supp. 1161, 1173, n.12 (N.D. Ill. 1990):

> 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.

Because the data and supporting information are not yet fully developed, the Advisory Group is not yet prepared to offer any suggestions for streamlining the criminal process in the Eastern District. On the basis of the information presently available, however, it seems very likely that any procedures that can be recommended and implemented will make only a slight difference in the amount of time 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 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, it is not likely that the Advisory Group will be able 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 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.

In addition to declining some prosecutions, the United States Attorney's Office has attempted to cooperate with local law enforcement authorities by dividing responsibility for prosecution of some cases which could fall under either federal or state jurisdiction.

Since 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 local crime, the criminal docket will remain a formidable competitor for the limited time of the Court.

The Advisory Group, notwithstanding these serious constraints, will continue to consider on an intensive basis means by which the impact of the criminal docket on the civil docket may be reduced and particularly welcomes public comment on this matter.

## 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,[4] 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

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[4] 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.

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 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, at 21-22, 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 successful in fostering greater cooperation among counsel 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. Preliminary survey results indicate that over 70% 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 three years, every third civil case filed, other than social security, habeas corpus and student loan cases, would be designated

as subject to automatic disclosure. The Clerk would so notify the parties and the docket sheet would reflect that the case is subject to automatic disclosure rules. Prior to the implementation of automatic disclosure, the Advisory Group will determine the tracking mechanisms to be used. After two years, a study would be undertaken to determine whether the automatic disclosure provisions should be revoked, modified, expanded, or adopted as permanent local rules.

There is some concern that designating every third civil case filed for automatic disclosure might result in some games-playing by lawyers laying back in the Clerk's office waiting to be the third case, if automatic disclosure is sought, or waiting to be one of the other two cases, if the current practice is preferred. The Advisory Group will continue to consider this matter before making any final recommendation. That recommendation might well be that automatic disclosure be provided in all cases for a fixed period of time or commencing on a given date in all cases up to a certain number of cases, excluding the types of cases enumerated for exclusion above. The Advisory Group particularly welcomes comment on this matter.

The subjects of such automatic disclosure follow:[5]

(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 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;
- The existence and contents of any insurance agreement under which an insurer may be liable (Fed. R. Civ. P. 26(a)(1)(D)).

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[5] 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 without regard to whether the proposed amendments to the Federal Rules of Civil Procedure are adopted.

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 preliminary survey results, nearly 75% of the respondents believe that automatic disclosure of witnesses would have a positive effect in expediting litigation. Over 70% believed that providing a general description of documents relied on in preparing the pleading would have a beneficial effect on litigation, while two-thirds felt that automatic disclosure of insurance agreements would facilitate litigation.

(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 early 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, if possible, should be resolved at the conference.

(3) Sanctions for Failure to Automatically 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. The initial returns from our survey indicate that nearly 78% 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.[6]

Preliminary survey results suggest that there is strong sentiment among respondents for limitations on discovery. Some 77% believed that the courts should condition 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. Nearly three-quarters 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. Over two-thirds favored assessing the costs of losing discovery motions as a means of

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[6] 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.

expediting litigation. Some 60% believed that providing less time for completion of discovery would expedite litigation.

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

The proposed Federal Rules place limits on the number of interrogatories and the number and length of depositions. Specifically, proposed Rule 33(a) limits the number of interrogatories that may be served to fifteen including all subparts. This limit may be extended 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 considered the possibility of placing limits on the number of interrogatories that may be used in a civil action but notes that a similar proposal had been raised, debated at length, and rejected 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 as unfairly prejudicial to parties of limited means who could not afford to take depositions. Nevertheless, the Advisory Group urges that the court in its discretion, in cases where resources of the parties are not an issue, utilize Local Rule 46 of the Southern District of New York which regulates the time at which certain types of

interrogatories may be served in a litigation.[7] Approximately 76% of those replying to our survey favored the approach of Local Rule 46.

With respect to depositions, the Advisory Group notes that disputes over the number of depositions to be taken is a matter that can usually be resolved between counsel. The Advisory Group believes that placing a presumptive limit on the number or length of depositions might well have the undesirable and unintended effect of encouraging a party to take more or longer depositions than the party might otherwise have taken. It also believes that abuses in the number or length of depositions are matters that can be readily resolved by a magistrate judge under the discovery procedures presently in place.

Accordingly, the Advisory Group opposes the imposition of a numerical limit on the number of interrogatories that may be served and the number or length of depositions that may be taken. We point out, however, that 72% of those answering our survey felt

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[7] The Advisory Group was not unanimous on this issue. Some felt that numerical limits on interrogatories should be adopted. We note that nearly 75% of those responding to our survey expressed the view that providing numerical limits on interrogatories would streamline litigation. This response will compel the Advisory Group to revisit the matter. Among other things, the Group will consider whether, if it alters its recommendation and recommends numerical limits on interrogatories, that there be a safety valve in cases involving parties of limited means so that if, for example, they waive all or agree to a very few short depositions, they may propound as many interrogatories to each other as they want, within the limitations now provided by law.

that a presumptive limit on the number of depositions would expedite litigation. The Advisory Group will also revisit this matter.

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 generally 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 in the Eastern District. 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.

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.

Equally important, procedures must be developed for determining when a motion is "submitted." The term submitted is not self-defined and may be susceptible to a number of differing interpretations. For example, the time of submission might be the time after which all briefs have been filed or the time after oral argument. Thus, if the Court were to request additional briefs or additional oral argument, the time for submission would have to be recalculated. For these reasons, we conclude below that the time of submission is best determined by the parties. We recognize that this is a matter of some tension and controversy and will continue

to consider whether to recommend that the time of submission be determined by the Court.

3. Method of Ruling on Motions

The Advisory Group recognizes that some judges and magistrate judges are comfortable ruling from the bench while others prefer drafting 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, the Advisory Group recommends the adoption of a local rule that would require counsel, unless

otherwise agreed, to submit to the Clerk of the Court a form, available from the Clerk's Office upon request, asking for an update on the status of the motion. The request would not be shown to the judicial officer; rather, upon receipt the Clerk's Office would inquire of the judicial officer's chambers as to the status of the motion and report the status to all parties. This action form would be a useful reminder to judicial officers and/or their clerks that a matter has been sub judice for an inordinate time. It 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 the magistrate judges for findings 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'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 a number of Eastern District judges require pre-motion conferences in an effort to screen motions before they are filed. To the extent a judicial officer has the time and is comfortable requiring pre-motion conferences, they may be useful, particularly for summary judgment

motions. We recommend that judicial officers who are advocates of pre-motion conferences demonstrate to their fellow judicial officers how such conferences can be effectively used to eliminate unwarranted and untimely motions. Those responding to our survey strongly favor the use of premotion conferences. Approximately 75% responded that premotion conferences should be permitted and 76% stated that premotion conferences should be required in discovery applications. A slightly smaller percentage (73%) felt that premotion conferences would be useful in resolving dispositive motions.

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 federal 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 case 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 educate the bar to their existence, 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 state of litigation is viewed as 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 then handling the case. The Advisory Group suggests, however, that where discovery is staged or tiered, it may be appropriate 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 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.

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 could 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 Conferences

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 discovery deadlines or trial dates be signed by counsel and the client (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. 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 indicates at pages 57-58 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 reports 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 Multidistrict 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.[8] 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 environmental actions may be attributable to substantive law shifts since the second edition of the Manual was issued in 1985.

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[8] 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), patent litigation (MCL § 33.6).

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

assigned 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 current 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 magistrate judges 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. 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 magistrate judges, 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 practice 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 wave 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

consistent 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,[9] 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.

(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 limine, they should not be allowed to supplement the summary

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[9] 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).

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. See Discovery Procedures, supra.

(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.

## IV. Alternative Dispute Resolution; 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. On the other hand, 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 dissatisfied 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). Preliminary 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, and only one-third 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., arbitration 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 the Northern District of California, 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 experimental, 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 preliminary survey results reveal that approximately 62% 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. 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.

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, Developing 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, it may conduct itself 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.[10] In the Advisory Group's view, elimination of this practice would lead to more thoughtful consideration before sanctions are sought.

Some members of the Advisory Group favored a mandatory premotion conference with the court as a condition precedent to filing a Rule 11 motion. While the Advisory Group as a whole sees merit in that approach, we believe, consistent with our approach to premotion conferences generally, that this matter should be left to the discretion of the individual judicial officer. Accordingly, we do not recommend that premotion conferences in Rule 11 cases be mandatory. In addition, apart from Rule 11, the Advisory Group notes that some judges impose sanctions on parties who settle cases

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[10] The Advisory Group was not unanimous in this view. Our preliminary survey results indicate that 63% of those responding favor a requirement that Rule 11 sanctions motions be separately filed and not simply appended to other motions.

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), modified, 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. After debating the views of various members, 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 then 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 themselves 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 a specified time period. 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 adversaries 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 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, attorneys may be reluctant to drop insubstantial claims or defenses for fear that in so doing they will trigger sanctions motions by 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 all aspects of the case.

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 settlement would not be assigned to an individual judge. We conclude that the adoption of a modified master calendar system would be unwise and recommend that the status quo be maintained. 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 implemented. 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.

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 the judge is known, rulings are more predictable and the chances of settlement are thereby 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 may raise a 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 does not provide for additional judges and 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 IV.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.

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 their submission to the court.

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 would 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.

Accordingly, the Advisory Group believes that bench trials should be encouraged, but at the same time we are aware that judges already are overburdened and have very little free time to handle additional trials. Thus, 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 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, however, would 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 pro bono service may be lessened. 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 the status quo 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 four 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 four 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 District.

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. Clearly, senior judges have served and continue to serve as a valuable resource.[11] 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 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

[11] 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, all 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 United States Courts.

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

manner. 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.

E. Buildings and Facilities

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 . . . .

Moreover, the federal government has projected that the Eastern District's space needs will continue to increase in the future. In 1989, the Administrative Office 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 Administrative

Office statistics show that for the year ended June 30, 1989, as noted, each of the Eastern District of New York judges had 575 "weighted" filings, while the U.S. average was 448. Yet, the Eastern District is literally bursting at the seams.

There are 10 district courtrooms for nine active judges and one senior judge in Brooklyn.[12] 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 Administrative Office 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 and the one vacancy are sworn in. Therefore, there will be sufficient space to house the new judges; but, even after the

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[12] 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.

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 Federal Probation Office and the Federal Defender's Office. The short-term solution to this problem has been to lease off-site space. Of the six bankruptcy judges assigned to the Eastern District, only one sits at a federal courthouse. Three bankruptcy judges are housed in leased space in Brooklyn; two others are in leased space in Westbury. The Federal Probation Office has approximately 1,000 square feet in the Brooklyn courthouse, but leases 23,500 square feet at 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. The Office also leases 300 square feet on Long Island.

The long-range solution to the space problem is the construction of additional facilities. The Board of Judges of the Eastern District of New York has proposed that all of the court components and allied agencies should be housed in two new courthouses: one in downtown Brooklyn and one near the Nassau/Suffolk County line. The primary reasons for the 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 plan would accommodate the 30-year needs of the court, its components, and allied agencies, and 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 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 two 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 Advisory Group endorses this proposal. 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.

## 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 root cause of unnecessary delay and expense in civil cases -- the increase in federal criminal jurisdiction and federal prosecutorial activity without adequate consideration of the impact on the Court and the civil justice system.

The United States Attorney has duties he must perform in accordance with his oath of office. The district judges and magistrate judges have their duties to perform in accordance with their oaths of office. We do not wish to interfere with that; we seek to find a realistic reconciliation that does not leave civil litigants as orphans of the process and that provides equal justice for civil litigants.

We know enough to know that this is no easy task. 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. We are 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 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.

August 28, 1991 Respectfully submitted,

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