CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE

REPORT AND PLAN

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

UNITED STATES DISTRICT COURT
for the DISTRICT OF VERMONT

Civil Justice Expense and Delay Reduction Report and Plan

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I. DESCRIPTION OF THE COURT

A. Judicial Officers

The District of Vermont is currently fully staffed with two Article III judges, one bankruptcy judge, and one full-time magistrate judge.[1] Until recently, the district was assisted by senior district judge Albert W. Coffrin who died on January 14, 1993.

Historically, judicial turnover has been minimal with only two judicial vacancies occurring within the last decade. Both vacancies, however, occurred during periods of increasing caseloads and required lengthy periods to fill, the last 18 months.

Based upon its jury plan, the District of Vermont is organized into two geographically separate divisions, a northern and southern division. Currently, both the chief judge and the magistrate judge sit at Burlington (the northern division) while the other district judge and bankruptcy judge sit at Rutland (the southern division) 70 miles south. The court also has facilities, including courtrooms, at Montpelier and Brattleboro but these locations are used infrequently. With the redistribution of Judge Coffrin's pending case load (55 civil cases) and the reassignment of 8 jury cases to U.S. Circuit Judge James L. Oakes sitting by designation at Brattleboro, the immediate availability of court facilities at this location minimized any potential delay in securing adequate trial facilities.

Case assignments are processed through the clerk's headquarters office which considers the filing location of the case as well as the parties and counsel initially involved. Because the district is only authorized two judges, efforts are directed towards balancing case loads between judges. Cases pending at the end of each month generally show no more than a 5 or 10 case imbalance. Calendaring and case management activities are conducted by courtroom deputies and chambers staff, in conjunction with the Court.

The district is not a pilot district nor has it elected to proceed as an early implementation district [EID].

B. Supporting Personnel

1. Clerk's Office

Staffing and allocation of clerk's office positions are based upon a work measurement formula computed by the Court Administration Division of the parent Administrative Office of the United States Courts located at Washington, DC. The formula in effect since 1981 was

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[1] 28 U.S.C. §§ 133, 152, and 633 respectively.

primarily based upon the number of civil cases and criminal defendants filed per statistical work year per district.[2] Due to significant changes in the quantity and more importantly, the nature of the work performed by the district courts, including acceptance of many decentralized initiatives from the Administrative Office, the staffing formula has been revised. The Judicial Conference approved the new formula for implementation during Fiscal Year 1993. The 1993 work measurement formula contains 36 separate factors for calculating the staffing needs of district clerk's office, including such diverse factors as the number of petit and grand jurors summoned, the number of attorney admissions and Criminal Justice Act vouchers processed, the number of Treasury checks disbursed, the number of divisional offices staffed and the number of names comprising the district's master jury wheel.

Based upon the 1993 measurement formula, the Clerk's Office is authorized 20.9 positions. Because the Fiscal Year 1993 appropriation did not provide sufficient funding to allow for a 100% staffing level, only 15 full-time permanent positions (including the clerk of court) were authorized for FY 1993. The congressional reduction in funding has, in effect, forced the Federal courts to operate with 79% of the personnel resources needed to fully discharge their duties.[3] Allocation of additional permanent positions above the current funding level will similarly be contingent upon future congressional funding. Although the current allocation of 15 full-time positions is deemed adequate at this time, its acceptability is premised upon the fact that case filings and administrative requirements will remain at current levels. Any significant increase in either filings or administrative work load may necessitate additional staffing. Current regulations allow for relief based upon "critical exceptions" as certified by the chief judge based upon need.

The Clerk's Office is configured with the clerk of court and 11 deputy clerks located at Burlington headquarters office and 3 deputy clerks located at the Rutland divisional office. The management structure of the Clerk's Office consists of the clerk of court assisted by a chief deputy clerk and divisional office deputy-in-charge. Professional positions within the clerk's office include financial, jury, and procurement administrators as well as two systems

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[2] Historically, the statistical work year for the Federal courts runs from July 1 through June 30th. At its March, 1992 session, the Judicial Conference of the United States approved a proposal to change the reporting year from June 30th to year ended September 30th.

[3] Nationwide [all bankruptcy, district, and appellate clerks' offices], the 79% staffing level will result in 15 courts remaining unchanged, 167 losing positions, and 14 courts gaining positions. Those courts operating above the 79% level will lose positions through attrition, with a hiring freeze in place until they reach their authorized level. The Third Branch, Vol. 25, Number 3, March, 1993, page 2.

administrators.[4] Each judicial officer, including the magistrate judge, has a full-time, permanent courtroom deputy whose primary responsibility is to conduct case and calendar management.

Employee turnover within the Clerk's Office has been historically low. All employees are generally hired with the expectation of career advancement and few leave or transfer to other agencies or positions.

2. U.S. Probation & Pretrial Services Office

Until 1991, the staffing allocation for the United States Probation Office was similarly based upon a work measurement formula devised by the Administrative Office in 1981. Based upon the substantial increase in work load due to implementation of Sentencing Guidelines and other statutory regulations, it became apparent that the U.S. Probation Office work measurement formula was also outdated. The probation work measurement formula was amended in 1991 and resulted in a staffing allocation of 16 full-time permanent positions for the district, which represented a 100% increase over its 8 positions in effect during November, 1987. The addition of four probation officers and other administrative and professional staff has greatly assisted the probation office in gaining control over its workload. Hopefully with additional staffing, the Probation Office will become less responsible for any delay in the sentencing process due to work overload.

The U.S. Probation Office also has its headquarters office located at Burlington with divisional offices located at Rutland and Montpelier. The chief probation officer functions as the agency manager and is assisted by one supervising probation officer.

C. Buildings & Facilities

Courtroom facilities within the District of Vermont are adequate. Separate, fully functional courtrooms, including law libraries, are available for each judicial officer. A separate, new grand jury facility, which fully conforms to the United States Court's Design Guide, was completed at the Burlington Federal building in March, 1993.

Support staff facilities for the Burlington headquarters office are quite satisfactory since the acquisition of additional space and the completion of a substantial modernization project concluding in 1991. A similar renovation and space acquisition project for all court facilities located at Rutland, including the U.S. Probation Office and Marshal's Office, has been initiated.

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[4] One SA specializes in the UNIX operating system; the other in the Disk Operating System (DOS).

Full funding has been approved and money was obligated during October, 1992. The project will centralize all court facilities on the second floor of the court's current site and will provide necessary space for all chambers, court and court support staff, including attorney conference and jury deliberation rooms. A separate grand jury facility is also included in this project, which has a scheduled completion date of September, 1994.

Prisoner facilities currently provided by the U.S. Marshals Service are not adequate, but this situation will be remedied within the next 12 months through a major expansion and renovation project known as "Phase III-A" currently underway at Burlington.[5] Upon completion of both the Burlington and Rutland projects, all U.S. Marshal locations will have suitable areas for handling multiple defendant cases including female and juvenile offenders. The attorney-client privilege will also be protected through the availability of separate witness interview rooms.

D. Automation and Technical Support

On January 1, 1991, the Clerk's Office implemented its Integrated Case Management System (ICMS), a full electronic docketing and case management system initially developed by the Federal Judicial Center and later implemented by the Administrative Office's Court Systems Division. The ICMS system runs on a 386-based UNIFY operating system and offers a database network which is linked to all deputy clerks, judicial officers and staff except U.S. Probation personnel. Although the ICMS system consists of two separate docketing systems, a civil and criminal component, the civil docketing portion is the only one currently utilized by the clerk's office.[6] A conscious management decision was made to implement the ICMS system commencing with cases filed subsequent to January 1, 1991 and to continue processing pre-1991 cases manually. However, all pre-1991 civil cases have been entered onto the database for statistical and indexing purposes. As of March, 1993, only 56 out of a total 486 cases (11.5%) still required manual docketing. Since pre-1991 cases were "older" and contained substantial docket entries, a determination was made not to data enter all previous docketing events.

On February 15, 1993, the clerk's office also implemented its "PACER" public access

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[5] Phase I consisted of renovation of all postal services on the first floor; Phase II, renovation and expansion of the court facilities on floors 4 and 5; Phase III, relocation and renovation of all U.S. Attorney offices, including the grand jury facility, on floors 2 and 3.

[6] Under current clerk's office practice, full, on-line criminal docketing is expected to be implemented sometime during FY 94, contingent upon training and funding. However, all criminal and misdemeanor cases are "opened" on the civil system in order to provide indexing and case referencing capabilities.

service to all private individuals and parties having access to a personal computer and modem.[7] Currently, the district court has 330 authorized PACER users.

The new ICMS automated docketing system provides a tremendous resource for assisting the court in meeting its expanding civil and criminal case load. Inherent within the system is the capability for docket clerks to identify and monitor key dates throughout the life of a case. For example, the civil system can routinely monitor the due dates for various pleadings, motions, or discovery schedules, etc., an ability which is crucial for effective case management. This capability will also become critically important when the court implements the criminal docketing subsystem to monitor excludable delay time periods and the available time left to commence trial.

The ICMS system also provides various case management reports to courtroom deputy clerks.[8] These reports track important case progress dates. Programming efforts are also underway to make the system automatically prepare routine procedural orders which are ready for the Court's signature.

The Clerk's Office has determined that a very large portion of its statistical data currently transmitted to Washington manually each month is being erroneously entered by Statistical Division personnel.[9] In order to remedy this situation, the clerk's office has set a target date of May, 1993 to begin transmitting all civil statistical reports directly to the Administrative Office using a Unix-to-Unix communications program (UUCP). This procedure should maximize the accuracy of statistical information.

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[7] **PACER** is the acronym for Public Access To Court Electronic Records. Individuals with a PC and modem can dial directly into the court's civil database and retrieve a public summary of all docket events or search for cases based upon participant name or case number. All users must first register to be eligible and are billed at the rate of $1 per minute for usage time.

[8] The reports currently utilized consist of the: 1) Motions Pending Report; 2) JS-56 Report (Motions and Bench Trials Pending More Than 6 Months); and 3) Cases Pending by Judge Report. A target date of July 1, 1993 has been set for utilizing the Answer Due Report and Tickler Report which will identify other procedural deadlines.

[9] A 10-month sample (April, 1992 - January, 1993) of all opening and closing civil case and criminal defendant statistical data transmitted to the Statistical Division of the Administrative Office contained errors in every month sampled. For July, 1992, the Statistical Division credited the District with 81 civil case terminations. The correct number was 46 case closings.

The Clerk's Office is also scheduled to receive a court-wide data communications network or DCN. This DCN will offer an electronic mail system as well a complete financial system designed to integrate the court's operating budget with its Treasury check disbursing operation, including all juror payments. Unfortunately, implementation of this project has been halted due to a shortfall of funding.

The ICMS automated system is a tremendous asset which will greatly assist the Clerk's Office in meeting its case management responsibilities. The Clerk's Office is fully aware that the potential of the system can only be realized if it is used correctly by all personnel. To this end, the Clerk's Office has undertaken a major effort to customize the system to the district and to provide additional specialized training to all staff.

E. Court Reporters

Verbatim court reporting services are currently adequate and should remain so in the foreseeable future. Each Article III judicial officer has an official court reporter. The magistrate judge currently utilizes a tape recording system operated by the courtroom deputy to record all official proceedings. This recording system was replaced with a completely new system offering additional enhancements during FY 1992. Tape recorded proceedings are transcribed by a local vendor, certified by the Administrative Office as an official transcriber, on an as-needed basis.

The U.S. Bankruptcy Judge and any other senior judges sitting by designation within the district utilize reporting services provided by independent, non-contract reporters also on an as-needed basis. In order to maximize resources, however, priority is given to the district's two official reporters before retaining private reporters.

II. ASSESSMENT OF CONDITION IN THE DISTRICT

A. Condition of the Docket

1. Caseload - Overview

The District of Vermont has traditionally enjoyed one of if not the lowest number of filings and pending caseloads per judge in the country (Table 2). The court has operated on an individual calendaring system which had generally allowed the judges to maintain control of a manageable caseload and process cases reasonably expeditiously. However, during the past four years near historically high civil filings and historically high criminal filings have posed serious obstacles to the court's ability to manage its civil caseload and process cases expeditiously (Table

1). The relative Vermont advantage in terms of filings and pending caseload has significantly diminished and may disappear if recent trends continue.[10] Nevertheless, the court has, by most measures, coped well with the increased caseload in spite of a long judicial vacancy.

Table 1 District of Vermont Statistical Overview

Statistical Year	1984	1985	1986	1987	1988	1989	1990	1991	1992
Total Cases Filed	528	430	393	421	397	475	453	483	556
Civil	446	386	317	345	311	362	365	357	453
Criminal Felony	22	46	76	76	86	113	90	126	103
Total Pending	666	521	411	408	422	498	523	588	682
Terminated	468	568	503	423	383	400	418	424	452

[10]Total filings in Vermont have risen from approximately 40% of the national average to 75% since 1985-86. Pending cases have risen from approximately 45% of the national average in 1986-88 to 84% at the end of SY 1992. Table 2.

Table 2 Average Filings and Pending Cases/Judge - Vermont and National

Statistical Year	1985	1986	1987	1988	1989	1990	1991	1992
Total Filings								
Vermont	215	197	271	199	238	227	242	303
National	520	491	466	478	459	437	372	403
Civil Filings								
Vermont	183	159	173	156	181	183	179	227[11]
National	476	444	416	417	406	379	320	--
Crim. Filings								
Vermont	32	38	38	43	57	44	63	52
National	44	47	50	51	53	58	52	---
Pend. Cases								
Vermont	261	206	204	211	249	262	289	341
National	474	457	461	466	461	476	422	405

2. Nature of Caseload

Administrative Office case-weighting[12] indicates the Vermont filings in 1990 and 1991 approximate the national caseload in terms of the amount of judicial time required (the average case weight is 1.04 in Vermont as opposed to 1.03 nationally). However, the significantly increased burden imposed by criminal cases over the past few years, discussed infra, suggests that the 1979 time-study based case weightings may not accurately reflect the real burden of the filings on the Vermont court.

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[11]1992 data was unavailable to the Committee at the time of preparation of the report in April, 1993.

[12]The Judicial Center has attempted to measure the amount of judge-time required for the various types of cases filed in federal courts. Based upon a 1979 study, the average judge time expended for all types of cases in all districts was 3.9 judge hours. This figure was assigned a weight of 1. "For comparison, the weight for an automobile personal injury case is 0.87, or about 3.4 judge hours." Guidance to Advisory Groups Memo, February 28, 1991 at B-3.

The weighing of filings by the Administrative Office, while arguably outdated, indicates that the nature of the recent Vermont filings (1990 and 1991 Statistical Years)[13] require more judicial time per average case than did the filings five years earlier (1.04 versus .98).[14] Both Vermont's heavy criminal docket and the weighing suggest that the District's docket is a demanding one in terms of judicial time required.

While Vermont has approximately the national average of class actions in its pending caseload (.9%), Vermont cases have been more concentrated in the civil rights area than in the areas of the RICO, ERISA, SEC and shareholder derivative suits which comprise half of class actions pending nationally. Vermont has a relatively high percentage of social security and civil rights filings. Because these categories of cases are generally referred to our magistrate judge, they place a relatively high burden on him. Vermont also has a relatively high rate of diversity filings, especially tort and contract cases.

3. Filings - Criminal

Vermont criminal filings have increased much more rapidly than have national filings over the past several years.[15] Since the stable Vermont 1986-87 years, filings increased 66% in Vermont, as opposed to less than 10% nationally, to 63 filings per judge in 1991 but declined 18% in 1992. The clearly upward Vermont trend is reflected in Table 3. The only declines

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[13]The Administrative Office of the United States Courts publishes data primarily for the "Statistical Year" which runs from July 1 to June 30 of each year. Data collected from July 1, 1990 to June 30 of 1991 constitute SY 1991.

[14]During the same period, cases nationally increased more markedly in terms of amount of time required, 1.03 versus .90. The sharper increase in the national figure is largely attributable to a steep decline in student loan recovery and veterans' overpayment cases, and social security appeals. Vermont continues to have a relatively high number of social security appeals. Recovery cases are weighted at .03. The explanation is derived from Annual Reports of the Director through 1991 explaining the downturn in federal civil filings since 1985 and a comparison of national and district social security filings.

[15]1991 Annual Report of the Director, Book 1, pp. 9-11, especially Table 6. National criminal filings increased throughout the ten year period from 1980 to 1990, but decreased 3.8% in 1991. On an authorized judgeship basis, however, cases per judgeship were at the same level in 1991 as they were in 1984 and 1986 (72 cases per judge) as a result of a 26% increase in authorized judgeships.

since 1985 were during 1990 and 1992.[16]

Table 3 Vermont Felony Criminal Filings

Statistical Year	1984	1985	1986	1987	1988	1989	1990	1991	1992
	82	64	76	76	86	113	90	126	103

The court, over the past four years, has averaged 108 felony filings, a 40% increase over the prior five year average.

The sharp rise in prosecution and related agency enforcement staff also suggests a continued high rate of criminal filings. The number of assistant U.S. Attorneys has increased from nine to fourteen[17] from 1989 to 1993. The number of Federal Bureau of Investigation (FBI) agents in Vermont has significantly increased since 1988. The Drug Enforcement Administration (DEA) has added four "task force" agents to its regular complement of three since 1987. Alcohol, Tobacco, and Firearms (ATF), which had no Vermont based staff in 1988, now has six Vermont agents. Border Patrol, Customs and Immigration have all increased enforcement staff in the past few years, but not at such dramatic rates. The Secret Service Division has opened a New England Regional Office in New Hampshire, making Vermont more accessible. These staff increases reflect Reagan-Bush administration drug enforcement priorities and the use of ATF, Border Patrol and Immigration personnel to aid in the war on drugs. The staff increases are reflected in the sharp increase in drug, firearm and criminal fraud prosecutions. The Clinton administration directive to cut federal agency budgets has led to a Justice Department freeze which may affect the number of agents assigned to Vermont. Prior

[16]The 1990 and 1992 downturns are somewhat deceptive since filings those years reflected a high rate of defendants per filing, 1.55 in 1990. Hence the 1990 and 1992 criminal workloads were not reduced as sharply as the figures might suggest.

The sharp increase in 1991 filings is primarily attributable to substantial increases in fraud and firearms cases. The rate of drug filings in Vermont and nationally has slowed in 1991, but picked up again in 1992.

[17]Nine of the fourteen attorneys are assigned to criminal cases. The staff increase has been focused on the criminal side.

to the change of administration, the U.S. Attorney in 1992 did not foresee additional enforcement or prosecutorial staff in the near future. While he could not forecast whether filings had reached a peak, he believed that they were fairly close to where they will be for the foreseeable future.[18]

We will attempt to explain the increase in criminal filings more fully in the section dealing with effects of legislation since most factors seem attributable to congressional legislation and funding decisions. We should at this point however note an intersystem effect: the Vermont Supreme Court has often interpreted the Vermont Constitution to provide greater safeguards for defendants than the U.S. Constitution, providing an incentive for law enforcement personnel to seek federal court prosecutions where the increasingly large area of concurrent jurisdiction exists. Similarly, the federal statutes concerning seizure of drug-related assets which are significantly more effective than state provisions, together with relatively greater prosecutorial resources, make the federal court especially attractive. The seizure provisions of course impact directly on the civil caseload.

4. Filings - Civil

Table 4 Civil Filings - Vermont

Statistical Year	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993 [19]
	446	386	318	345	311	362	365	357	453	398

Civil filings have declined steadily nationally since 1985. Vermont civil filings generally appeared to be declining through 1988 but have increased 18% from the 1986-88 level (325) during 1989-92. What is more ominous is the sharp increase in filings during SY 1992, an increase of 25% over the 1989-91 level. 1993 filings, if the total for the year follows the pattern during the first eight months, should decrease to approximately 400 cases. Removal by the FDIC of bank cases, increase in filings in civil rights cases and removal of such cases by the state, and personal injury and contract filings account for more than three-quarters of the 1992

[18]It should be noted that the pending appointment of a new U.S. Attorney may also have some effect on the rate of criminal filings.

[19]Projected figure based on filings during first eight months of SY 1993.

increase.[20]

The data available to the Committee does not permit a detailed analysis of why the Vermont civil filings have not tracked the significant national decline. However, we can state that Vermont's diversity filings have been relatively stable through SY 1991 in spite of the increase in jurisdictional amount in 1988 (while national filings have declined 32%) and increased sharply in 1992. Vermont's diversity filings represented 54% of private cases filed in 1991 versus 42% nationally. This may be largely attributable to the fact that Vermont state courts have been increasingly unable to process civil cases expeditiously in the face of cuts in their budgets, demands of the new family court and civil jury trial moratoria.[21] Attorneys interviewed by the Committee have indicated that vastly more expeditious case processing in the federal court is becoming an increasingly important factor in forum selection where diversity jurisdiction exists. We can anticipate this high level of diversity filings for at least the next few years.[22]

The court has experienced a higher than normal number of bankruptcy appeals in light of the recent increase in bankruptcy filings and adversary proceedings in 1989-1991. The bankruptcy court had five times as many pending adversary proceedings at the end of SY 1991 as it had two years earlier but was able to significantly decrease the number of pending cases in SY 1992 when the number of adversary proceedings filed declined by half.

5. Pending Cases & Terminations

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[20]See Table 1, Guidance to Advisory Groups Memo SY 92 Statistics Supplement, September 21, 1992, p. 12.

[21]The number of active civil cases pending in state court more than two years increased nearly 250% between 1989 and the end of 1990. The number of pending Superior Court civil cases rose by approximately 60% during 1989-90 and did not decline during 1991. See Vermont Judicial Caseload Statistical Time Series, Court Administrators Office, Nov. 20, 1991 as amended.

[22]Superior Court filings may have leveled off but the Vermont Court Administrator does not anticipate return to normal trial times until late 1995, assuming additional judgeships will be authorized, which is by no means certain. As of early 1993, there were several vacancies in authorized judgeships which suggests that the situation will deteriorate further before improving.

The effect of the filing trends outlined in the prior sections, especially the steep increase in criminal filings and the increase in civil filings over the past four years can be seen below in the corresponding increase in pending cases. Pending civil cases increased 23% in 1992, but appear to have leveled off at the end of SY 1992.

Table 5 Pending Cases

SY	1984	1985	1986	1987	1988	1989	1990	1991	1992
Civil	591	451	334	342	347	391	414	430	527[23]
Total	666	521	411	408	422	498	523	588	682

The effect of the increased filings was exacerbated when one of two authorized judgeships was vacant for eighteen months of the 1989-91 period.[24] While Senior Judge Coffrin greatly alleviated the stress caused by the increased filings and vacant judgeship, he was incapacitated or able to assume only a lighter burden for much of the period. When Judge Parker was finally confirmed, he had to assume his new duties during the court's busiest period in many years. Even with a full compliment of active judges and substantial assistance from Judge Coffrin for the nearly two and one-half years prior to his death, the court has fallen further behind.

The court responded to the filing pressures by terminating slightly more civil cases in each of the last four years, disposing of more cases in 1992 than it had any year since the docket-reducing years of 1984-86. (See Table 1). Yet, in spite of the increased terminations, the court's civil docket at the end of SY 1992 had grown 52% over the figure four years earlier. Table 1 provides the figures for filings, terminations and pending caseloads and demonstrates the interrelationships described above.

Table 5 shows that the court had a record number of total pending cases at the end of FY

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[23]Local figures show 486 cases pending at the end of SY 1992. The above figure is taken from Second Circuit figures. Early 1993 district data suggests the pending caseload has stabilized at the 490 level over the past year.

[24]Similarly, the previous judicial vacancy coincided with a higher rate of civil filings in the first half of the eighties.

1992, although that figure is slightly exaggerated by the long wait for presentence reports in criminal cases.[25] Table 2 shows that the Vermont advantage of having only approximately one-half as many pending cases per judge in the recent past has substantially decreased. Vermont pending caseload was 84% of the national average at the end of SY 1992. While the figures in table 2 are skewed by use of authorized judgeships,[26] because a significant number of the authorized judgeships remain unfilled, the figures are indicative of the fact that additional judgeships and declining civil dockets in other districts have eroded and will continue to erode the Vermont advantage.

Table 6 Civil Cases Pending

1987	1988	1989	1990	1991	1992
335	334	380	409	430	527

Pending civil caseload increased 58% from 1988 to 1992 while civil filings increased only 46%. The fact that the pending civil caseload increased more dramatically than civil filings suggests that the increased burden of criminal cases and the vacant judgeship substantially contributed to the increase in pending cases.

The court also confronted a sharp increase in civil caseload from 1980-84 during a period of substantial filing increases and greater terminations. The court was never able to bring its pending caseload back to the 300 level (1979), but was able to come close to that level after four years of *sharply declining* filings.[27] Reference to Table 1 illustrates that civil filings are near

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[25]A hopefully temporary condition. See the discussion in the next section.

[26]While the use of authorized judgeships understates the actual caseload per filled judgeship, recall that Vermont operated with only one-half filled judgeships during much of the crucial past three years. Hence, Vermont's understatement of actual load would seemingly be much greater than the national average over this period.

[27]Second Circuit Report 1988, Figure 26, p.43 depicts filings, terminations and pending cases from 1978-1988.

historical highs and that the more demanding felony filings have reached historical highs over the past few years.

The pressure of the increased filings and pending cases are reflected in the number of cases tried. The District tried a large number of cases in 1987-88 in clearing the civil docket that had grown in the early 80's. But the court tried over fifty civil cases per year from 1986-88 and only an average of 24 criminal cases per year. The number of trials has increased in the past three years to near record levels (80), but the majority have been criminal trials, a high of 48 in 1991. The percentage of civil trials has generally declined significantly since 1986-87, although the court tried 37 civil cases in 1992. The courts nationally tried slightly fewer cases in recent years. Vermont, by contrast, has tried significantly more cases in recent years. Indications are that the number of criminal trials will continue at a high rate, sapping the ability of the court to dispose of civil cases which require trial or the pressure of a trial.

Criminal sentencings also impact on the ability of the court to process its civil caseload. Sentencings under the Guidelines consume several times more time than sentencings in the pre-Guidelines era. Courts must now carefully make findings with respect to prior record and facts related to the offense to apply the Guidelines. The routine half-hour sentencing of yesteryear now typically lasts two or more hours. Hearings occasionally extend into a second or even a third day. Creation of mandatory minimum sentences by Congress, restrictions on plea negotiations by the Department of Justice and failure to utilize the diversion procedure have also required that additional time be expended by the court on the criminal docket.

6. Time Required to Terminate Cases

Although the focus of this section will be on disposition time for civil cases, the extremely poor median time for disposing of criminal cases should be briefly addressed. That time was 9.3 months in 1991, the second longest in the country, and 11.1 months in 1992. Vermont lagged behind the national median by approximately a month until 1990 when vacancies in probation staff caused serious delays in presentence reports. The problem was exacerbated by the great increase in criminal cases and by the much greater time now required of probation staff to attempt to resolve factual disputes necessary to apply the Sentencing Guidelines, requirements to which the Vermont office apparently devotes more time than many other offices. The Probation Office is now at full staff and began to prepare reports in a timely fashion in 1992. It is expected that median disposition time for criminal cases will decline significantly in 1993.

The most prominent measure of civil disposition time in Administrative Office publications is the median time in months from filing to disposition for cases disposed during

the SY.[28] By this measure, Vermont lagged a month behind the national median in 1989, 1990, and 1992 (10 versus 9), and two months behind in 1991 (11 versus 9).[29] Similarly the amount of time required to dispose of 90% of cases rose in 1991, from 24 to 27 months, but Vermont continued to best the national figures in this respect by four months.

Another measure of dispatch is the median time required from joinder of issue to trial. This measure has remained constant since 1988 at 13 months, although the time required to try 90% of the civil cases during the year has risen slightly in 90-91 to 31 months. Vermont bests the national figures in this regard, 14 and 37 respectively.

A final measure of processing speed utilized by the Administrative Office is the age of pending cases, with a focus on the percentage of the caseload pending for more than three years. The percentage of Vermont cases more than three years old has risen slowly from 2.3% to 3.6% from 1988 to 1990 and jumped to 6.5% in 1991. The percentage declined to 5.1% in SY 1992 and to 4% later in the calendar year.

The national average has risen steadily from 8.8% to 11.8% in 1991 and declined to 8.7% in 1992. Thus Vermont has averaged well below the national figure for "stale" cases over the past few years, exceeding half the national average only in SY 1991 and 1992. Perhaps more importantly, Vermont's caseload is younger than the national average. 62% of Vermont's cases were pending for less than a year in 1990 and 1991; the comparable national figure is 56%. 86% of the caseload in Vermont was pending less than two years as opposed to 78% nationally. While the percentage of cases pending more than three years rose in 1991, as indicated above, the percentage pending between two and three years declined, so the percentage of cases pending for more than two years remained constant over the two years at less than 15% (versus a national increase from 22 to 23%). Furthermore, the *actual* median disposition time for the 10% of the slowest cases terminated (versus pending cases data above) has been four or

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[28]The median is the midpoint of all disposition times for the year arranged from lowest to highest time period. Nationally, the mean (or average) disposition figure is typically approximately 50% higher than the median.

[29]The median rose significantly in response to the much sharper then current increase in civil filings during the first half of 1980 and the ensuing increase in pending caseload, reaching a high of 13 in 1985 only after filings had declined and the court was able to move a large number of older cases. This and a conversation with John Shapard of the Federal Judicial Center's Research Division suggested that we may be seeing a beginning of an upward movement in the median, given the criminal pressures on the court and the civil filing and pending case increase. However, the mean figure declined for SY 1992.

five months less than the national figure.[30]

The Committee was able to calculate average disposition time for SY 1989-91 from local data. The figures were 11.75, 12.54 and 12.44 months respectively. The figures, like the Administrative Office median figures, show an approximately one month increase over the period for age of cases terminated, but the increase showed up a year earlier in the average age figures.

We have been given no guidelines by Congress or the Judicial Center by which to measure whether there is unnecessary delay in processing the District's caseload.
The ABA Court Delay Reduction Standards utilize termination time as the measure in suggesting that civil cases should be concluded "within twenty four months of filing except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur" (Standard 2.52). The standards also suggest that 90% of cases be concluded within a year of filing, 98% eighteen months. The data generated by the Administrative office permit only a guesstimate as to whether these goals have been met over the past few years. Furthermore the district does not currently have the appropriate technology to generate data necessary to meaningfully apply such goals. What we can say is that over the past four years, the district has disposed of nearly 90% of its cases within two years of filing and has generally accommodated attorneys' perceived needs for an expeditious trial or resolution. We also know that the vast majority of cases greater than three years old have special circumstances which appear to explain the delay.

Two additional measures which have been developed to predict trends in caseload processing cast a darker light on the question of delay. The Second Circuit has developed the "Inventory Control Index" to help assess whether a court is gaining or losing ground in managing its calendar. The index represents the number of months it would take a court to dispose of all its pending civil cases at the court's current termination rate. The Vermont figure rose from 13.2 months in 1988 to 18.1 in 1992.[31] The national index rose very gradually from 1980 to 1991, from 12.1 to 13.6, and declined to 11.6 in 1992. According to this measure, Vermont would now require more than a third more time to dispose of its civil docket than it would have four years ago and a half longer than the average federal court.

The Judicial Center has opined in its "Guidance Memo" that ages of cases terminated in

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[30]Comparable data for SY 1992 was unavailable at the time the Committee was updating its statistical analysis in March, 1993.

[31]The 1992 figure is preliminary. Preliminary figures have typically been slightly higher than the final figures.

recent years is not a reliable predictor of future prospects. The Center has therefore calculated an index to measure the "life expectancy" of a case filed during the statistical year. The measure is sensitive to changes in the filing rate. The lifespan figure for Vermont has risen sharply since FY 1988, especially in the past two years. The average case which could be expected to terminate in a year if filed in 1988 would take seventeen months if filed in 1992.

The considerably greater "life expectancy" increase in the Type II cases[32] (which dominate the docket) suggests special difficulty disposing of these Article III judge intensive cases recently, not surprising in light of the vacancy and criminal caseload pressures. Apparently the court's ability to expeditiously terminate the more routinely processed cases has not been as affected.

The limited statistical data relevant to disposition time is difficult to interpret. The data consistently indicate that the court is feeling the impact of the increased caseload of the past few years, exacerbated by the eighteen month vacant judgeship. The district has in recent years generally been slightly less able to dispose of the most stale cases and has taken somewhat longer to dispose of its cases. Viewed from the national perspective, Vermont has not fared badly when we look at traditional measures such as time to trial, median disposition time and caseload age. Similarly, our meetings with members of the district bar indicate that the court is processing cases relatively expeditiously, and is able to accommodate requests for accelerated trials. In fact, several attorneys interviewed indicated that federal cases move too quickly.

However, the indices specifically developed to measure change in disposition time and project into the future are sobering, at least at first glance. These measures, which are more sensitive to the effect of increased filings and caseload (as these changes are occurring), suggest disposition time will increase significantly in the near future if recent filing trends continue. The Committee was somewhat skeptical of the inventory control and life expectancy indices because the actual median disposition time for civil cases returned to 1988-1990 levels in 1992 rather than increasing precipitously as one would have expected in light of the indices. Other actual data has showed only modest or no increase in disposition time.

While the life expectancy figures may overstate the potential for delay in the future, the probability of significantly greater disposition times is intuitively appealing in light of filing, termination and pending case data, and the lag between the increases in filings and caseload, and disposition time data in 1981-85. A modest increase in disposition times also seems probable

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[32]Type II cases are ones which cannot be routinely handled in the same manner and "are disposed of by a greater variety of methods and follow more varied paths to disposition." Guidance to Advisory Groups memorandum, p. 10.

because Judge Parker's caseload is a relatively young one and he was able to try only a limited number of civil cases during his first two years on the bench. As his caseload matures there is a greater likelihood of older problematic cases which may further increase the typical disposition time. Furthermore, he and Judge Billings will have to absorb most of Judge Coffrin's mature caseload.

Sharp rises in disposition time occurred during the first half of the 1980's as a result of filing and caseload pressures and a judicial vacancy. However, the current pressures on the court are different than those of the first half of the 1980's when the court was faced with an historically high influx of civil cases, but was able to bring its pending caseload down within two years after filings dropped back to normal levels in the mid 80's. First, the civil case increase of the early 80's consisted largely of more routinely handled Type I[33] cases. Second, the court then was faced with less than half the current criminal caseload at a time *prior* to Sentencing Guidelines requirements. It is probably a fair estimate to say that the court's criminal burden then was only one-third the current criminal case burden. The court is currently at its historical high for more complex Type II[34] civil cases, and near its high for all civil cases. More importantly, the number of felony criminal filings over the past three years is nearly half again as high as it was in 1987. This constitutes a large number of additional defendants to process yearly under the more demanding Guidelines requirements. Hence, the Committee's concern that a problem with respect to delay may emerge which will not be cured in the near future by a serendipitous reduction in case filings.

In sum, while the court has coped admirably with caseload pressures and the vacancy, the court must make significant efforts to terminate more civil cases at an earlier stage or risk seeing its disposition times increase in the near future, other things remaining equal. The court cannot count on great civil or criminal filing relief in the near future although some relief may be indicated by SY 92 criminal data and civil data from the first eight months of SY 1993. The great criminal pressure, a high number of civil filings and pending cases, and the resultant difficulty in successfully managing the civil caseload, given considerably less judicial time to devote to each civil case, will apparently continue for the near future.

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[33]Type I cases are ones which can be routinely processed in the same manner. Guidance to Advisory Groups memorandum, p. 10.

[34]See note 32, *supra*.

B. Cost and Delay

1. Is There Excessive Cost and Delay?

Analysis of the data in part A, which included comparison with other courts, reviews of average disposition time for the various categories of cases in the district, deliberations of the Committee and meetings with members of the bar, have led to the conclusion that a general problem of excessive cost and delay does not exist in this district. Relatively complicated cases in the district such as medical malpractice and products liability cases were terminated, on average, in less than eighteen months. All attorneys who appeared before the Committee and members of the Committee thought that cases generally reached trial in an expeditious (some thought too expeditious) manner. Attorneys indicated that the court was willing and able to quickly schedule a case for trial when special circumstances required a trial soon after the discovery schedule had expired. Attorneys' and the Committee's concern focused on the danger that the district would not be able to continue to process the vast majority of cases expeditiously in the future.

The Committee was mindful, however, of a relatively small percentage of cases which the court required more than two or three years to terminate. The vast majority of cases pending more than three years were cases on the late Senior Judge Coffrin's docket. These cases lapsed during the 18 month judicial vacancy and the judge's lingering health problems. Several of the cases involved appeals or other complicating factors contributing to the delay. Senior Circuit Judge Oakes has generously agreed to assume several of Judge Coffrin's cases. As of September 30, 1992, 4% of civil cases were pending for more than three years. Only five cases in the active judges' docket of more than four hundred cases, or approximately 1%, were pending more than three years. Less than 7% of the district's cases have been pending for between two and three years. Thus, approximately one in ten of the district's cases have been pending more than two years.

2. Principal Causes of Cost and Delay.

One aspect of the statistical analysis concerned the Committee. Vermont disposes of twice as many cases without any court action as do courts nationally, yet takes nearly half again as long to terminate these cases. Vermont also takes significantly longer to terminate cases which involve court action but are terminated before pretrial or trial. Yet, Vermont tries approximately twice as many cases as the national average but is able to terminate these cases in slightly less time than the national average. These figures and the slightly greater than median termination time for all cases led the Committee to conclude that attention should be focused on the relatively long time required to settle cases which should not require trial or the pressure of trial to effect resolution.

Discussions with judges and attorneys led the Committee to conclude that attorneys were reluctant to initiate settlement discussions and tended to entertain an overly optimistic view of what could be expected from trial until the day of reckoning was imminent. We concluded that, to the extent there was avoidable delay in the district, the delay in processing and terminating cases was primarily attributable to these problems and the lack of a court imposed mechanism to force attorneys to discuss settlement and confront case value in timely fashion. We furthermore concluded that unnecessary discovery and duplicative effort required by attorneys to refamiliarize themselves with the case, and therefore unnecessary cost, resulted. Further discussion of Committee action on these conclusions follows in Section III of the report.

a. Effect of Case Type

No single case category is especially subject to excessive cost and delay in civil litigation in this district. The cases pending for more than three years can be largely attributed to the factors discussed above and the unusually complex nature of the case, frequently involving bankruptcies, related state court proceedings, or appeals, but these cases reflect a wide range of subject matter.

The relatively large number of criminal cases and the Speedy Trial and Sentencing Guidelines requirements greatly affect the court's ability to monitor and expeditiously process civil cases.

The district's ability to process some motions as expeditiously as we would like and to hold a greater number of pretrial conferences is hindered by the relatively large number of prisoner petitions in the district. The magistrate judge and the reporter have worked with the Vermont Department of Corrections to institute an approved grievance procedure to reduce the amount of petitions which must be heard and provide an adequate record for cases which require substantial attention by the court. The Department has recently sought approval of a less-than-adequate procedure. The Department has undertaken an approximately two-year effort to institute a better procedure, but we have no assurance that the Department will finalize these efforts.

Much of the magistrate judge's time which could be devoted to other cases on the docket is consumed screening petitions, processing ill-drafted *pro se* pleadings, conducting discovery in the *pro se* cases and occasional travel to correctional institutions. The magistrate judge is able to secure counsel for prisoners only in more meritorious cases, especially cases which hold some promise for a related civil recovery. The magistrate judge has but a single law clerk and the district has no *pro se* clerk. If the magistrate judge had a second clerk who could devote considerable time to the petitions, much of his time could be far better utilized. In addition to more expeditious hearings on referred matters and greater use of pretrial conferences, the Committee would like to make the highly respected magistrate judge available for consensual

trials.

b. Impact of Court Procedures and Rules.

The Committee could ascertain no significant detrimental impact from the existing local rules. We did, however, note the absence of adequate ADR mechanisms to expeditiously terminate cases not requiring trial or pressure of trial in Section 1. above. The Committee also noted that Local Rule 6 providing for pretrials was utilized primarily only in very complex cases because of the enormous expenditure of time required by counsel and resultant cost. The Committee perceived a need for a less cumbersome procedure to effect settlement and expedite trial of the more typical case. More attention will be devoted to rules and procedures in Section III. C. below.

The Committee concluded that the vast majority of motions filed were promptly heard and decided by the court. Local Rule 5 requires prompt responses to motions. The Committee decided to monitor for a potential problem in the future via improved data reporting procedures and to recommend better use of the automated system to monitor motions. The Committee concluded that recommending imposing a motion hearing and decision timetable was inappropriate in light of the apparently small number of problematic motions, the Administrative Office reporting requirement and our recommendations.

c. Effect of Court Resources.

Court physical resources are generally adequate or will be in the near future. Clerk staff is currently barely adequate. See I. A. above. The Committee is concerned about the possibility of a freeze in clerk staff hiring if a vacancy appears, given the cutbacks in the court's budget, because the staff is only adequate and some additional pressure will be created by Committee Early Neutral Evaluation (ENE) recommendations and probable future additional ADR recommendations. The Committee has also requested and will receive statistical reports which will better enable the court and Committee to identify problems of delay, but which require additional time expenditure by clerk staff.

The Committee is also concerned about how the district will accommodate the death of Senior Judge Coffrin. In spite of health difficulties, Judge Coffrin maintained a caseload of approximately sixty cases. A number of these cases were among the district's oldest cases and require prompt reassignment. Our district judges are fully occupied by their caseloads, especially the criminal cases which must be given prompt attention, and our magistrate judge is extremely busy. Senior Circuit Judge Oakes has agreed to accept a limited number of Judge Coffrin's trial-ready cases. However, utilization of Judge Oakes and the Brattleboro court will strain the clerk's staff by requiring transfer of staff from the Burlington site. If the district were able to

secure an additional clerk for the magistrate judge, he would be able to handle some matters previously undertaken by Judge Coffrin.

The magistrate judge is currently less utilized by the Rutland court for motions and pre-trial conferences, largely because of the distance between his Burlington location and the Rutland court and lawyers in the southern part of the state. Even if the distance problem did not exist, it is doubtful that the magistrate judge could absorb a significant number of referrals from the southern part of the state.[35] The caseload pressure on the court could be greatly alleviated by a part-time magistrate who would be based at the Rutland court. The magistrate could serve Rutland and Brattleboro, which is a two and one-half hour drive from Burlington in atypical ideal Vermont weather conditions. While the Committee is mindful of the Administrative Office caseload Guidelines for magistrate judges and clerks, the Committee respectfully suggests a waiver of the Guidelines is appropriate in light of the unique considerations of the increasing caseload, lack of a senior district judge, the long distances between courts and the geographically wide dispersal of attorneys and clients in the state-wide district.

The lack of adequate law clerks for the magistrate judge and the absence of a magistrate judge in the southern part of the state affects the ability of the district to expeditiously terminate cases which do not require trial or the pressure of an imminent trial. Resources dictate that the district can hold full pretrial and periodic status conferences only in those cases where conditions clearly indicate that a conference might be fruitful. The geographical constraints explained above greatly increase the cost of invoking Rule 16 and therefore reduce the utility of conferences for cases from the southern part of the state. This resource issue largely explains the Committee decision to recommend that the ENE be conducted by private attorneys.

The Committee and the court have been somewhat hampered in analyzing possible delay and planning to reduce delay by the paucity of statistical information other than that available in Administrative Office and Second Circuit reports. The clerk's office has been effectively utilizing the automated system in recent months to generate helpful information. The recently hired chief deputy clerk has extensive experience with data collection and reporting in other court contexts and is interested in developing a better data collection system. The data subcommittee has met several times with the very cooperative members of the clerk's office staff to design reports for the Committee and court which reflect disposition time by category of case

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[35] The Committee analyzed trends in the magistrate judge caseload in the district and comparative data from the Second Circuit reports. We concluded that Vermont's magistrate judge carried an average criminal caseload and a significantly more burdensome civil caseload than the typical magistrate judge. His caseload in both categories has significantly increased in recent years as criminal and civil case filings have increased.

and procedural posture of the case at disposition. It has also designed a report to measure a number of intervals in the case which could contribute to delay and expense, among other significant variables.

d. Practices of Litigants and Clients

Practice in the district is, by and large, conducted at a high level of civility. Bench and bar agreed that there was a very small amount of motion abuse and little discovery abuse. Much of the infrequent abuse was attributed to out-of-district attorneys who were unfamiliar with the nature of practice in the district. There was an average of one motion for sanctions and two motions for a protective order each month in the district during 1991 and 1992. The judges have rarely been asked to and even more rarely felt that a grant of Rule 11 sanctions was appropriate.

Local Rule 4 requires that the parties jointly submit, within 30 days of the last answer, a discovery schedule which provides for completion of discovery within eight months. The court is willing to grant extensions of the time provided in the schedule when necessary. The Committee is recommending amendment of the Rule to make it clear that extensions will be granted only for good cause shown. The Rule also requires that counsel contemplating a discovery motion pursuant to Rules 26 and 37 must first confer with opposing counsel to discuss the disputed issues in an attempt to resolve them. An affidavit must be filed with the motion certifying the effort has been made and the extent to which issues have been resolved or remain disputed. While the procedure seems generally effective, several motions to compel are filed monthly. In some of these cases, counsel have not adequately focused on the nature of the underlying disputes, requiring more judicial time than the dispute merits. The judges utilize discovery disputes which reach the motion stage to conduct a status or settlement conference in appropriate circumstances. The Committee opines that proposed amendments to Rule 26, if adopted, and its recommendation for ENE will alleviate much of the lack of communication or poor communication which has led to unnecessary hearing time.

The tendency of attorneys not to discuss settlement sufficiently early in the course of litigation is discussed in part b. above. The tendency to postpone discussions of settlement until trial is imminent results in a large number of cases
actually scheduled for trial settling shortly before trial. While several cases were assigned, the judge frequently finds there are no actual cases to try at such a late date as to make scheduling of other matters to fill the vacuum difficult or impossible.

Conduct of clients did not emerge as a major contributor to delay or excessive cost in the discussions with members of the bar or in the Committee. To the extent that clients entertained unrealistic expectations relative to the merit of their cases, the Committee believes

that the recommendation for ENE which requires the client to be present to hear a presentation by the other side and meet with an evaluator should provide a sobering antidote.

e. Assessing Impact of Legislative and Executive Branch Actions

The Committee is charged to "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts." The Committee will attempt to address this task, but will not undertake an exhaustive examination of the congressional activities because the basic difficulties are quite well-known. Perhaps it is best to begin with the perception that civil delay and expense, which have not yet reached serious proportions in the district, are largely a function of factors beyond the control of the court. We must briefly note the effect of a state court system in crisis which has led to significantly increased civil filings in the district. We must also note a state judiciary which is much more sympathetic to the rights of criminal defendants than the current Supreme Court and recent Justice Department, which may lead law enforcement personnel to prefer prosecution in federal court where there is concurrent jurisdiction. Finally, we must note that the external impact on the district is also largely a function of executive department policies, a matter which will be addressed below, because any serious congressional examination must consider its explicit or implicit approval of executive department actions.

The Federal Courts Study Committee has considered the impact of the volume of legislation on the federal courts. Much of the legislation, such as ERISA and environmental legislation, has generated complex litigation which is inherently costly and delay-prone. In the criminal area narcotics, firearms, and fraud legislation have greatly expanded the scope of federal criminal jurisdiction. In sum, the massive amount of legislation has increased the court's workload quantitatively and qualitatively.

Also, a considerable amount of legislation has created burdens on the court in terms of how the court processes its caseload, particularly in the criminal area, without creating the resources necessary to manage the burden. The Sentencing Guidelines require that the probation department and judges dedicate considerably more time to the sentencing process. In spite of the G.A.O. report and other warnings, Congress apparently ignored the impact on the court system. The Speedy Trial Act required the court to prioritize resources further in the criminal direction. The Bail Reform Act consumed considerably more of the magistrate judge's hearing time. The Sentencing Guidelines and mandatory minimum sentences greatly reduced the flexibility available to the parties and brought additional issues before judicial officers.

Executive department action has sometimes acted in harmony with congressional action and occasionally exploited congressional inaction, creating problems for the courts. For example, the Reagan administration changed interpretations of legislation in the social security

area, resulting in court challenges. The Justice Department has interpreted the Sentencing Guidelines to preclude plea bargaining except in limited circumstances. The Department has apparently acted in harmony with Congress in greatly expanding prosecutorial and enforcement staff, significantly increasing the criminal caseload. The Department has utilized the new statutes in its initiatives to utilize immigration and firearms personnel enforcement. The finance fraud initiative follows congressional action in the wake of savings and loan/bank problems. Congress has provided the tools, including financing, for these executive actions which have promoted delay and increased cost in the civil caseload.

The collaboration of executive and legislative branches has hurt this district particularly badly in the failure to promptly approve two eminently qualified judicial appointees in recent years. Both delays were unconscionably long, the last 18 months. Both occurred during a substantial upturn in caseload. This two-judge district operated at half judge staff for a third of its historically most busy period.

The Committee is struck by the disparity between the expressed concern of Congress and the executive department recently about delay and cost of federal civil litigation and the reality of congressional and executive action, briefly described above, which undermines the ability of the courts to implement the CJRA. A recent indication of that disparity is the reduction in appropriation for the Judicial Department in FY 1993. Congress should require that all civil legislation that it enacts conform to the principles set forth in section 2 of Executive Order 12778.[36] Congress should carefully consider the impact of any proposed legislation which would expand federal jurisdiction or otherwise require additional burdens which might affect civil delay or cost. Congress should heed the impact analyses of proposed legislation prepared by the Administrative office and statements and reports of the G.A.O., Judicial Conference and other responsible bodies.

Most of the legislative and many of the executive initiatives will affect the quantity of federal court workload and thereby impact delay and possibly cost. Part of the problem could be managed by creating additional judicial and support staff and, at a minimum, filling vacancies promptly and funding staff positions at the levels specified in Administrative Office Guidelines. But the initiatives also affect the quality of the federal court workload. While recent congressional and executive initiatives have brought complex new civil matters into the court, they have also brought an influx of criminal matters which have traditionally been viewed as de minimis and/or brought in the state courts. Many lawyers who spoke before the Committee and

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[36]Executive Order 12778, of October 23, 1992, is directed to Civil Justice Reform. Section 2 sets forth principles which the executive branch must utilize to review proposed legislation to ensure that the legislation does not unduly burden the federal court system.

the Committee itself have not only questioned the ability of this court to control delay and cost and to provide a civil trial for the type of cases traditionally deemed to belong in the federal court, but have also questioned the decisions to bring certain types of cases into the federal courts. While the Committee recognizes the plenary power of Congress to articulate the constitutional grant of jurisdiction to the federal court, executive initiatives based upon recent legislation may have tended to trivialize that jurisdiction while preventing the court from promptly fulfilling its valued traditional role.

III. RECOMMENDATIONS AND THEIR BASES

A. Create a Program of Early Neutral Evaluation (ENE) and Continue the Alternative Dispute Resolution (ADR) Subcommittee to Implement the ENE Recommendation and Study the Use of Other ADR Techniques in the District

1. Institute a program of early neutral evaluation by July 1, 1994 based upon the following principles:

a. Goals. Early settlement of cases is the primary goal of the program. Alternatively, the program should result in narrowing of issues, stipulations and agreements for structuring of discovery and trial preparation to avoid unnecessary delay and expenditure of resources by the parties and the court.

b. Cases Subject to ENE. Except for classes of cases determined to be unsuitable, all cases will be subject to ENE. The ADR subcommittee will consider ENE experience in other districts to recommend cases to be excepted.

c. Coordination With Local Rule 4, Discovery. Implementation will require that Rule 4 be amended to provide that the discovery schedule required to be prepared jointly by the parties and submitted to the court for approval shall include a proposed date for the ENE at or near the midpoint of the discovery period. Parties will be instructed to focus discovery prior to the evaluation to facilitate the goals of ENE. They will be instructed that the ENE must be scheduled and held unless excused or delayed by court order based upon a showing of good cause.

d. Evaluators. Evaluators will be experienced lawyers (five years of practice and significant trial experience are desirable) and qualified non-lawyers who have relevant experience. The ADR subcommittee will select a group of evaluators with experience representative of the caseload subject to ENE and arrange for an appropriate training program for those selected.

e. Cost. Evaluators will be paid $500 per case evaluated, the cost to be shared by the parties. The evaluator fee is based upon an approximately half-day ENE, related preparation, and the report of the evaluator. If significantly more time is required than a half-day for the evaluation session(s) or the parties desire a formal case evaluation by the evaluator, the parties and the evaluator shall agree upon any additional compensation.

f. Attendance at ENE. Each party and his or her insurer should be represented at the ENE by a person with settlement authority and an attorney having primary responsibility for the case. A government official need not be present when represented by an Assistant U.S. Attorney with settlement authority. If it will cause an unreasonable hardship for a representative with settlement authority to attend, that representative shall be available by telephone during the ENE and the party or insurer shall designate another representative (in addition to the attorney) who is fully familiar with the case to attend the ENE. The arrangement must be approved by the court prior to the date set for the ENE and may be approved only for good cause shown.

g. Procedure. The ENE procedure should ensure that the parties identify the material issues in the case, that they fully and conscientiously evaluate the case and that the evaluator has the information necessary to assist in serious settlement and issue-narrowing efforts. The procedure will include:

(1) a pre-ENE submission to the evaluator and opponents which identifies the issues and summarizes the positions of the party relative to the issues;

(2) presentations by each party during the ENE;

(3) a requirement that the parties be prepared to discuss realistic estimates of case value and cost and delay that will result if settlement efforts are not successful. Costs to be addressed by the parties include those for additional discovery, expert witnesses, and attorney and other costs associated with trial preparation and trial.

The evaluator, after hearing the parties' presentations, will explore options to narrow issues and effect settlement using mediation techniques. At some point, if necessary, the evaluator will give an assessment of case value on trial outcome.

h. After completion of the ENE, the evaluator will file a report with the parties and the court which includes:

(1) the date(s) of the ENE, including the starting and finishing times;

(2) persons attending, including full identification of each party's

representative and a summary of any special arrangement regarding the representative made for cause;

(3) the date(s) on which the pre-ENE submissions were received;

(4) a notation as to whether the parties made presentations at the ENE;

(5) the result of the ENE, including any settlement reached, any stipulations to narrow issues and any agreement to expedite or limit discovery and avoid pre-trial cost or delay.

(6) The report will not include the evaluator's assessment of case value.

The ENE will be treated as settlement negotiations under F. R. Evid. 408.

i. Implementation. The program will begin with cases filed after a date certain, providing for a de facto phase-in period. As the cases progress through the discovery period and the dates set for ENE, the ENE caseload will build to its ultimate level. Based upon current filings, not subject to exception, a pool of 20-30 evaluators will be required for a mature program. No evaluator will be asked to assume more than two cases per month absent exceptional circumstances. Parties will be allowed a role in selecting the evaluator from a panel approved by the ADR subcommittee for the appropriate type of case.

j. ENE Program Administration. A member of the court staff will be designated as the ENE Program Administrator.

2. The ADR subcommittee will present its detailed proposal to the entire Committee before presenting it to the court for implementation. Once the plan is implemented, the subcommittee will monitor the ENE program and study its effectiveness, making such recommendations to the Committee as are necessary to meet the goals of the program.

3. The ADR subcommittee, after implementing the ENE program and gaining experience with its effectiveness and study of the district caseload, will explore the possibility of additional court-annexed ADR techniques. In the meantime, the subcommittee will familiarize the evaluators and judges with other ADR techniques to enable them to recommend appropriate voluntary efforts to the parties as part of the status conference and ENE processes.

4. Members of the federal court bar will be invited to participate with the Committee in the planning and implementation of the ADR program in order to, inter alia, enhance initial

acceptance of the program and facilitate recruitment of experienced lawyers to act as neutrals.

COMMENT: The goals are set out in 1.a. above. The recommendation is particularly addressed to the reluctance of attorneys to initiate fruitful settlement discussions prior to a trial date, the relatively long time required to terminate cases not requiring court attention and the phenomenon of cases being settled shortly before trial, leaving no cases for trial by the date set for trial and insufficient time to add cases to the trial list. These related problems were deemed by the Committee to be the primary cause of unnecessary cost and delay in the district. The recommendation for a pretrial order in F.4, *infra*, is also intended to address these problems.

B. Appointment of a Data Subcommittee; Periodic Reports Including ICMS Reports

1. Courtroom deputies should fully utilize the capabilities of the automated system to monitor motions filed. Each courtroom deputy should generate at least monthly reports of pending motions and review the printout to insure prompt referral of matters to the magistrate judge, scheduling of motions and decisions on motions submitted to their judge.

2. The District should develop appropriate caseload data to enable the court and community to better identify possible sources and causes of unnecessary delay and cost and implement its recommendations for ADR, especially ENE.

3. The clerk's office should generate the two reports designed by the subcommittee in collaboration with the clerk's office. The first is the "Quarterly Executive Summary of the District Court Cases" which provides data relative to pending caseload, pending motions, age and disposition time of motions, age and disposition time of cases, trial hours, civil cases pending trial and their age, and age of cases tried. The second is the yearly report which provides mean disposition time for "procedural progress at termination" based on "nature of suit." These reports should be made available to court personnel and the Committee on a regular basis.

4. The Committee recommends that the Administrative Office more carefully monitor the reporting of caseload data by the districts to insure that the data is in fact uniformly reported. The Committee has been unable to develop meaningful data comparing its caseload processing performance to that of other districts because of a well-grounded perception that other districts report data in a favorable light.

5. The data subcommittee should work with the clerk's office to develop a mechanism to monitor the effectiveness of ENE in meeting the objectives established by the Committee.

Comment: The recommendations stem from the paucity of hard data from which to identify

unnecessary cost and delay and possible sources thereof. The Committee also wanted to insure that the few cases in which motions were not quickly heard and decided would not increase with the upturn in pending cases; hence the monitoring recommendation. We recognized the importance of monitoring the ENE program and disposition time of ENE cases to determine the effectiveness of the program. Better case disposition data and ENE data are necessary to make informed decisions with respect to use of other possible court-annexed ADR techniques.

C. Bar Education and Meetings

1. The district should establish a mechanism with which the court and Committee can work with members of the district bar to develop and nurture a local legal culture that creates and fulfills the expectations of all participants (judges, lawyers, litigants and the public) for the efficient, effective resolution of disputes.

2. For the duration of the CJRA Committee, the mechanism should be the bar relations subcommittee of the Committee. The subcommittee should arrange an annual conference of the bar to, inter alia:

a. discuss problems in the district and solicit recommendations for more efficient, effective resolution of cases;

b. discuss CJRA efforts and the Committee's recommendations to reduce cost and delay;

c. conduct continuing legal education seminars with respect to changes in federal practice and procedure, with a focus on local practice;

d. encourage attorneys to undertake representation of *pro se* plaintiffs and arrange for training programs and materials to assist those willing to volunteer; and

e. enlist the cooperation of the bar in the implementation of the district's ADR program.

3. The subcommittee should work with the judges and clerk's office to implement the recommendation that copies of jury instructions be made available to attorneys at the clerk's office. The subcommittee should work with the bar to devise other possible methods of disseminating commonly used instructions.

4. The subcommittee will work with the bar to develop cost containment guidelines for the district modeled on the American Board of Trial Attorneys guidelines for consideration by

the full Committee by the end of 1993.

Comment: The Committee concluded that lawyers in the district generally respected the interests of the court and other litigants. However, we perceived a need to require lawyers to seriously discuss issues and settlement at an earlier stage of cases and to be better prepared for trial. We further determined that lawyers in the district shared the court's and Committee's interest in controlling costs and time required to process cases in the district. We concluded that we should harness the good will of the bar to implement the recommendations of the Committee (*e.g.* ENE, representation of *pro se* prisoners and the jury instruction project) and to help us identify cost and delay issues and recommend possible future action.

The Committee also felt strongly that adopting many of the suggestions for rule changes contained in the CJRA were unnecessary in light of the high level of civility and interest in efficient practice in the district. We concluded, however, that education of the bar and work with the bar to develop guidelines for practice in the district addressed to the goals of the CJRA would help ensure continued civility and increase interest in efficient resolution of disputes.

D. Jury Instructions

1. The judges should make copies of their current jury instructions available to the clerk's office, noting the type of case involved. The clerk's office should then place the instructions in notebooks organized by judge's name, type of case, and name of case. The notebooks should be updated and maintained in the clerk's offices for ready access by attorneys.

2. The first sentence of Local Rule 7.A should be amended to read: "Requests for jury instructions must be filed no later than seven days prior to the date set for trial of the case."

Comment: The Committee recognized the importance of counsel providing relatively complete and accurate requests to charge sufficiently far in advance of trial for the judge and opposing counsel to evaluate the proposed instructions. We identified two problems with respect to current practice. First was that the current rule requires that requests to charge be submitted so far in advance of trial that counsel fail to submit requests or do at the last minute. The second problem was the difficulty of gaining access to instructions in areas of practice where attorneys had not compiled their own bank of appropriate instructions. The recommendations address the problems. Note also C.3. above. The Committee anticipates additional efforts to make instructions even more accessible.

E. Magistrate Judge Utilization

1. The Administrative Office should make CJRA or other funds available to the district

to hire a second judicial clerk for the magistrate judge.

2. The Administrative Office should make funds available to hire a part-time magistrate judge for the Rutland division of the court.

3. The clerk's office should prepare a letter to be sent to parties in social security cases encouraging them to consent to a decision by the magistrate judge. A copy of a model consent form should be sent with the letter.

4. In the interim period before the bar relations subcommittee is able to solicit assistance from the bar for *pro se* plaintiffs, the magistrate judge should send a letter to members of the district bar asking their assistance in providing representation to *pro se* prisoners in appropriate cases. Positive responses would be used to update the list of attorneys willing to assist *pro se* prisoner plaintiffs. The magistrate judge should assemble a modest library of materials devoted to representation of *pro se* prisoners and inform members of the bar of the materials in the solicitation letter.

5. The clerk's office should notify the parties, at or near the date set in the discovery order for completion of discovery, that they can request a pretrial conference with the magistrate judge and that they can consent to a trial before the magistrate judge at a time certain.

6. The Committee should undertake further efforts to alleviate the burden caused by *pro se* prisoner petitions and the lack of an adequate approved state grievance procedure. Specifically, the magistrate judge and reporter should continue their efforts to cooperate with the Department of Corrections in drafting an adequate procedure. Second, the reporter, in consultation with the magistrate judge, should prepare a report on whether use of a model discovery form in *pro se* cases in other districts has been successful in obtaining information necessary to process the petitions expeditiously. If other districts' experience has proven successful, the reporter should draft a proposed form or forms for use by the district.

Comment: The reasons for recommendations 1, 2, 4 and 6 are discussed in "Effect of Type of Cases, II.B.2.a. and "Effect of Court Resources," II.B.2.c., *supra*. The current magistrate judge is referred nearly all social security matters and is well respected for his expertise. Recommendation 3 is an attempt to obviate the need for Article III judge review of the magistrate judge's work. Recommendation 5 is an attempt to encourage consensual trials by the magistrate judge by offering a certain trial date to accommodate counsels' schedules. The success of 5 in relieving the burden on the judges will be largely determined by whether numbers 1, 2, 4 and 6 can be implemented.

F. Amendments to Local Rules

1. Rule 4 A.I. Discovery Schedule

a. Add a new sentence as follows to be effective as of the date of the ENE program: Counsel is directed to prepare the schedule to conform with the court's order with respect to cases subject to early neutral evaluation approximately midway during the discovery period.

b. The current second sentence should be amended as follows and become the second-to-last sentence of the amended rule: In cases where additional time may be required for discovery, due to case complexity or other extraordinary circumstances, counsel may apply for an extension of time for good cause shown. An additional last sentence should be added as follows: Absent exceptional circumstances, such request shall be made prior to the expiration of the date set for completion of discovery.

Comment: The first recommendation draws counsel's attention to the fact that the proposed schedule must accommodate an ENE in cases where the evaluation is required. Number 2 allows counsel to request a longer discovery period in exceptional circumstances at a time later than submission of the proposed schedule when counsel are more familiar with the demands of the case. The proposed time revision conforms with actual practice. The proposal, however, makes it clear that counsel seeking the extension must demonstrate good cause and that the request must ordinarily be made within the time frame originally established for discovery.

2. Rule 5.A. Motions in General

a. The Committee recommends Local Rule 5.A.II be amended as follows:

A party desiring to oppose the granting of any motion other than a summary judgment motion shall file a brief or memorandum in opposition thereto not later than ten days after the service of such motion. The opposing party shall file a brief or memorandum in opposition to a motion for summary judgment not later than thirty days after service of the motion. The moving party shall file a reply, if any, within ten days of service of the opponent's papers. Such times may be extended by order of the judge to whom the case is assigned.

b. The Committee Recommends Local Rule 5.D. be amended to read as follows:

Within thirty days from the date of the filing of the defendant's answer and certified copy of the transcript of the record in Social Security appeals, the plaintiff shall file its motion for summary judgment and supporting memoranda. Within thirty days from the date of service of

plaintiff's motion, defendant shall file its response and any cross-motion with supporting memoranda. Plaintiff shall file any reply within ten days of service of defendant's papers.

Comment: Proposed a. is recommended to spare the court time required to consider motions to extend time to file opposing documents in summary judgment cases and conform time limits to practice. Proposed b. is recommended to expedite the timetable in social security cases and better focus the arguments.

3. Clarification of F. R. Civ. P. 12

The Committee recommends the following Local Rule to clarify application of F. R. Civ. P. 12 be added as part B of Local Rule 11:

Federal Rule of Civil Procedure 12 provides that the United States or an officer or agency thereof shall have 60 days to answer a complaint, cross-claim or counterclaim. This shall include all cases in which a federal employee is sued in an individual (as opposed to official) capacity, such as suits seeking money damages for the employee's alleged constitutional violations, so long as the allegations concern activities related to the individual's employment with the government.

Comment: Rule 12 has caused confusion with respect to the time allowed for answer when a federal officer or employee is sued in an individual capacity.

4. Proposed Local Rule 12: Pre-trial Order and Conference in Less Complex Cases.

The Committee recommends adoption of a new local rule as follows:

RULE NO. 12 TRIAL ORDER IN CASES WHERE PRE-TRIAL CONFERENCE PURSUANT TO RULE 6 IS NOT ORDERED BY THE COURT

A. General

The court will ordinarily issue a trial order at or shortly after the time a case is scheduled for trial if the case has not been scheduled for a full pre-trial conference pursuant to Rule 6. The purpose of the trial order is to require counsel to take certain actions which can be undertaken without undue hardship on counsel or expense to clients, and which will expedite trial of the case and facilitate a settlement discussion with the court a few weeks in advance of the scheduled trial. The settlement aspect of the conference is intended to elicit cooperation of counsel in effecting settlement far enough in advance of trial so the court can

adjust its trial list if the case can be settled, thereby promoting efficient use of the court's time and early trial of cases requiring trial. Counsel are expected to anticipate issuance of the trial order after the completion of the time provided for discovery and incorporate the requirements of the order into their trial preparation so that they will be prepared for a conference scheduled as early as a week after the order is issued.

B. Preparation For and Topics to be Addressed at the Conference

Counsel are directed to confer with opposing counsel with respect to the matters set forth below which require consultation, and to be prepared to advise the court of the following at the conference:

1. Their best estimate of the time required to try the case;

2. The witnesses they intend to call during their case in chief;

3. The issues with respect to which they have been able to reach agreement and those remaining to be resolved at the trial;

4. Whether the parties may by agreement be able to reduce any of the issues remaining in controversy, and whether the court might assist the parties in further reducing the issues to be tried;

5. Whether the witnesses and evidence which are required at trial are available for presentation or use at trial and, if not, what steps have been taken to procure the required evidence (issuance of subpoenas or submission of designated portions of deposition transcripts or videotapes);

6. The status of settlement negotiations, and whether settlement of the action should be explored by the court;

7. Any evidentiary issue or other matter which the party seeks to have the court consider prior to trial. Counsel are expected to raise evidentiary issues which if raised at trial would consume a significant amount of time and disrupt the flow of the trial. Where the issue is novel or complex, the court will then be able to request that memoranda be submitted by the date scheduled for trial if required to resolve the issue.

C. Exhibits and Foundational Issues

All exhibits are to be marked prior to the trial. Prior to trial, counsel are directed to

meet to discuss foundational issues pertaining to such exhibits and to complete the following:

1. Joint marking and preparation of a copy for each party and the court of a set of exhibits which contains those exhibits which each party intends to offer during the direct examination of their witnesses;

2. Any agreements pertaining to the admissibility of evidence.

D. Designated Portions of Deposition Testimony

Counsel are further directed to provide the court and opposing counsel with the designated portions of transcript or videotaped deposition which they intend to offer during their case in chief no later than the date set for the conference. Objections to any of the designated deposition testimony must be made on or before the date the trial begins.

E. Discussion of Settlement and Settlement Authority

Possible settlement of the case shall be explored orally at the conference. Counsel shall be prepared to inform the court at the conference of the extent and nature of prior settlement negotiations, including any reasons for the absence thereof, other than any discussions which took place at an early neutral evaluation. Prior to the conference, counsel for the parties shall discuss with their clients terms of settlement which would be acceptable. Each party shall be represented at such conference by counsel responsible for trial of the case who has authority to discuss settlement of the action. If counsel does not have full authority to settle the case, that authority should be readily available by phone.

F. Additional Requirements

1. In appropriate cases, the court may require that counsel prepare additional materials prior to trial or be prepared to discuss additional matters at the conference.

2. Counsels' attention is directed to the requirements of Rule 7.

Comment: The recommendation is directed primarily to two issues identified by the Committee. First is the tendency of counsel to avoid settlement discussions until trial is imminent and leave the court with no cases to try after the cases on the trial list have settled at the last minute. The conference shortly before trial when counsel are approaching trial readiness should result in some additional settlements, thus complementing the ENE recommendation. But perhaps more importantly, at least some of the settlements should be

effected far enough in advance of trial to allow the court to place additional trial-ready cases on the docket. Second, the court has been reluctant to utilize Rule 6 in ordinary cases because of the time required to prepare for a full pre-trial conference and resultant cost. Yet, the number and length of trials in the district suggest some mechanism to promote settlement and expedite trials in all cases would be helpful. The recommendation attempts to strike the appropriate cost-benefit balance for the typical non-complex case in the district.

The proposed rule was drafted to share the objectives and benefits of the rule with counsel and thereby, we hope, elicit maximum cooperation of counsel. Counsel are directed to anticipate the order and conference so that preparation will not be undertaken at the last minute. This direction should permit a fruitful conference and more expeditious trial of the case.

G. Use of Conference Calls

The court should attempt to use conference calls in scheduling hearings and conferences in situations where counsel would be required to commute an appreciable distance to meet with a judicial officer and the hearing or conference does not require the personal presence of counsel or others. Examples of appropriate use are status conferences and focused discovery disputes. Counsel should be encouraged to request use of a conference call in appropriate circumstances to facilitate the recommendation.

Comment: Parts I.A. (Description of Court) and II.B.2.c. (Effect of Court Resources) describe the frequent long distances of counsel from court. The commuting distances suggested use of conference calls to significantly reduce the costs of litigation.

H. Contributions by Court, Litigants and Attorneys Required by the Recommendations

1. Litigants. The proposal for ENE is directed at clients who entertain unrealistic expectations with respect to their cases and therefore contribute to unnecessary cost and delay. Clients will be required to defray the cost of and attend the evaluation. We anticipate that clients will be prompted to more carefully consider their cases prior to, during and after the evaluation. The Committee will be examining the utility of using other ADR mechanisms which will also increase client participation in case evaluation, including costs of future litigation, and settlement efforts.

2. Attorneys. The Committee has recommended a number of methods to educate the bar with respect to proper procedures and enlist their support for the court's efforts to reduce delay and excessive cost. The ENE recommendation is directed toward requiring attorneys to tier discovery efforts, better examine the costs of litigation, realistically evaluate case value

and commence settlement discussions at a much earlier point in time. The recommendation for pre-trial order and limited conference a few weeks in advance of trial would impose several requirements on counsel designed to effect settlement in advance of the trial date and expedite trial. Counsel will be enlisted to serve as early neutral evaluators and to increase their representation of *pro se* prisoners. The bar relations subcommittee will attempt to actively involve the federal bar generally in the process of delay and cost reduction mandated by the CJRA.

3. Court. Recommendations include a number of suggestions to directly reduce cost to litigants and others to reduce delay and thereby indirectly reduce costs. The court would make typical jury instructions available to counsel and utilize conference calls wherever possible to reduce cost. Several local rule clarifications would obviate the need to litigate unclear issues. The adoption of mandatory ENE will require counsel to better plan discovery and evaluate cases earlier in the process, resulting in earlier disposition of some cases, and elimination of unnecessary discovery. The adoption of the pre-trial order and conference rule would require that the court hold a conference prior to trial in all cases and thereby contribute to settlement and more expeditious trial of cases. The court will utilize the bar meetings to make its expectations clear to counsel and to elicit suggestions for additional court initiatives for reduction of delay and cost and cooperation with current recommendations. The clerk's office will be generating additional statistical information which will better allow the court to monitor delays and provide more useful information from which to identify causes of delay and excessive cost.

Several recommendations would result in more efficient use of the magistrate judge for important referrals and consensual trials. Among these recommendations are increasing the pool of and training counsel for *pro se* prisoners and an additional clerk for the magistrate judge.

IV. PRINCIPLES AND TECHNIQUES WHICH MUST BE CONSIDERED BY THE CJRA COMMITTEE

A. The Six Principles

1. Systematic, differential treatment of civil cases. The district currently routinely refers prisoner petitions and social security appeals to the magistrate judge for specialized treatment. The Committee has in effect recommended differential treatment of cases for final pre-trial proceedings. Complex cases have typically been subject to a plenary pre-trial conference pursuant to Local Rule 6. Recommended Rule 12 would ordinarily require less complex pre-trial proceeding for all cases in which Rule 6 procedure has not been ordered. The distinction drawn is essentially between complex and ordinary cases. However,

definition of "complex" cases in the district is elusive. Thus, the categorization of the case for purposes of final pre-trial procedure is appropriately left to the judge to be made on a case-by-case basis.

The Committee rejected further differential treatment other than ENE because of the perception that the nature of the remaining caseload did not merit such treatment. Current flexibility in tailoring appropriate treatment for the diverse requirements of the cases was deemed desirable. Partly because of the assignment of cases to individual judges and a still manageable caseload, judges are able to identify cases which require status conferences and other particular attention. Unusual discovery disputes or motion activity alert the court to problematic cases. Local Rule 4 requires the judge to examine and approve a discovery schedule in each case. The discovery schedule and any subsequent request for modification thereof also are utilized to monitor potential problems by the district's judges.

2. Early and ongoing judicial control of the pretrial process. Local Rule 4 requires counsel to file a discovery schedule, within thirty days of the answer, which calls for completion of the discovery process within eight months. Summary judgement motions must be filed within thirty days of the date fixed for completion of discovery. All other motions must be filed within the eight month discovery period pursuant to Local Rule 5. The adoption of the ENE requirement will force counsel to consider in more detail how to prioritize discovery and motions. The amended rule anticipates counsel will focus early discovery on matters necessary to complete a general assessment of the merit and value of the case prior to the ENE, which will occur approximately mid-way during the discovery period. In light of existing rules, the remarks in a. above and our recommendation for ENE, the Committee could perceive no merit in requiring further judicial control.

3. Discovery/case management conferences. Rule 4 provides the mechanism for controlling the length of discovery in all cases subject to discovery. The judge must review and approve the discovery schedule. The proposed early neutral evaluation will require parties to focus early discovery on the conference and should provide for, in conjunction with the motion timetable, early resolution of many cases. The parties and evaluator will identify the principal issues in the case and attempt to reach a settlement. The judge will be advised by the evaluator of the status of the issues after the evaluation, but not of the parties' settlement positions. Proposed Rule 12 will insure that a final pre-trial conference will ordinarily be held in all cases. Several of the requirements of Rules 6 and 12 are directed to "managing" an expeditious trial.

4. Cooperative discovery. The Committee declined to recommend adoption of mandatory initial exchange of information along the lines of proposed F.R.Civ.P. 26 at this time. The Committee thought that the proposal would be adopted at the national level. We

were concerned with the Rule 83[37] implications of adopting the requirement locally. The Committee opined that probable adoption of the proposed rule and the requirement of memoranda outlining the parties' cases for ENE would largely meet the principle. Additionally, the Committee has referred the ABOTA guidelines, which call for voluntary exchange of information, to the bar relations subcommittee for consideration in light of local practice.

5. Certification of effort to reach agreement as a prerequisite to discovery motions. Certification is required by Local Rule 4.C.

6. Referral to ADR. Our recommendation requires that most cases be referred to ENE. We have also recommended that the ADR sub-committee continue to work with Professor McCrory, an ADR specialist, to develop further recommendations for appropriate ADR referrals. Our immediate focus has been on ENE as the technique most suitable to the vast majority of the district's cases and the one which holds the greatest promise for requiring the parties to confront case merit and value at an early date, possibly effect settlement and issue narrowing, and reduce unnecessary cost and delay. The Committee anticipates that evaluators will recommend additional voluntary ADR techniques where appropriate if the ENE does not result in settlement.

B. Required Techniques

1. Discovery/case management plan. Counsel must currently present a joint discovery plan to the court for approval or disapproval within thirty days of answer pursuant to Local Rule 4. Local Rule 5 sets out motion time limits. The Committee concluded that the Rules and the ability of the court to intervene when a problematic case arises work well, subject to resource limitations. The Committee thought that the addition of ENE would provide helpful initial focus in many cases. An analysis of the utility of mandatory initial pretrial conferences suggested to the Committee that court and attorney time required did not justify mandating such conferences. Management of the trial is required by Rule 6 and proposed by Rule 12.

2. Representation by attorney with authority to bind party. The ENE recommendation would require the presence of such an attorney. Local Rule 6 governing pre-trial conferences requires the presence of an attorney with power to settle the case or ready access to someone

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[37]F.R. Civ. P. 83 authorizes adoption of local rules "not inconsistent with these rules." In spite of Congress' invitation to consider adoption of mandatory exchange of information in the CJRA, doubt exists as to whether such a requirement is consistent with Rules 26-37. See, e.g., Carl Tobias, Collision Course in Federal Civil Discovery, 145 F.R.D. 139 (1993).

with full authority. Recommended Rule 12 requiring an abbreviated pre-trial conference where Rule 6 is not used has a similar requirement.

3. Party signature on requests for extension of discovery deadlines or trial dates. The Committee has recommended that Local Rule 4 be amended to make it clear that extensions of time for discovery beyond the eight months period will be granted only for good cause shown. The Committee concluded that current measures were adequate to eliminate the avoidable problems posed by requests for extension of time.

4. Early neutral evaluation. The Committee has made a recommendation for ENE.

5. Representatives of parties with settlement power. Local Rule 6 and recommended Rule 12 require that a representative of the client with settlement authority (if the attorney does not have such authority) be present or readily available by phone at final pre-trial conference. Judges will require presence of such a person at other conferences where they feel the presence is appropriate. The recommendation for ENE would ordinarily require the presence of clients and would require that one with settlement authority be available if not present.

V. RECOMMENDATION TO THE COURT

The Committee recommends that the court adopt a plan based upon the recommendations of the Committee set forth in III.A.-G. above. The Committee believes that its report meets the requirements of the CJRA and the guidelines set forth by the Judicial Conference for an advisory committee report and court plan.

CJRA PLAN FOR THE DISTRICT OF VERMONT

Introduction

The court has adopted the recommendations of the Advisory Committee contained in the Civil Justice Expense and Delay Report approved May 11, 1993 with the following exceptions.

1. The court declines to adopt the recommendation which appears at section III.D. of the Report with regard to making jury instructions available to the public and Bar. The court believes that in light of the numerous revisions and frequent changes involving instructions to the jury, the time, effort and costs involved in implementing this recommendation outweigh the anticipated benefit.

2. The court declines to adopt the recommendations with regard to a second clerk for the magistrate judge and a part-time magistrate for the Rutland division which appear at sections III.E.1. and 2. of the Report in light of the Administrative Office guidelines with respect to these positions.

3. The court adopts the recommendation with regard to use of conference calls which appears at section III.G. of the Report as amended to reflect the difficulty of creating an adequate record in some cases when utilizing conference calls.

4. The recommendation for notification of the availability of consensual trial by the magistrate judge which appears at section E.5. of the Report is adopted with a minor clarifying amendment.

5. The court has substituted the actual language of the Early Neutral Evaluation rule by committee, prepared after the report was adopted, for section III.A. of the Report recommending adoption of ENE. Additionally, after reviewing a suggestion made during the commentary period, the court has supplemented paragraph 5 of the ENE Rule to allow for selection of the Early Neutral Evaluator by the parties when so stipulated.

6. The court has modified recommendation F.1.a. amending the discovery schedule provision to conform the language of the amendment to its decision to adopt the ENE requirement as a rule rather than an order, to narrow the time frame during which the evaluation must be held, and to clarify the language governing counsels' obligation to plan for ENE.

7. The portion of recommendation F.4. dealing with settlement authority at conferences pursuant to trial order has been modified to reflect the practice of the court.

8. The plan includes the entire text of the local rule section amended by adoption of the plan. Deleted material is stricken. New material is high-lighted for amendments of existing rules but not for entirely new sections or rules.

The plan does not include the Committee's comments to the recommendations and the text of sections III.H and IV included in the report. The latter sections describe contributions required by the plan of court, litigants and attorneys, and principles and techniques suggested by the Civil Justice Reform Act considered by the court respectively. The recommendations have been reorganized to facilitate amendment of local rules.

VI. Effective Date

The effective date of the local rule amendments is December 1, 1993, except for Rule 12 which applies to all cases filed on or after July 1, 1994. The court has taken steps to implement Local Rule 12 governing Early Neutral Evaluation. The list of evaluators has been compiled and the ADR subcommittee has begun work on the required manuals for evaluators and attorneys, as well as the design of training program for court staff, evaluators and attorneys.

All recommendations which do not require amendment of the local rules will be implemented on December 1, 1993, or as soon as practical thereafter.

VII. Measures Which Do Not Require Amendments to Local Rules of Procedure

A. Appointment of a Data Subcommittee; Periodic Reports Including ICMS Reports

1. Courtroom deputies should fully utilize the capabilities of the automated system to monitor motions filed. Each courtroom deputy should generate at least monthly reports of pending motions and review the printout to insure prompt referral of matters to the magistrate judge, scheduling of motions and decisions on motions submitted to their judge.

2. The District should develop appropriate caseload data to enable the court and community to better identify possible sources and causes of unnecessary delay and cost and implement its recommendations for ADR, especially ENE.

3. The clerk's office should generate the two reports designed by the subcommittee in collaboration with the clerk's office. The first is the "Quarterly Executive Summary of the District Court Cases" which provides data relative to pending caseload, pending motions, age and disposition time of motions, age and disposition time of cases, trial hours, civil cases pending trial and their age, and age of cases tried. The second is the yearly report which provides mean disposition time for "procedural progress at termination" based on "nature of suit." These reports should be made available to court personnel and the Committee on a

regular basis.

4. The Committee recommends that the Administrative Office more carefully monitor the reporting of caseload data by the districts to insure that the data is in fact uniformly reported. The Committee has been unable to develop meaningful data comparing its caseload processing performance to that of other districts because of a well-grounded perception that other districts report data in a favorable light.

5. The data subcommittee should work with the clerk's office to develop a mechanism to monitor the effectiveness of ENE in meeting the objectives established by the Committee.

B. Bar Education and Meetings

1. The district should establish a mechanism with which the court and Committee can work with members of the district bar to develop and nurture a local legal culture that creates and fulfills the expectations of all participants (judges, lawyers, litigants and the public) for the efficient, effective resolution of disputes.

2. For the duration of the CJRA Committee, the mechanism should be the bar relations subcommittee of the Committee. The subcommittee should arrange an annual conference of the bar to, inter alia:

a. discuss problems in the district and solicit recommendations for more efficient, effective resolution of cases;

b. discuss CJRA efforts and the Committee's recommendations to reduce cost and delay;

c. conduct continuing legal education seminars with respect to changes in federal practice and procedure, with a focus on local practice;

d. encourage attorneys to undertake representation of *pro se* plaintiffs and arrange for training programs and materials to assist those willing to volunteer; and

e. enlist the cooperation of the bar in the implementation of the district's ADR program.

3. The subcommittee should work with the judges and clerk's office to implement the recommendation that copies of jury instructions be made available to attorneys at the clerk's office. The subcommittee should work with the bar to devise other possible methods of disseminating commonly used instructions.

4. The subcommittee will work with the bar to develop cost containment guidelines for the district modeled on the American Board of Trial Attorneys guidelines for consideration by the full Committee by the end of 1993.

C. Use of Conference Calls

The court should attempt to use conference calls for hearings and conferences in situations where counsel would be required to commute an appreciable distance to meet with a judicial officer, the hearing or conference does not require the personal presence of counsel and others, and the judicial officer who is scheduled to conduct the hearing or conference is confident that any record required can adequately reflect the remarks of counsel and the judicial officer. Examples of appropriate use are status conferences and focused discovery disputes. Counsel should be encouraged to request use of a conference call in appropriate circumstances, mindful of the need to identify themselves for the reporter when on the record and to not speak while another participant is speaking. The judicial officer may terminate a conference call and reschedule the hearing or conference at the court when appropriate.

D. Magistrate Judge Utilization

1. The clerk's office should notify the parties in social security cases, at the time the Government files its answer or other motion, encouraging them to consent to a decision by the magistrate judge. A copy of a model consent form should be sent with the letter.

2. In the interim period before the bar relations subcommittee is able to solicit assistance from the bar for *pro se* plaintiffs, the magistrate judge should send a letter to members of the district bar asking their assistance in providing representation to *pro se* prisoners in appropriate cases. Positive responses would be used to update the list of attorneys willing to assist *pro se* prisoner plaintiffs. The magistrate judge should assemble a modest library of materials devoted to representation of *pro se* prisoners and inform members of the bar of the materials in the solicitation letter.

3. The clerk's office should notify the parties, on the date set in the discovery order for completion of discovery, that they can request a pretrial conference with the magistrate judge pursuant to Local Rule 6 and that they can consent to a trial before the magistrate judge at a time certain.

4. The Committee should undertake further efforts to alleviate the burden caused by *pro se* prisoner petitions and the lack of an adequate approved state grievance procedure. Specifically, the magistrate judge and reporter should continue their efforts to cooperate with the Department of Corrections in drafting an adequate procedure. Second, the reporter, in consultation with the magistrate judge, should prepare a report on whether use of a model discovery form in *pro se* cases in other districts has been successful in obtaining information

necessary to process the petitions expeditiously. If other districts' experience has proven successful, the reporter should draft a proposed form or forms for use by the district.

VIII. Measures Which Require Amendments of Existing Local Rules

A. Amend Rule 4.A.I. as follows:

A. Discovery Schedule

I. Within thirty days from the date of filing answer (last answer in multiple defendant cases), counsel for the parties then before the court shall jointly prepare and file a single schedule providing for the completion of discovery no later than eight months from the date on which answer has been filed. ~~In those cases in which, due to their complexity or to other extraordinary circumstances, additional time for discovery may be needed, counsel shall apply to the court within thirty days from the date of filing answer for an enlargement of the discovery period. The court will schedule a hearing on said application to determine the amount of additional time, if any, which will be allowed.~~ Counsel is directed to include in the schedule a time to conduct early neutral evaluation (mid-way through the discovery period) in conformity with Rule 12 in all cases subject to early neutral evaluation. Discovery schedules shall provide specific dates by which specific discovery items are to be completed. Counsel shall strictly comply with the terms of this section. Failure to do so shall constitute a waiver of the need for discovery and the case will be scheduled for trial when reached in the ordinary course of the court's business.

The discovery schedule filed by the parties when approved by the court shall be the scheduling order provided by Rule 16(b) of the Federal Rules of Civil Procedure with respect to the time limits for the completion of discovery, and for filing and hearing motions, including motions to join other parties and to amend the pleadings pursuant to Local Rule 5(B). In cases where additional time may be required for discovery, due to case complexity or other extraordinary circumstances, counsel may apply for an extension of time for good cause shown. Absent exceptional circumstances, such request shall be made prior to the expiration of the date set for completion of discovery.

B. Amend Rule 5.A.II as follows:

A. Written Motions and Arguments

II. ~~Any party desiring to oppose the granting of such motion shall file a brief or memorandum in opposition thereto, not later than ten days after the date of service of such motion and memorandum or brief, unless such time is extended by order of the judge to whom the case is assigned.~~ A party desiring to oppose the granting of any motion other than a summary judgment motion shall file a brief or memorandum in opposition thereto not later

than ten days after the service of such motion. The opposing party shall file a brief or memorandum in opposition to a motion for summary judgment not later than thirty days after service of the motion. The moving party shall file a reply, if any, within ten days of service of the opponent's papers. Such times may be extended by order of the judge to whom the case is assigned.

C. Amend Rule 5.D. as follows:

D. Motions in Appeals from Social Security Judgments

Within ~~ninety~~ thirty days from the date of the filing of the defendant's answer and certified copy of the transcript of the record in Social Security appeals, the plaintiff shall file ~~their~~ its motions for ~~disposition by the court or other relief and supporting memoranda.~~ summary judgment and supporting memoranda. Within thirty days from the date of service of plaintiff's motion, defendant shall file its response and any cross-motion with supporting memoranda. Plaintiff shall file any reply within ten days of service of defendant's papers.

E. Amend Rule 7.A. as follows:

Rule No. 7. Requests for Jury Instruction and Requests to Charge

A. Jury Cases. ~~Requests for jury instructions must be filed no later than fourteen days from the date when counsel are first notified that the case has been placed on the master calendar for trial by jury.~~ Requests for jury instructions must be filed no later than seven days prior to the date set for trial of the case. The failure to file requests for instructions as provided shall, except in exceptional circumstances, be deemed a waiver of a party's need or desire to file such requests.

IX. Measures Which Require Adding an Entirely New Provision to the Local Rules

A. Adopt a new section B to existing Rule 11 and renumber existing Rule 11 as Rule 13.

B. Federal Rule of Civil Procedure 12 provides that the United States or an officer or agency thereof shall have 60 days to answer a complaint, cross-claim or counterclaim. This shall include all cases in which a federal employee is sued in an individual (as opposed to official) capacity, such as suits seeking money damages for the employee's alleged constitutional violations, so long as the allegations concern activities related to the individual's employment with the government.

B. Adopt new Rule 11 as follows:

Rule No. 11 Trial Order in Cases Where Pre-Trial Conference Pursuant to Rule 6 is Not Ordered by the Court

A. General

The court will ordinarily issue a trial order at or shortly after the time a case is scheduled for trial if the case has not been scheduled for a full pre-trial conference pursuant to Rule 6. The purpose of the trial order is to require counsel to take certain actions which can be undertaken without undue hardship on counsel or expense to clients, and which will expedite trial of the case and facilitate a settlement discussion with the court a few weeks in advance of the scheduled trial. The settlement aspect of the conference is intended to elicit cooperation of counsel in effecting settlement far enough in advance of trial so the court can adjust its trial list if the case can be settled, thereby promoting efficient use of the court's time and early trial of cases requiring trial. Counsel are expected to anticipate issuance of the trial order after the completion of the time provided for discovery and incorporate the requirements of the order into their trial preparation so that they will be prepared for a conference scheduled as early as a week after the order is issued.

B. Preparation For and Topics to be Addressed at the Conference

Counsel are directed to confer with opposing counsel with respect to the matters set forth below which require consultation, and to be prepared to advise the court of the following at the conference:

1. Their best estimate of the time required to try the case;

2. The witnesses they intend to call during their case in chief;

3. The issues with respect to which they have been able to reach agreement and those remaining to be resolved at the trial;

4. Whether the parties may by agreement be able to reduce any of the issues remaining in controversy, and whether the court might assist the parties in further reducing the issues to be tried;

5. Whether the witnesses and evidence which are required at trial are available for presentation or use at trial and, if not, what steps have been taken to procure the required evidence (issuance of subpoenas or submission of designated portions of deposition transcripts or videotapes);

6. The status of settlement negotiations, and whether settlement of the action should be explored by the court;

7. Any evidentiary issue or other matter which the party seeks to have the court consider prior to trial. Counsel are expected to raise evidentiary issues which if raised at trial would consume a significant amount of time and disrupt the flow of the trial. Where the issue is novel or complex, the court will then be able to request that memoranda be submitted by the date scheduled for trial if required to resolve the issue.

C. Exhibits and Foundational Issues

All exhibits are to be marked prior to the trial. Prior to trial, counsel are directed to meet to discuss foundational issues pertaining to such exhibits and to complete the following:

1. Joint marking and preparation of a copy for each party and the court of a set of exhibits which contains those exhibits which each party intends to offer during the direct examination of their witnesses;

2. Any agreements pertaining to the admissibility of evidence.

D. Designated Portions of Deposition Testimony

Counsel are further directed to provide the court and opposing counsel with the designated portions of transcript or videotaped deposition which they intend to offer during their case in chief no later than the date set for the conference. Objections to any of the designated deposition testimony must be made on or before the date the trial begins.

E. Discussion of Settlement and Settlement Authority

Possible settlement of the case shall be explored orally at the conference. Counsel shall be prepared to inform the court at the conference of the extent and nature of prior settlement negotiations, including any reasons for the absence thereof, other than any discussions which took place at an early neutral evaluation. Prior to the conference, counsel for the parties shall discuss with their clients terms of settlement which would be acceptable. Each party shall be represented at such conference by counsel responsible for trial of the case. Each party shall be present at the conference, or have a representative with settlement authority present or available by telephone for consultation with counsel during the conference.

F. Additional Requirements

1. In appropriate cases, the court may require that counsel prepare additional materials prior to trial or be prepared to discuss additional matters at the conference.

2. Counsels' attention is directed to the requirements of Rule 7.

G. Adopt new Rule 12 as follows:

Rule No. 12 Early Neutral Evaluation

1. The ENE Process and Goals

Early in the processing of a case, after an opportunity for limited discovery, the litigants shall meet with a neutral evaluator, who is knowledgeable in the subject matter of the litigation, to discuss all aspects of the case. The purpose for this early neutral evaluation (ENE) procedure is to reduce the cost and duration of litigation by providing an early opportunity for realistic settlement negotiations or, in the absence of settlement, narrowing issues and structuring discovery and trial preparation to avoid unnecessary delay and expenditure of resources by the parties and the court.

2. Cases Subject to ENE

a. Civil cases in the following categories, as designated under "nature of suit" in the Civil Cover Sheet, shall be subject to the ENE procedure set forth in this order:

CONTRACT: 110 (Insurance), 120 (Marine), 140 (Negotiable Instrument), 150 (Recovery of Overpayment & Enforcement of Judgement), 160 (Stockholders Suit), 190 (Other Contract) and 195 (Contract Product Liability)

REAL PROPERTY: 230 (Rent Lease & Ejectment), 240 (Torts to Land), 245 (Tort Product Liability) and 290 (All Other Real Property)

TORTS: 310-368 (all Personal Injury cases) and 370-385 (all Personal Property cases)

CIVIL RIGHTS: 442 (Employment) and 440 (Other Civil Rights)

LABOR: 720 (Labor/Mgmt Relations), 740 (Railway Labor Act), 790 (Other Labor Litigation) and 791 (Empl. Ret. Inc. Security Act)

PROPERTY RIGHTS: 820 (Copyrights), 830 (Patent) and 840 (Trademark)

OTHER STATUTES: 410 (Antitrust), 430 (Banks and Banking), 470 (Racketeer Influenced and Corrupt Organizations), 850 (Securities/Commodities/Exchange), 891 (Agricultural Acts), 893

(Environmental Matters) and 900 (Appeal of Fee Determination Under Equal Access to Justice)

b. A case included in a category listed in Section 2.a. may be excused from ENE only by order of the Court upon a showing of good cause.

c. Categories of cases subject to this rule are subject to change pursuant to order of the court.

3. ENE Administration

a. A member of the court staff shall be appointed ENE Administrator, to oversee the ENE program and perform the duties specified under this rule.

b. The Alternative Dispute Resolution Subcommittee of the Civil Justice Reform Act Advisory Committee (ADR Subcommittee) shall assist with the selection of neutral evaluators, and in the evaluation and oversight of the program.

4. Timing of ENE; Inclusion in Discovery Schedule

The ENE session shall be scheduled by the parties at or near the midpoint of the eight month discovery period and shall be included in the discovery schedule required under Local Rule No. 4. In selecting a date for the session, the parties shall consult with the evaluator designated for the case pursuant to Section 6.a., to ensure his/her availability, and the ENE Administrator. The parties should plan discovery to ensure that they are prepared for serious and productive settlement negotiations and to otherwise facilitate the goals of ENE. The ENE session shall be held on the date scheduled unless delayed or excused by order of the Court upon a showing of good cause.

5. Neutral Evaluators; Roster and Compensation

a. The Court shall maintain a roster of neutral evaluators who shall be appointed with the advice of the ADR Subcommittee. To be eligible for the roster a person should be:

1) an attorney admitted to practice for not less than five years, with significant trial experience and substantive expertise that will serve the objectives of the ENE program; or

2) a non-attorney, or an attorney admitted to practice for less than five

years, who has expertise in a substantive or legal area that will serve the objectives of the ENE program.

b. Evaluators shall be paid $500 per case evaluated, the cost to be shared equally by the parties. This fee assumes an ENE session of approximately half a day, related preparation and submission of an evaluator's report. If significantly more time is required for the ENE session, an additional session(s) is required or the parties request the evaluator to prepare a formal evaluation, the parties and the evaluator shall agree upon any additional compensation.

c. Early Neutral Evaluation by Stipulation. Nothing herein shall prevent all of the parties from agreeing by stipulation to early neutral evaluation performed by a person of their choosing, for such fee as the parties may agree to pay the evaluator. ENE by Stipulation shall be permitted if, no later than the date on which the parties are required to report their selection of an evaluator to the ENE administrator, they file with the ENE administrator a Stipulation, signed by all parties, which contains the following information:

1) the name and mailing address of the evaluator;

2) the fee arrangement with the evaluator, clearly setting forth each parties share of the fees;

3) the agreement of each party to the litigation to participate in the evaluation procedure; and

4) the agreement of the evaluator to perform early neutral evaluation in accordance with the rules of the court, including the filing of an ENE report with the court on a date set forth in the Stipulation which date shall be no later than 60 days after the date the Stipulation is filed.

d. In the event that the court's ENE administrator does not receive an ENE report from the evaluator within the time set forth on the Stipulation, the ENE administrator shall schedule early neutral evaluation in accordance with Rule 12, paragraph 6.

6. Selection of Neutral Evaluator

a. After the answer in a case is filed (the last answer in a multiple defendant case), the ENE Administrator shall send to the parties a list of potential evaluators from the Court's roster. The number of evaluators on the list shall be one more than the number of "sides" in the litigation. For purposes of this

order, all plaintiffs are one side, all defendants are one side, and all third-party defendants are one side. The parties shall have ten days from the date of the correspondence containing the list to select an evaluator and report their selection, in writing, to the ENE Administrator. If the parties fail to agree on an evaluator, each "side" may, but need not, strike the name of one potential evaluator, notifying the ENE Administrator, in writing, of the strike within ten days of the date of the correspondence containing the list. The ENE Administrator shall assign to the case the evaluator selected by the parties or, in the absence of agreement, an evaluator whose name has not been stricken and promptly notify the parties and the evaluator of the designation. The evaluator selection process should be completed expeditiously to enable the parties to consult with the evaluator in scheduling the ENE session for inclusion in the discovery schedule required by Local Rule No. 4.

b. No person shall serve as a neutral evaluator for a case in which any of the circumstances specified in 28 USC Section 455 exist, unless there is a waiver by all parties. An evaluator shall promptly disclose disqualifying circumstances to the ENE Administrator. A party who believes that a potential or assigned evaluator has a conflict of interest shall bring this concern to the attention of the ENE Administrator within five days of learning of the source of the possible conflict or shall be deemed to have waived objection.

7. Attendance at ENE Sessions

a. The parties themselves shall attend the ENE session, except when excused under Section 7.c. This requirement reflects the Court's view that the main objectives of ENE are to afford litigants an opportunity to articulate their positions, to hear first hand their opponents views on the matters in dispute, to hear a neutral assessment of the strengths and weaknesses of each party's case and to foster an environment for serious and productive settlement efforts.

b. When a party is not a natural person (for example, a corporation), a person (other than outside counsel) who has settlement authority and authority to enter stipulations on behalf of the party shall attend. When a party is the United States Government, or an agency or unit thereof, this requirement is satisfied by the attendance of counsel from the United States Attorney's office who has settlement authority and authority to enter stipulations.

c. In cases involving insurance carriers, representatives of the insurance companies with settlement authority shall attend the ENE session. If an insurance carrier has exclusive settlement authority, the insured party need not attend.

d. An attorney for each party who has primary responsibility for handling the trial of the case shall attend the ENE session.

e. A party or attorney will be excused from attending an ENE session only with approval of the Court upon a showing of unreasonable hardship. A person who is excused shall be available by telephone during the session and shall designate a person who is familiar with the case to attend in his/her place. A request to be excused shall be submitted to the Court, in writing, not less than fifteen calendar days before the date set for the session and shall identify the substitute who will attend the session and describe his/her familiarity with the case. The designation of a substitute shall be subject to Court approval.

8. Evaluation Statements

a. No later than ten calendar days before the ENE session, each party shall submit directly to the evaluator, and shall serve on all parties, a written evaluation statement not to exceed ten pages (excluding exhibits and attachments). The statements shall:

1) give a brief statement of facts;

2) identify the legal and factual issues in dispute and the submitting party's positions relating to those issues;

3) address whether there are legal or factual issues the early resolution of which might facilitate early settlement or reduce the scope of the dispute;

4) identify the attorney who will represent the party at the ENE session; and

5) identify the person(s), in addition to counsel, who will attend the ENE session as the party's representative with decision making authority.

Other matters that will assist the evaluator may be included. Parties shall attach to their statements copies of key documents out of which the case arose (e.g., a contract) or other materials that will assist the evaluator and advance the purposes of the ENE session (e.g., medical reports, photographs).

b. Written evaluation statements are solely to facilitate the ENE and shall not be filed with the Court or given to the presiding judge.

9. Procedures at the ENE Session

a. The evaluator shall have broad discretion in structuring the ENE session. The session shall be informal and the rules of evidence shall not apply. There shall be no formal examination or cross-examination of witnesses.

b. The evaluator shall:

1) permit each party to make an oral presentation of its position;

2) help the parties to identify areas of agreement and enter a stipulation, where feasible;

3) assess the strengths and weaknesses of the parties' contentions and evidence and explain the reasons for the assessments;

4) explore the possibility of settlement using private caucusing and mediation techniques;

5) estimate, where feasible, the likelihood of liability and the range of damages.

c. If negotiation and mediation do not result in settlement, the evaluator shall:

1) discuss with the parties follow-up measures that will contribute to efficient case development or future settlement (e.g., an additional ENE session, formal evaluation, other ADR procedures); and

2) help the parties develop an information sharing plan or discovery plan to expedite settlement discussions or position the case for efficient and timely disposition by other means.

d. The parties shall be prepared to participate fully in the procedures outlined in Sections 9. a. through 9. c. above and to discuss realistic estimates of case value and cost and delay that will result if settlement efforts are not successful. The costs to be addressed shall include, but are not limited to, those for additional discovery, expert witnesses, attorney fees and other costs associated with preparation for trial and actual trial.

10. Evaluator's Report

a. Within fifteen calendar days after the ENE session, the evaluator shall file

with the Court, and send to the parties, a report that includes:

1) the date on which the session was held, including the starting and finishing times;

2) a list of the names and addresses of the persons attending, showing their role in the session and specifically identifying the representative of each party who had decision making authority;

3) a summary of any substitute arrangement made regarding attendance at the session;

4) the date of receipt of each parties written evaluation statement;

5) notations showing whether each party did or did not make an oral presentation of its position;

6) the results of the session, i.e., stating whether full or partial settlement was reached and, where appropriate, describing:

i. any stipulation entered to narrow the scope of the dispute; and

ii. any agreement made to limit discovery, facilitate future settlement or otherwise reduce cost and delay associated with trial preparation; (including the scheduling of an additional ENE session).

b. The report shall not disclose:

1) the evaluator's assessment of any aspect of the case; or

2) substantive matters discussed during the session, except as is required to report information described in Section 10. a. 6. above.

11. Confidentiality

a. All written and oral communications made in connection with or during the ENE process shall be confidential. The ENE process shall be treated as settlement negotiations under Federal Rule of Evidence 408.

b. This section shall not apply to any stipulation or agreement to narrow the

scope of the dispute, facilitate future settlement or otherwise reduce cost and delay that was approved by all parties.

c. Parties, counsel, insurance representatives and evaluators may respond to inquires from persons authorized by the Court to monitor or evaluate the ENE program. The sources of data and opinions collected for this purpose shall be kept confidential.

12. Effective Date

This rule shall apply to all cases not subject to exemption under section 2 filed in the district on or after July 1, 1994.