CIVIL JUSTICE REFORM ACT ADVISORY GROUP
FOR
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AUGUST 30, 1996

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Francis P. Newell
Arthur G. Raynes
Robert Robinson
Richard Rosenbleeth
Daniel J. Ryan
John Shellenberger
Michael R. Stiles
J. Clayton Undercofler
Lloyd R. Ziff

Ex-Officio Members
Honorable Edward N. Cahn
Honorable Louis C. Bechtle
Honorable Robert F. Kelly
Honorable James R. Melinson
Michael E. Kunz, Clerk of Court

Reporter
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I am pleased to transmit to you this Report of the Civil Justice Reform Act Advisory Group of the United States District Court for the Eastern District of Pennsylvania, a metropolitan pilot court under the Civil Justice Reform Act of 1990. This is the Advisory Group's third Annual Report.

The Advisory Group is a prototype of the litigants and practitioners in this Court, with a balance of the total range of affected interests in the complex litigation that comes before the Court. Its members were selected because all of them are experienced in their fields and committed to the mission set forth in this legislation.

The Advisory Group is obligated by statute to determine the condition of the criminal and civil dockets, identify the principal causes of cost and delay, and examine the extent to which costs and delays could be reduced. Information was solicited from the Office of the Clerk, litigants, government agencies and universities, public interest groups, and the Judges of this Court, who gave generously of their time and expertise.

In making sense of this mountain of raw data, the Advisory Group must pay tribute to Professor A. Leo Levin of the University of Pennsylvania Law School, whose assistance was invaluable. In addition, we thank Dr. Abba Krieger, Professor of Statistics at the Wharton School of the University of Pennsylvania, who devised a questionnaire designed to assess the impact of the Plan's provisions on Self-Executing Disclosure. A thorough analysis of the impact of Self-Executing Disclosure is attached to the Report as an appendix.

The Annual Report concludes that this court's Civil Justice Expense and Delay Reduction Plan has been successful, helping to make the Eastern District among the most efficient large metropolitan courts in the federal system. We believe that this intensive effort, distilled through the collective experience that all of us have brought to this mission, represents a fair and objective consensus of the Advisory Group on recommendations that can serve as a model for all federal courts.

We invite your comments on this material, and I request that you forward them to me as we continue to perfect this exciting new departure point for profound and positive improvements to the administration of justice in federal courts.

We would also like to thank Michael E. Kunz, Clerk of the United States District Court for the Eastern District of Pennsylvania. The statistics, informed opinions and logistical support that he and his staff provided were invaluable. If you would like additional copies of the report, please address your request to Mr. Kunz at the U.S. Courthouse, 601 Market Street, Room 2609, Philadelphia, PA 19106.

ROBERT M. LANDIS
Chairman

Annual Report of the Advisory Group of the United States District Court for the Eastern District of Pennsylvania

appointed under the

Civil Justice Reform Act of 1990

June 1996

Advisory Group

Robert M. Landis, *Chairman*

Members

Alice W. Ballard
Michael Churchill
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A. Leo Levin, *REPORTER*

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ANNUAL REPORT

INTRODUCTION

The Civil Justice Reform Act of 1990 requires each United States district court that has promulgated a civil justice delay and reduction plan to reassess the state of its docket at regular intervals, in consultation with its Advisory Group, for the purpose of determining whether further action is needed - all in the interest of reducing "cost and delay."[1] This is the third report in that series.

It is appropriate to take this occasion to report, in addition, on developments affecting the timetable imposed by the Congress on the courts, changes in the personnel of the Advisory Group, and a major study of the operation of a highly controversial provision in the court's plan, the one governing self-executing disclosure, conducted by the Advisory Group in the discharge of its statutory obligation.

We begin with the state of the docket.

I.
THE STATE OF THE DOCKET

From the perspective of the litigants and of the bar, two measures of the state of the docket are of paramount importance. The first is the time it ordinarily takes to dispose of civil litigation, and the second, because some cases await disposition for years rather than months, is the extent to which cases remain in court unresolved for more than three years. In more technical terms, the first concern is reflected in the median time from filing to disposition and, in addition, the median time from filing to trial. The second is the number and percentage of civil cases over three years old.

[1] 28 U.S.C. §475.

For the year ended September 30, 1995, the median time from the filing of civil cases until disposition was six months, speediest in the circuit and ranking number seven of the 94 United States district courts in the country.[2] This figure includes, of course, cases disposed of on motion and by settlement. For those cases that are not so disposed of, the median time from filing until trial is of central importance. In the Eastern District this figure is 12 months, the best in the circuit, fully one-third less than the national median (18 months), and ranking the court ninth in the country.

The percentage of civil cases over three years old is a minuscule 1.1%, the best record in the circuit and the sixth best in the country. The national average is more than five times as large (5.6%). Bench trials awaiting decision longer than six months are not a problem. At the time of our last annual report there was one such case; currently there are none. The number of motions awaiting decision for more than 180 days did increase. There were 63 at the last reporting period. However, with the number hovering around the 300 mark in other metropolitan courts, this figure, while clearly a matter of concern, should be put in perspective.

We do not detail the data with respect to the court's record in dealing simultaneously with a heavy criminal caseload.[3] Nor does this record result from a wide discrepancy in available judicial resources.[4] On the contrary, a heavy volume of cases continue to be assigned to this district by the Judicial Panel on Multidistrict Litigation,[5] and for statistical purposes relevant to this analysis they are credited to the district in which they were filed rather than the district to which they are transferred.[6] The most familiar of these are the asbestos cases, but from January, 1995, through

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[2] Administrative Office of the U.S. Courts, Federal Court Management Statistics (1995).

[3] Median time from filing to disposition for criminal felony cases was 7.7 months, a little over one month longer than the national median. Id.

[4] Weighted caseload per judgeship for the same year, a measure that adjusts for the burdens to be anticipated in dealing with a multi-party antitrust case compared to those in an action to recover on a defaulted government loan, was 405 for this district compared to 448 nationally. Thus, the former was slightly over 90% of the latter.

[5] See 28 U.S.C. §1407 which provides for such transfer when civil actions with common questions of fact are pending in different districts. Transfer is for purpose of consolidated pretrial proceedings. See 28 U.S.C. §1407(a). In practice, however, many of these are finally resolved in the transferee district.

[6] Similarly, they are not credited to the transferee district in ascertaining weighted caseload, but they are considered in connection with dispositions. This further reflects negatively on the

April, 1996, this district was assigned over 1,700 non-asbestos cases, most in what is known as the Orthopedic Bone Screw Products Liability Litigation, as well as a substantial number of silicone gel breast implant cases.

Particularly worthy of mention is the fact that in category after category the data here reported represent an improvement over the record of the court as reported in our most recent annual report.[7] The differences are, as would be expected, relatively small, but the trend is clear: the situation revealed by the statistics, impressive as it has been in recent years, is still improving.

In view of this record, it is entirely appropriate to express appreciation for this achievement to the judges of the court, the lawyers who practice before them, and the able members of the court staff who support them.

The contribution of court-annexed arbitration, mandatory but non-binding, need not be rehearsed once more. Suffice it to note that the contribution remains significant. In calendar year 1995, 16% of the total number of civil cases filed were referred to arbitration.

Included as attachments to this report, are tables, prepared by the Administrative Office of the United States Courts, charting relevant data over a ten-year period and affording an easily

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transferee district because the interval between original filing (in the transferor district) and disposition (in the transferee district) tends to increase the median in this category since, almost by definition, these are complicated cases.

[7] The Advisory Group's most recent annual report, issued in December, 1994, was based on published data for the year ending September, 1993, the most recent then available. The median from filing to disposition in the Eastern District at that time was eight months, compared to six months for the year ending September 30, 1995, reported in the text.

The median time from filing to trial, which was 12 months in 1995, was not reported previously. Instead, the figure reported was the median time from at issue to trial, which, as noted in our last annual report, was also 12 months. A comparison of the two figures clearly reflects improvement in case processing in this district since the period from filing to at issue is never zero, and is often substantial.

It may be observed, parenthetically, that Rule 4(m) provides that service is timely if made within 120 days of the filing of the complaint. Moreover, by its own terms it allows for extensions. This standard is far more lenient than the governing standard as recently as 15 years ago, a change that has been viewed as facilitating access to the courts, but one which obviously also involves extending the duration of some cases.

The percentage of the caseload that was over three years old dropped from 1.5% to 1.1%.

understood visual representation of the position of the Eastern District among other district courts in the Third Circuit and in the country.

II.

THE NATIONAL TIMETABLE

As originally conceived, the Civil Justice Reform Act created a three-year experiment in which every district court was to participate, but in which demonstration districts and pilot courts had a special role. The three-year experiment was to be followed by an appropriate period during which "an independent organization with expertise in the area of federal court management"[8] would complete its evaluation of the experience of the pilot courts and submit a report to the Judicial Conference of the United States. That body was charged with submitting its report to the Congress "Not later than December 31, 1995."[9]

The schedule was unrealistic; among other things, many, if not most, of the cases most in need of study, those that tend to linger in court, would not have been terminated. The Rand Civil Justice Institute, the independent organization that was selected, asked for more time, and the Congress extended the deadline by a year.[10]

A parallel study of demonstration districts was being conducted by the Federal Judicial Center, but through an oversight the legislation failed to extend the deadline for that study. To correct the oversight, and to avoid a disparity in deadlines for complimentary studies, Congress enacted corrective legislation in the Civil Justice Reform Act Amendment of 1995.[11]

Based on information currently available, Rand will complete its report during the current calendar year and submit it to the Judicial Conference before the end of December, 1996.

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[8] P.L. 101-650 §105 (c)(1).

[9] Id.

[10] For discussion and citation of authorities, both for this amendment and one that followed a year later, see Margaret L. Sanner and Carl Tobias, The Civil Justice Reform Act Amendment Act of 1995, 164 F.R.D. 577 (1996).

[11] Id.

Precisely how soon thereafter the Judicial Conference will be able to submit its report to the Congress remains problematic, and a further legislative extension is under discussion.

III.

SELF-EXECUTING DISCLOSURE

The most controversial provision of the Plan recommended by the Advisory Group and adopted by the court was the requirement that litigants make disclosure of specified information without awaiting a discovery request by the opposing party.[12] Those who supported such a provision envisioned increased efficiency, a reduction in the number of technical objections to discovery requests, and even the possibility of reducing acrimony and fostering a spirit of cooperation in civil litigation. Those opposed thought the rule caused additional delay and constituted a serious attack on the adversary system.

To learn more about how self-executing disclosure was working in fact in this district,[13] the Advisory Group, with the able assistance of Professor Abba Krieger, Professor of Statistics at the Wharton School of the University of Pennsylvania, surveyed 4,000 attorneys of record in cases subject to the rule and received and analyzed over 1,000 usable responses. In addition, the

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[12] See § 4.01 of the Civil Justice Expense and Delay Reduction Plan. The full text is set forth in Attachment 1 of the full report of the survey, which appears at Appendix A. That report contains a more elaborate statement, with citation of authorities, of the purpose behind self-executing disclosure and of Federal Rule of Civil Procedure 26(a)(1).

[13] Varying standards defining precisely what has to be disclosed, make a significant difference in the implementation of the rule. The national rule, as finally promulgated, has been the object of particular criticism. A knowledgeable observer of federal civil litigation put it this way in the course of an Advisory Group discussion: "I think certainly everyone I've talked to agrees that what they put in [F.R.C.P.] 26(a) is really an abomination. The criterion for what has to be disclosed is just impossible, in my judgment, and completely inconsistent with the notice pleading philosophy of the Federal Rules of Civil Procedure." (tr. of meeting of Nov. 13, 1995, p. 10).

Of course, the national rule, by its terms, really offered each district court an option, allowing it to accept, modify, or reject its provisions. The rule in operation in this district sets forth a very different standard for disclosure and the success or lack of success of the one is not necessarily applicable to the other.

It should also be noted that a subcommittee charged with considering whether the requirement of disclosure should be continued by the court considered whether this district should adopt the national standard, i.e. the formulation of F. R. C. P. 26(a). It recommended against that course and this recommendation was accepted by the Advisory Group.

Advisory Group sought the views of 34 judicial officers, virtually each one of whom had substantial experience with cases to which the rule applied.

The complete report of the findings of that survey, as well as supporting material on methodology, is to be found in Appendix A. Only a brief account of the data relevant to an understanding of the recommendation of the Advisory Group to the court and the action the court took thereafter, is included here.

On the major premise question of whether some rule mandating self-executing disclosure should remain in effect, of the 1,000-plus attorneys expressing their views, over 60% responded in the affirmative.[14] Among the 34 judicial officers surveyed, 33 of whom had experience with more than 20 cases subject to the rule, an even greater majority -- 85% -- favored retention of some rule: 29 voted yes, as against four in the negative and one not voting.

This does not reflect an uncritical vote in favor of maintaining the status quo. Focusing on suggestions that had emerged from earlier examination of problems with the present rule, respondents were asked whether they would favor amending its provisions to provide that discovery by a litigant could proceed as soon as that litigant had made disclosure. This would, of course, be a significant change from the present rule under which discovery typically awaits completion of disclosure by both sides.[15] Among the lawyers, such a change was favored by almost three-fourths of the respondents, with only 15% opposed, and about 10% neutral.[16]

Among the judges, there was a similar response. Close to three-fourths of the judicial officers favored allowing discovery once the litigant had made its own disclosure, with less than 12% opposed.[17]

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[14] On the question of whether some rule providing for self-executing disclosure should remain in effect, 667 respondents, or 61.2%, voted yes and 423, 38.8%, voted no.

[15] Section 4.01(b) of the Plan provides: "Except by leave of court or upon agreement of the parties, a party may not seek discovery from any source before making the disclosures under subdivision (a)(1), and may not seek discovery from another party before the date such disclosures have been made by, or are due from, such other party."

[16] Respondents were asked to express their feelings about the following statement: "Assuming some kind of self-executing disclosure will remain, what are your feelings about the following:.... Permit a party to institute discovery once the party has made its self-executing disclosures without necessarily waiting for the opposing party's self-executing disclosure."

[17] Specifically, 25 judicial officers favored allowing such discovery, four were neutral, one did not answer, and four were opposed.

There remained for consideration the question of whether formal discovery should be allowed even before the party seeking discovery has made disclosure. The Advisory Group's subcommittee did not favor such a change. In its view, this entailed the risk of scuttling the entire provision for disclosure, for the need to complete one's own disclosure before seeking formal discovery is a simple, powerful incentive for compliance. And the subcommittee was mindful of the very heavy affirmation by the respondents of the desirability of retaining a requirement of disclosure.

It is true that a majority of the respondents in our survey, both lawyers and judicial officers, favored allowing discovery even before a litigant had made disclosure. The votes, however, were close. Among the judges, a change of one vote would have meant a majority in favor of the opposite result.[18] Among the lawyers, the results were similar.[19] Accordingly, the subcommittee did not recommend amendment of the Plan to make such a change.

By November, 1995, the deadlines imposed by the original statute had been extended for a year and the Advisory Group met to consider what it should recommend to the court with respect to self-executing disclosure. It had the benefit of the results of the survey and of detailed consideration by a subcommittee.

In the opinion of the subcommittee, the views expressed by the respondents to the survey, reflecting substantial experience, were entitled to far more weight than any theoretical counter-arguments that might be offered.[20] Accordingly, the subcommittee was of the view that the Advisory Group recommend to the court that the requirement of self-executing disclosure be continued but that amendment of the Plan permitting plaintiffs to initiate discovery once they had completed disclosure was desirable.

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[18] Fourteen judicial officers favored such a change, 13 were opposed, and 7 were neutral.

[19] The lawyers were asked to express their feelings, see note 4 supra, with respect to the following statement: "Permit a party to institute discovery without awaiting any developments with respect to self-executing disclosure." The results: 382 (35.0.% said "strongly agree," 215 (19.7%) "mildly agree", 122 (11.2%) were neutral, 170 (15.6%) said "mildly disagree", and 201 (18.4%) said "strongly disagree."

[20] The subcommittee gave no serious consideration to recommending that this district adopt the pattern set forth in the national rules, which ties the commencement of discovery to the discovery conference mandated by F.R.C.P. 26(f). This seems to invite even more delay and, in any event, this district has opted out of the requirement that a discovery conference be required in virtually every case.

The Advisory Group readily agreed that the basic requirement of disclosure should be continued for another year, but it recommended against any amendment of its provisions at that time. A number of factors entered into the decision. First, the issue was continuation for one more year, at most two, and the primary reason for the extension was to facilitate study by the Rand Corporation of the operation of plans here and elsewhere. Changes in the middle of the study period could only hamper that effort.

Then, too, the members of the Advisory Group were mindful of the expressed concern of members of the bar over the country that continual amendment and change imposed a heavy burden on litigators. Moreover, the members of the Advisory Group recognized that it took some time for active litigators to adjust to new rules so that change would not yield new and useful data over the short range.

After weighing all the factors, the Advisory Group recommended to the judges of the Eastern District that they continue the present requirements of Section 4.01 of the Civil Justice Expense and Delay Reduction Plan, without amendment, but with renewed emphasis on the desirability of making perfectly clear, particularly for the benefit of lawyers from outside the district, that its provisions do not apply to cases on the Special Management Track.

IV.

CHANGES IN THE MEMBERSHIP OF THE ADVISORY GROUP

The Civil Justice Reform Act envisioned a rotating membership for the Advisory Groups.[21] Some changes are automatic. For example, when Michael R. Stiles succeeded Michael M. Baylson as United States Attorney in the district, he also succeeded him as a member of the Advisory Group in accordance with the statute.[22] When Honorable Edward N. Cahn succeeded Honorable Louis C. Bechtle as Chief Judge of the Eastern District no change in the membership of the Advisory Group was necessary as both had been and both remained as ex-officio members.

In June 1994 Robert L. Robinson replaced James C. Corcoran as a member of the Advisory Group. In February 1995 Lloyd R. Ziff replaced S. Gerald Litvin, and in April 1996 Francis P.

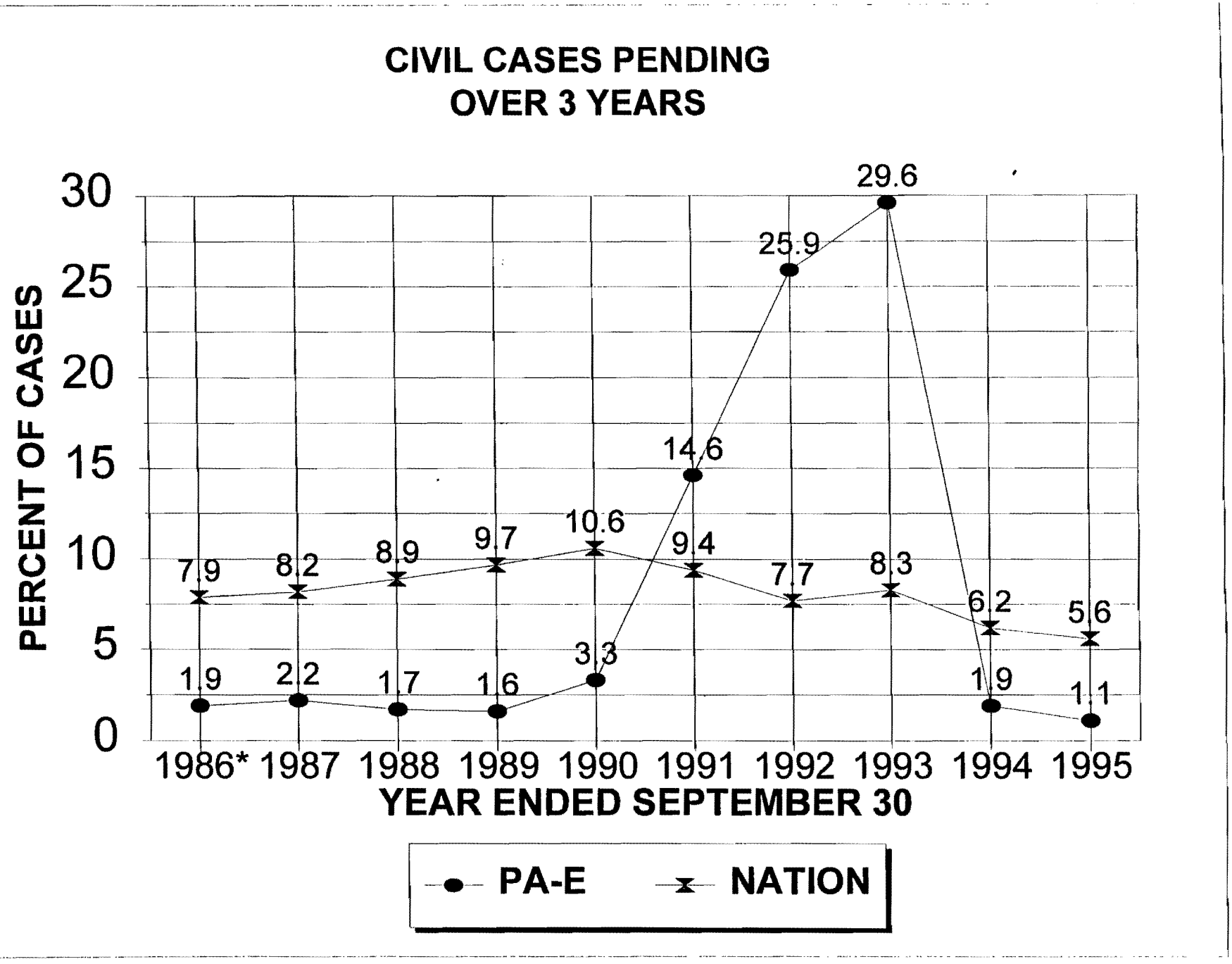
[21] See 28 U.S.C. §478(d).

[22] 28 U.S.C. §478(d).

Newell, Jennifer R. Clarke, and Ann Laupheimer were added to the Advisory Group. Each is an active litigator in the court and each has a background of interest in and concern with the smooth functioning of the court in the disposition of civil litigation.

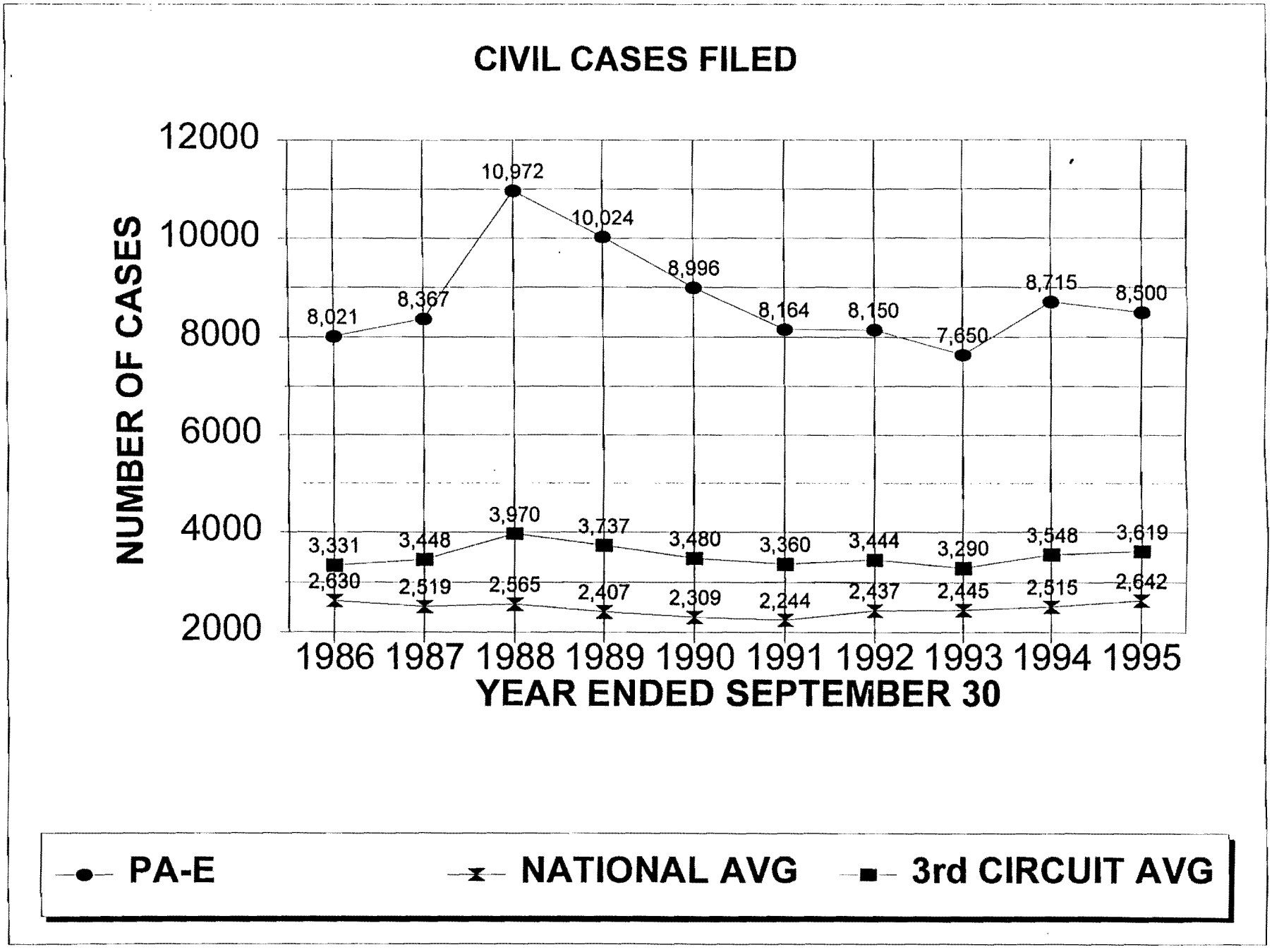
V.
CONCLUSION

On the whole, the Civil Justice Expense and Delay Reduction Plan is working well in this district. The Advisory Group recommends against amendment at this time. It is appropriate, however, to record once again the very high regard that the members of the Advisory Group and, more generally, the members of the bar, have for the judges of the Eastern District of Pennsylvania and for the staff they have assembled, all of whom make this record possible.



* YEAR ENDED JUNE 30

TABLE II


CIVIL CASES FILED
NUMBER OF CASES
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10000
8000
6000
4000
2000
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8,367
10,972
10,024
8,996
8,164
8,150
7,650
8,715
8,500
3,331
3,448
3,970
3,737
3,480
3,360
3,444
3,290
3,548
3,619
2,630
2,519
2,565
2,407
2,309
2,244
2,437
2,445
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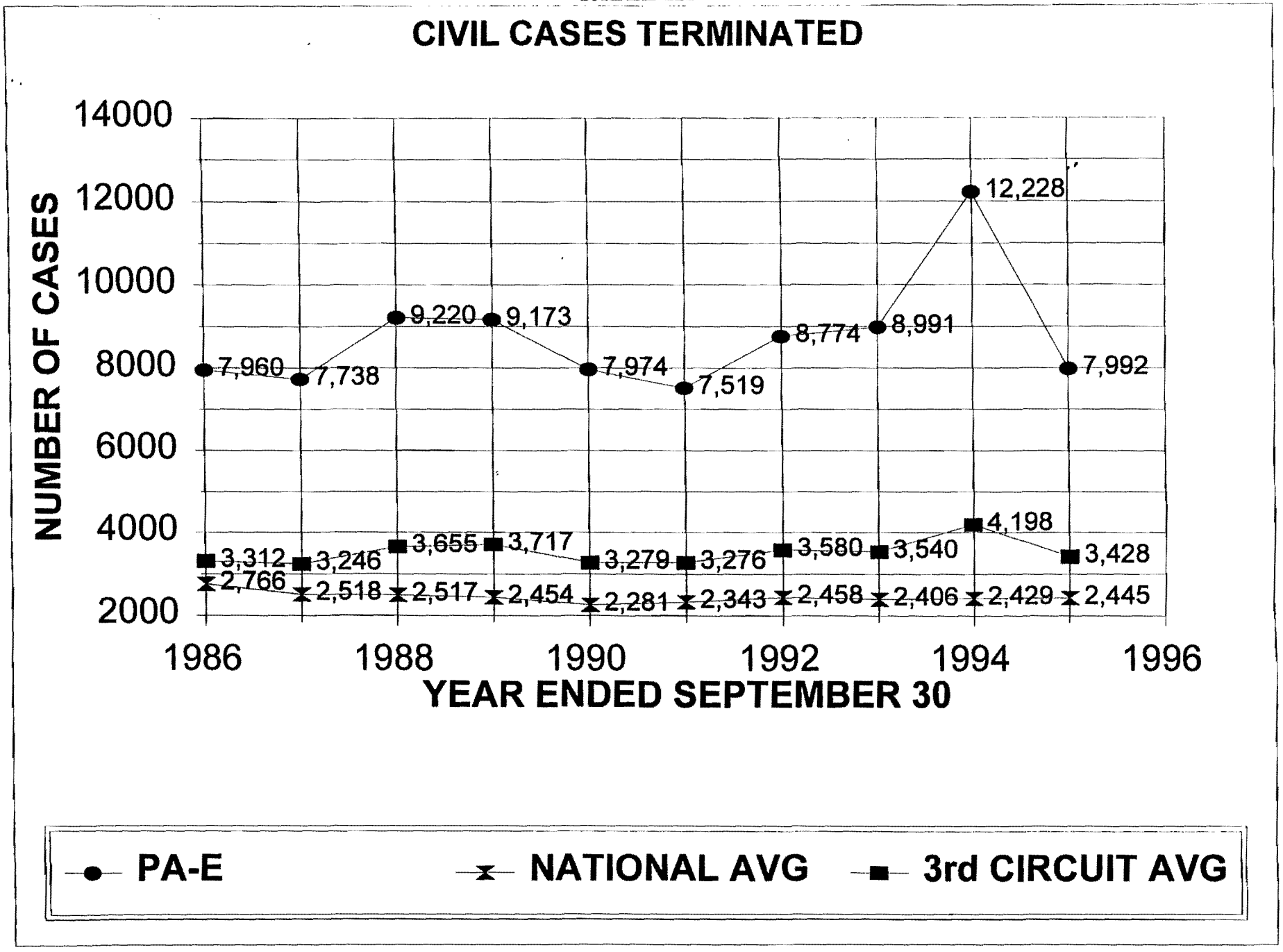
2,642
1986 1987 1988 1989 1990 1991 1992 1993 1994 1995
YEAR ENDED SEPTEMBER 30
PA-E
NATIONAL AVG
3rd CIRCUIT AVG

TABLE III


CIVIL CASES TERMINATED
NUMBER OF CASES
14000
12000
10000
8000
6000
4000
2000
1986
1988
1990
1992
1994
1996
YEAR ENDED SEPTEMBER 30
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7,738
9,220
9,173
7,974
7,519
8,774
8,991
12,228
7,992
3,312
3,246
3,655
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3,279
3,276
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4,198
3,428
2,766
2,518
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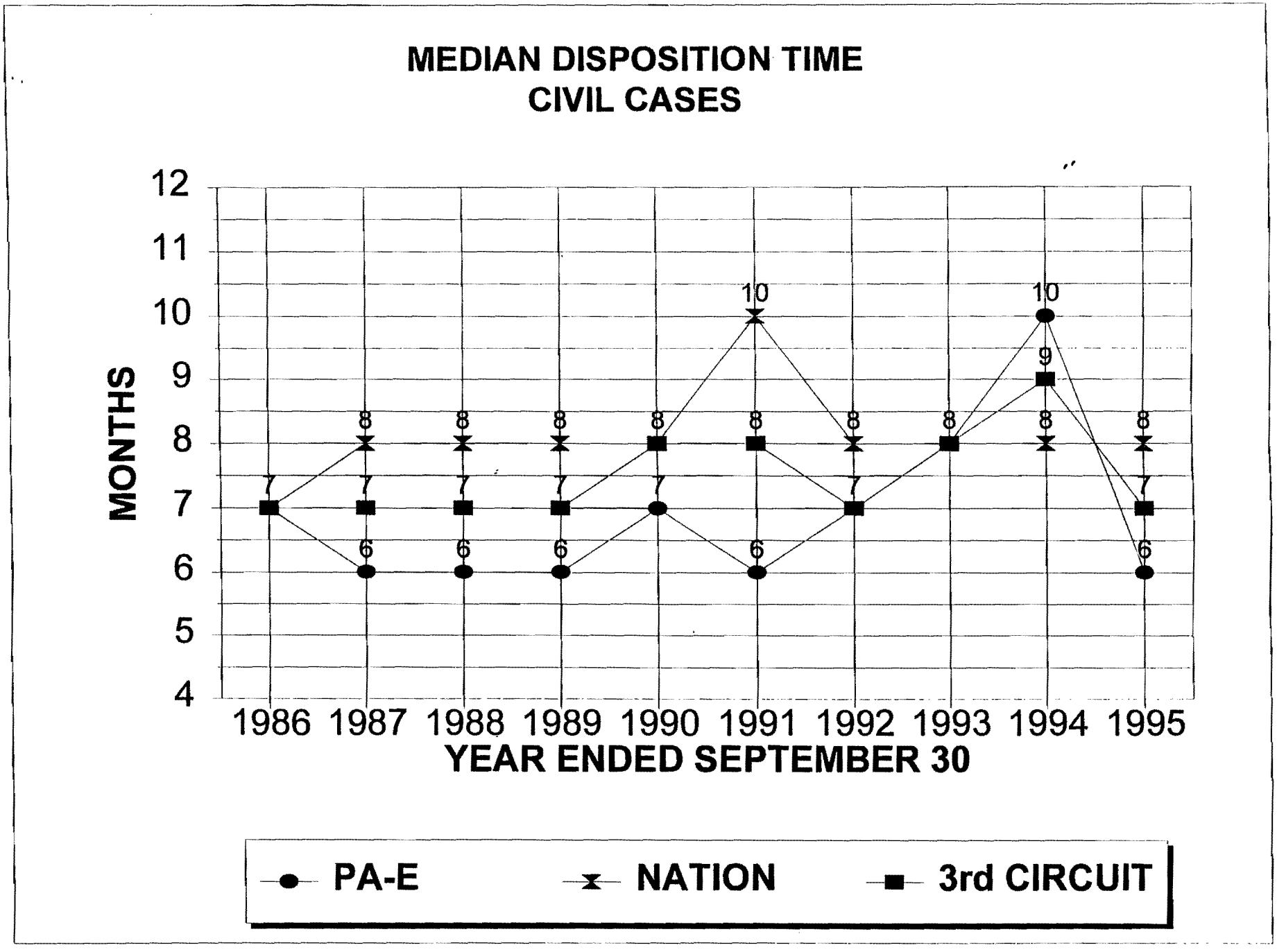
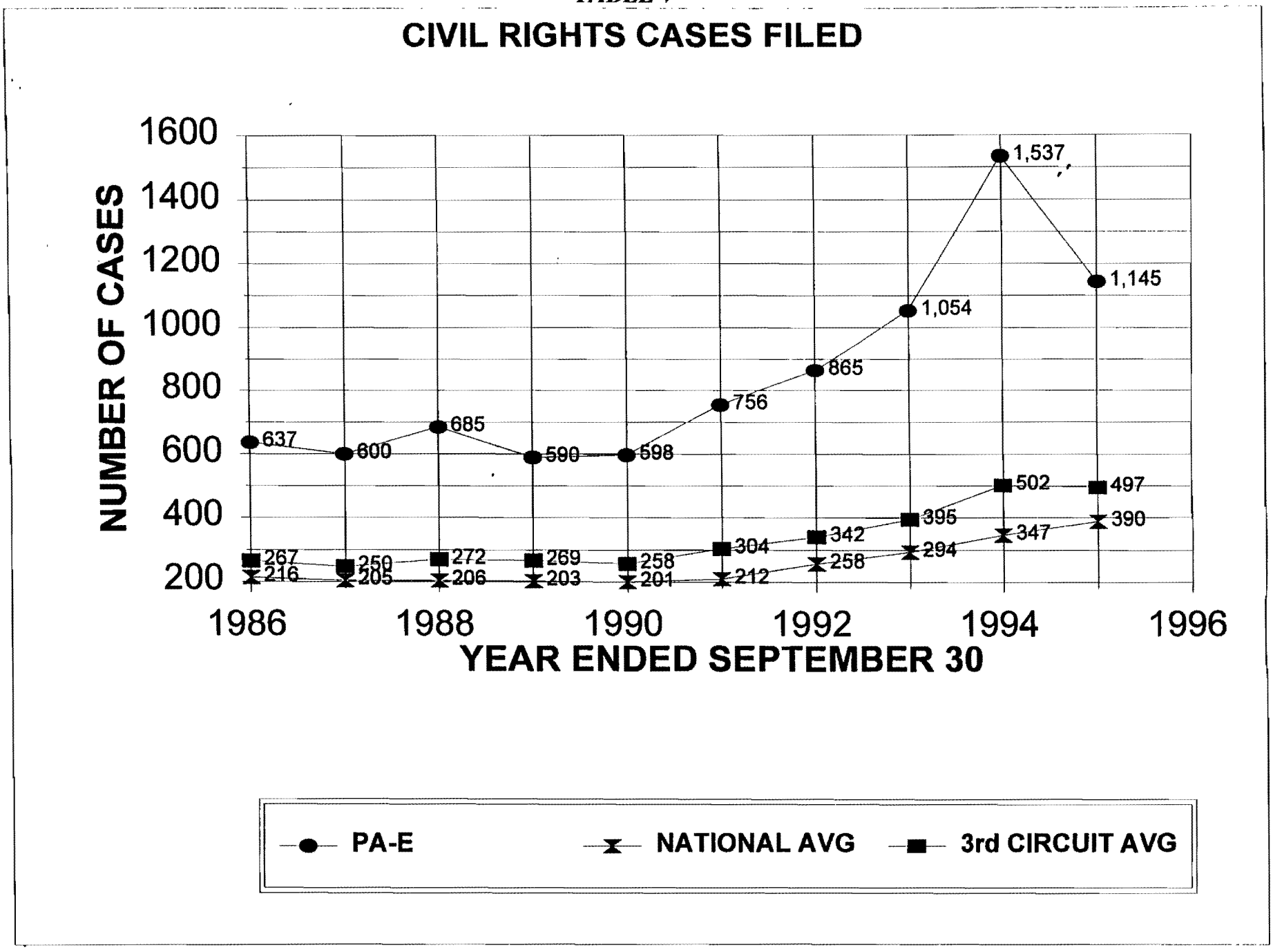
2,343
2,458
2,406
2,429
2,445
PA-E
NATIONAL AVG
3rd CIRCUIT AVG

TABLE IV



EXCLUDES: LAND CONDEMNATION, PRISONER PETITIONS, AND DEPORTATION REVIEWS

TABLE V


CIVIL RIGHTS CASES FILED
NUMBER OF CASES
1600
1400
1200
1000
800
600
400
200
1986
1988
1990
1992
1994
1996
YEAR ENDED SEPTEMBER 30
637
600
685
590
598
756
865
1,054
1,537
1,145
267
250
272
269
258
304
342
395
502
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216
205
206
203
201
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258
294
347
390
PA-E
NATIONAL AVG
3rd CIRCUIT AVG

TABLE VI

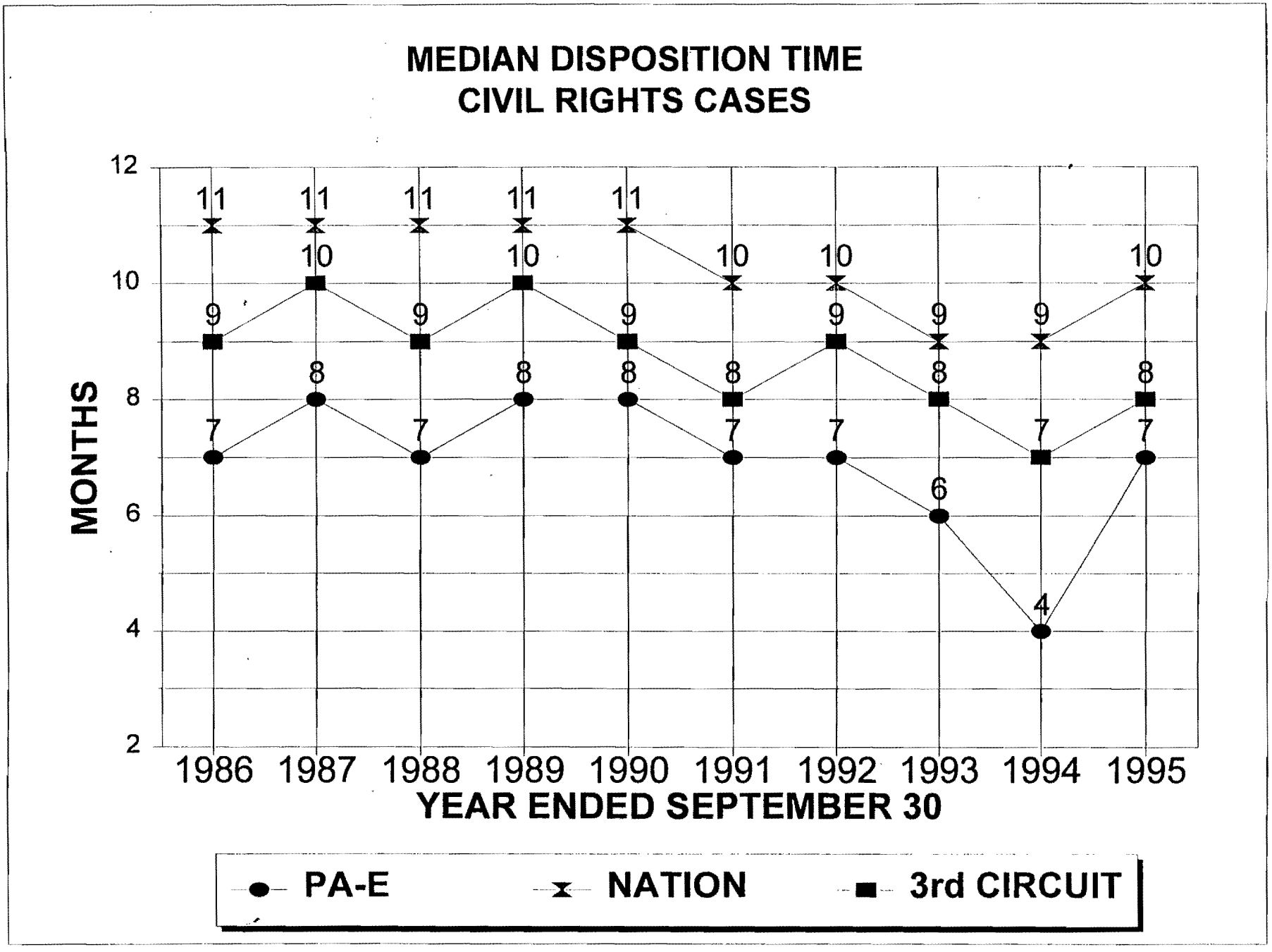
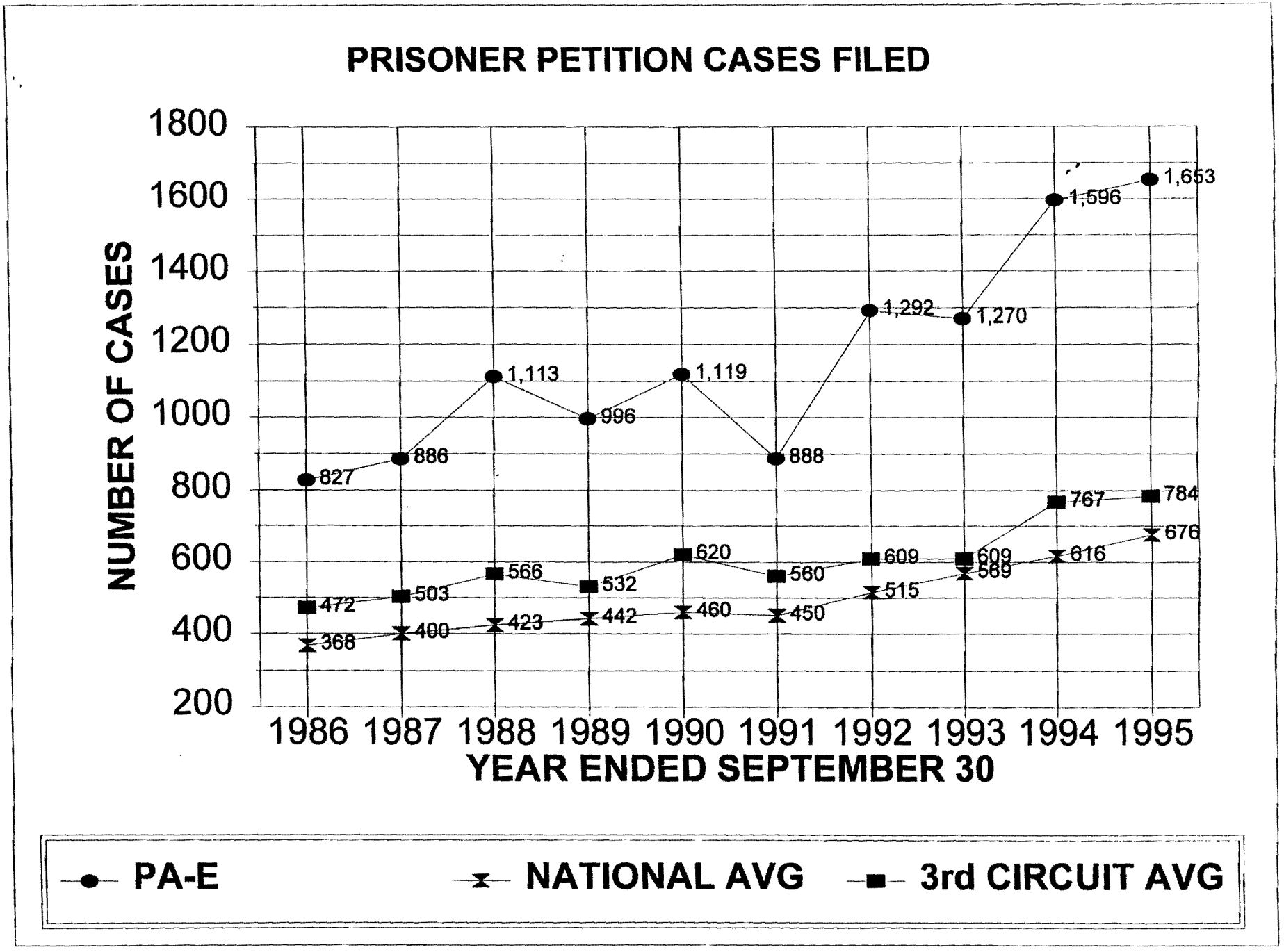

MEDIAN DISPOSITION TIME
CIVIL RIGHTS CASES
MONTHS
12
10
8
6
4
2
11 11 11 11 11 10 10 10
9 10 9 10 9 9 9 9 10
8 8 8 8 8 7
7 7 7 7 7 6
4
1986 1987 1988 1989 1990 1991 1992 1993 1994 1995
YEAR ENDED SEPTEMBER 30
PA-E
NATION
3rd CIRCUIT

TABLE VII


PRISONER PETITION CASES FILED
NUMBER OF CASES
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1600
1400
1200
1000
800
600
400
200
827
886
1,113
996
1,119
888
1,292
1,270
1,596
1,653
472
503
566
532
620
560
609
609
767
784
368
400
423
442
460
450
515
569
616
676
1986 1987 1988 1989 1990 1991 1992 1993 1994 1995
YEAR ENDED SEPTEMBER 30
PA-E
NATIONAL AVG
3rd CIRCUIT AVG

TABLE VIII

MEDIAN DISPOSITION TIME
PRISONER PETITION CASES

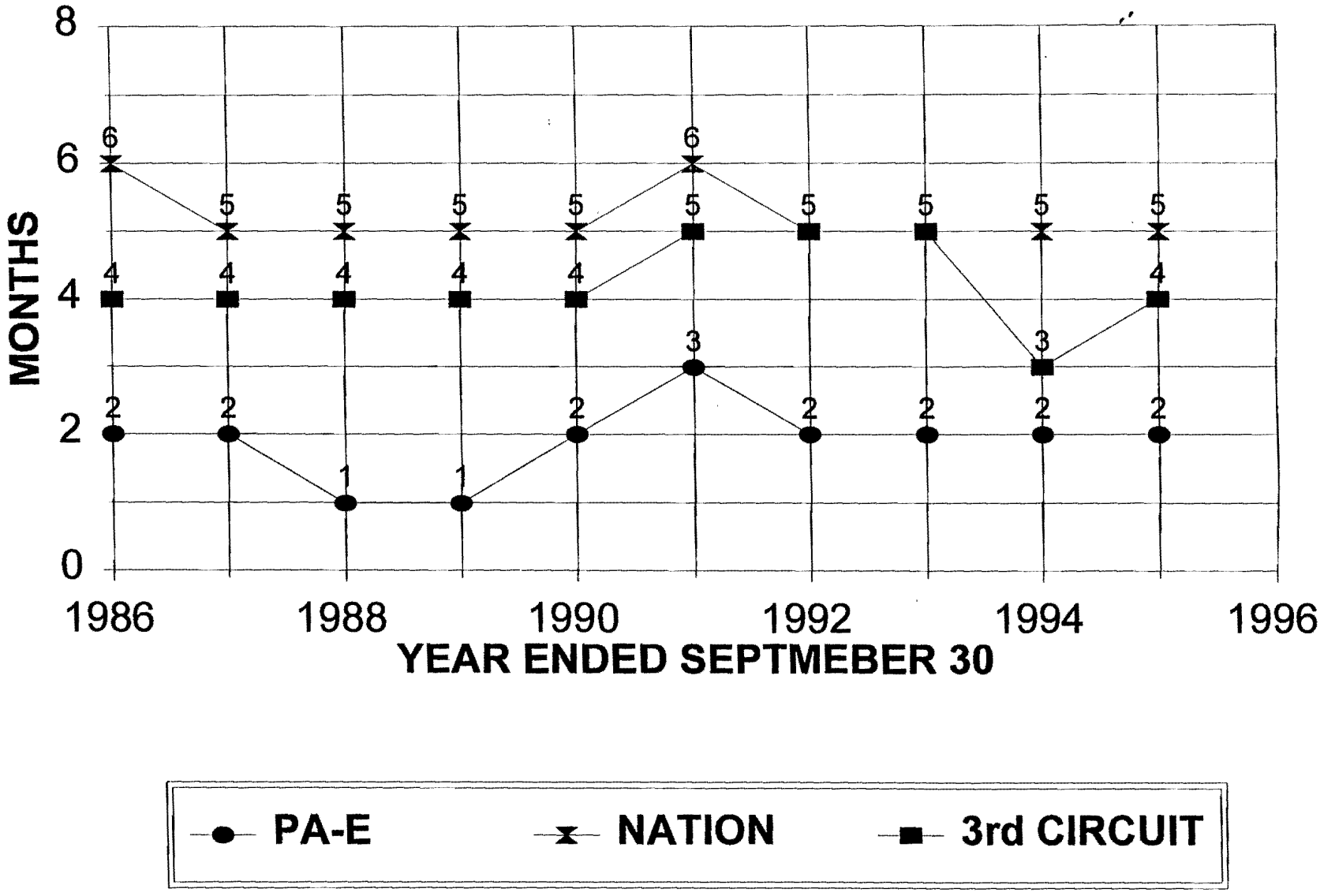


TABLE IX

CRIMINAL CASES CLOSED WITH MORE THAN 3 DEFENDANTS

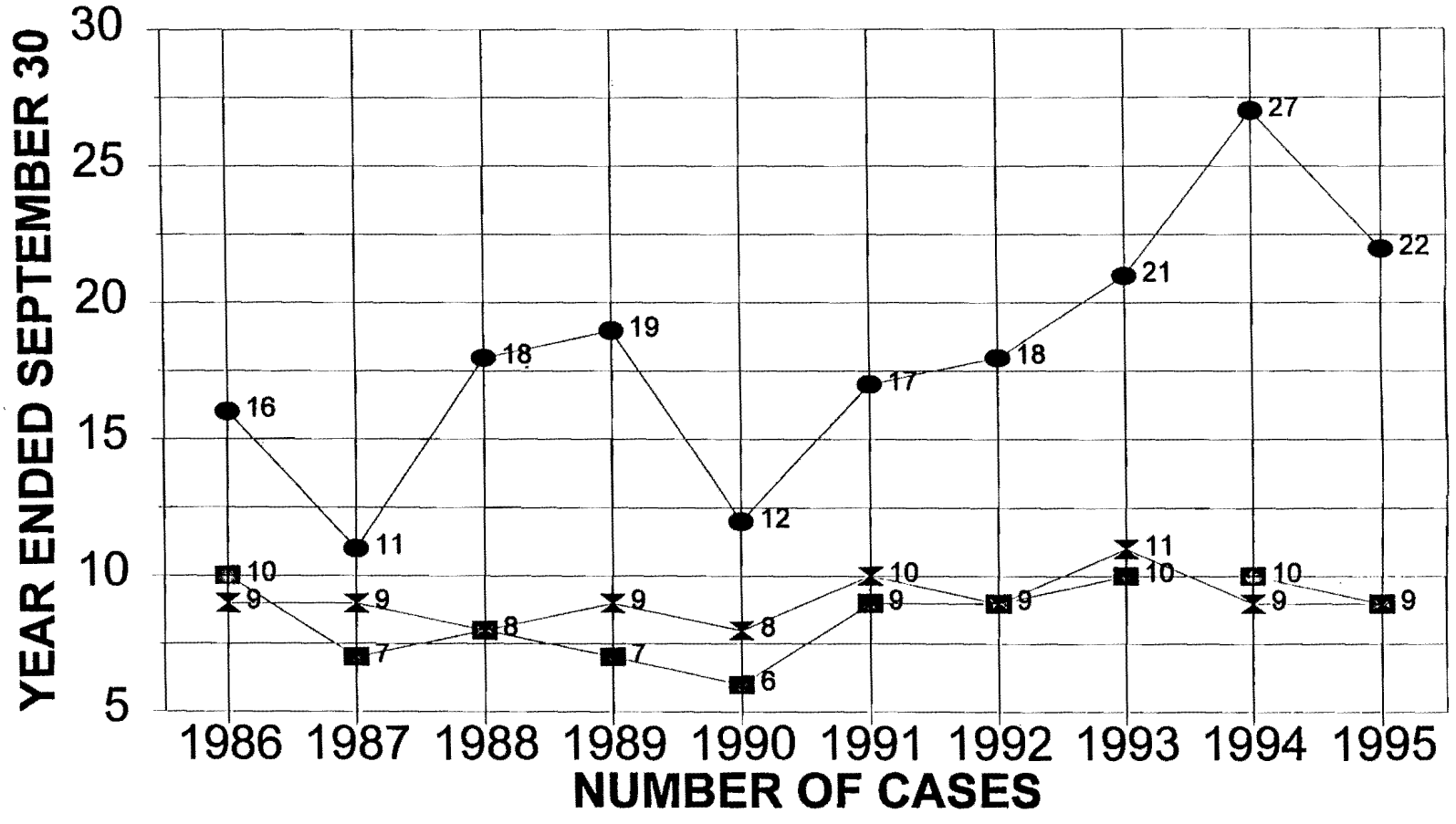
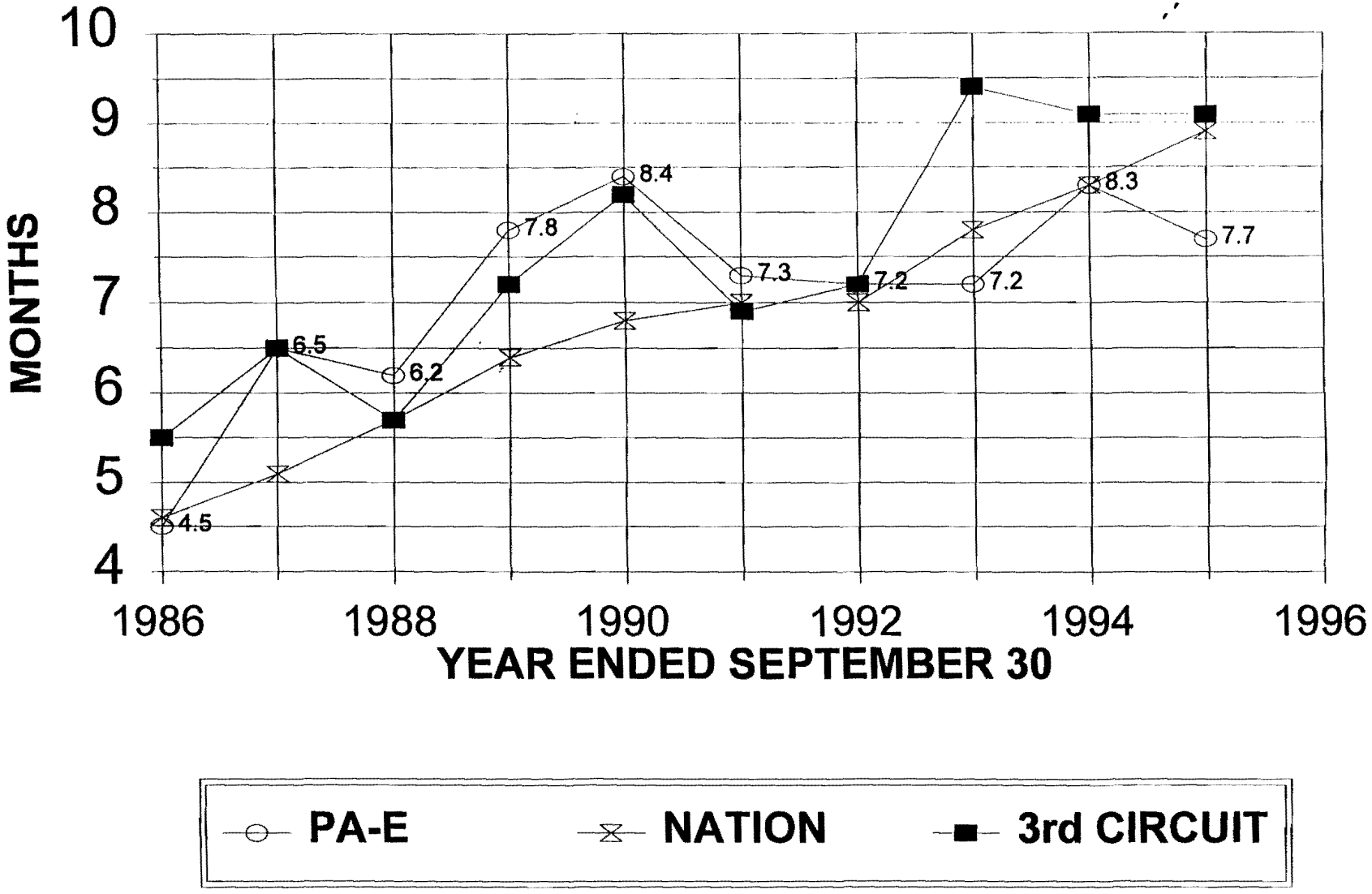


TABLE X

MEDIAN DISPOSITION TIME OF CRIMINAL CASES WITH MORE THAN 3 DEFENDANTS



MEDIAN TIME COMPUTED ONLY WHERE THERE ARE 10 OR MORE CASES

TABLE XI

CRIMINAL CASES CLOSED WITH 3 OR FEWER DEFENDANTS

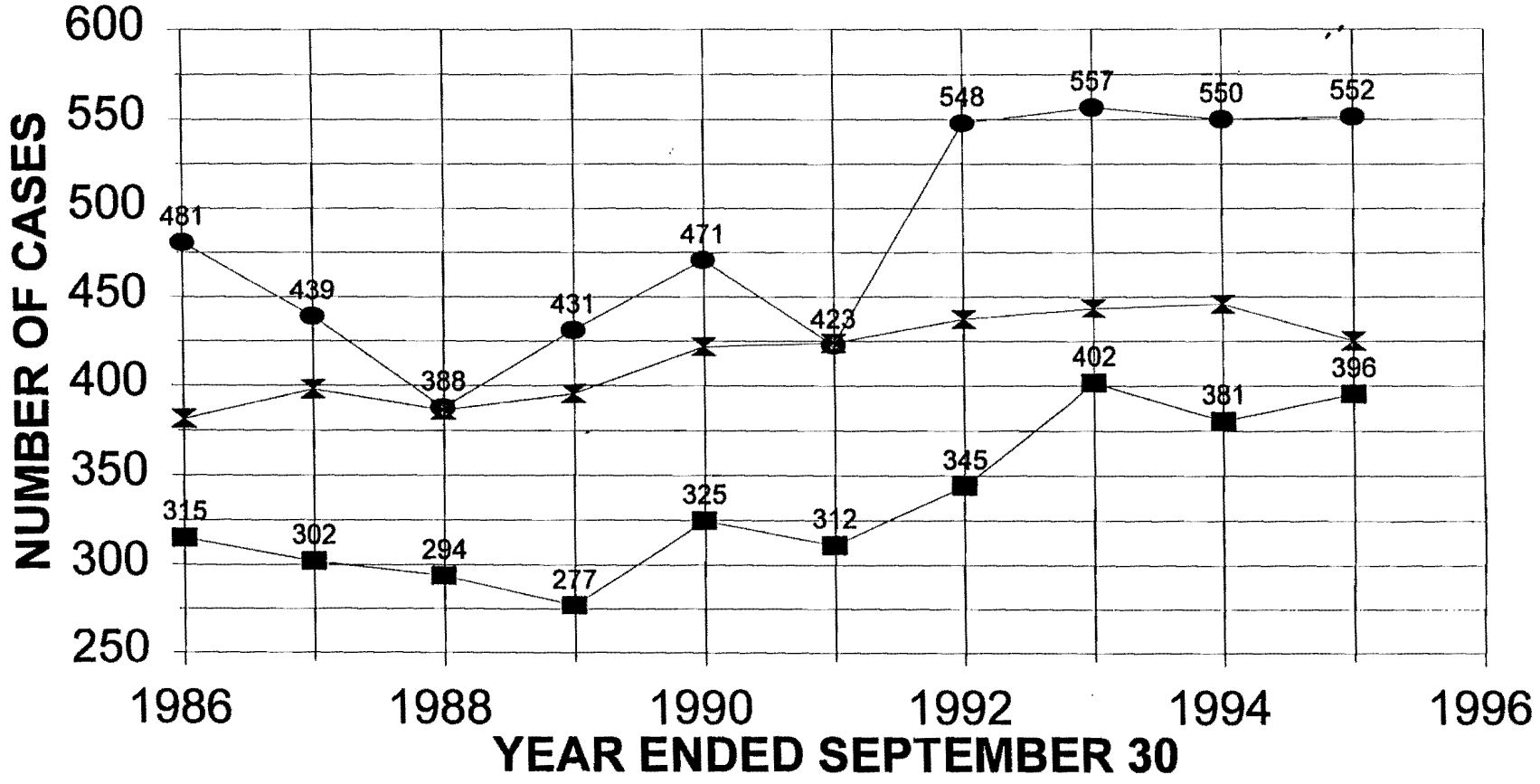


TABLE XII

MEDIAN DISPOSITION TIME OF CRIMINAL CASES WITH 3 OR FEWER DEFENDANTS

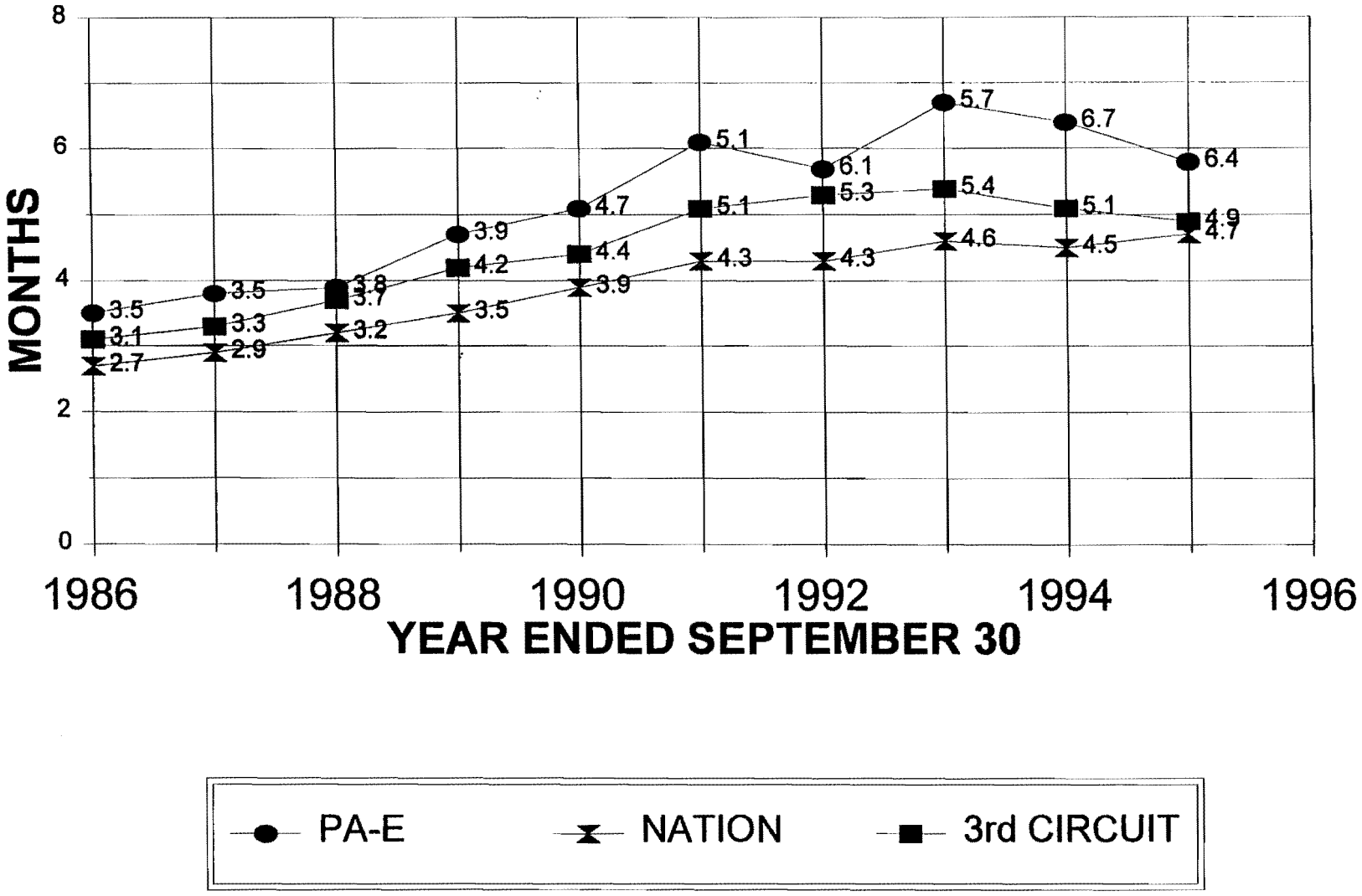
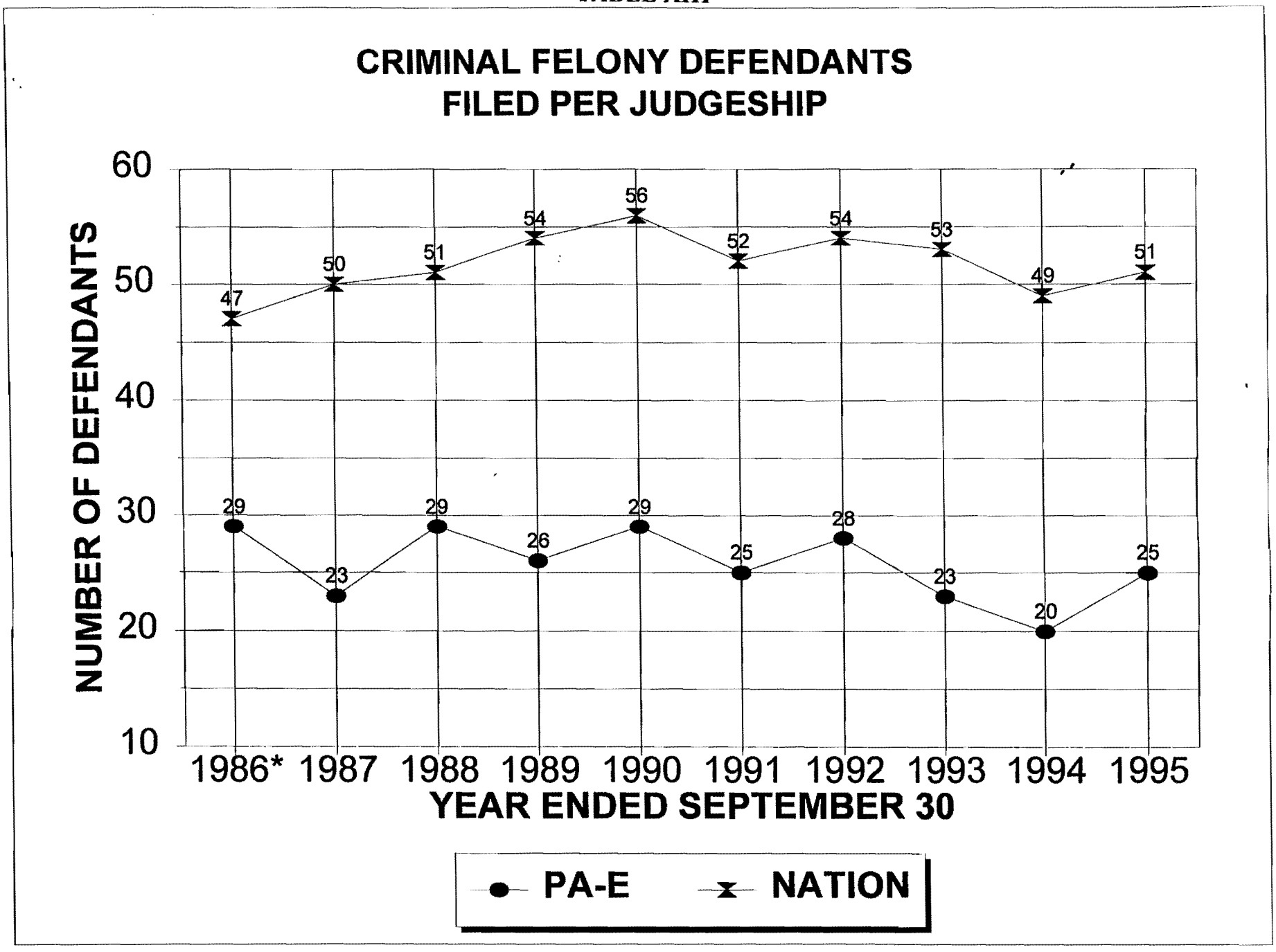
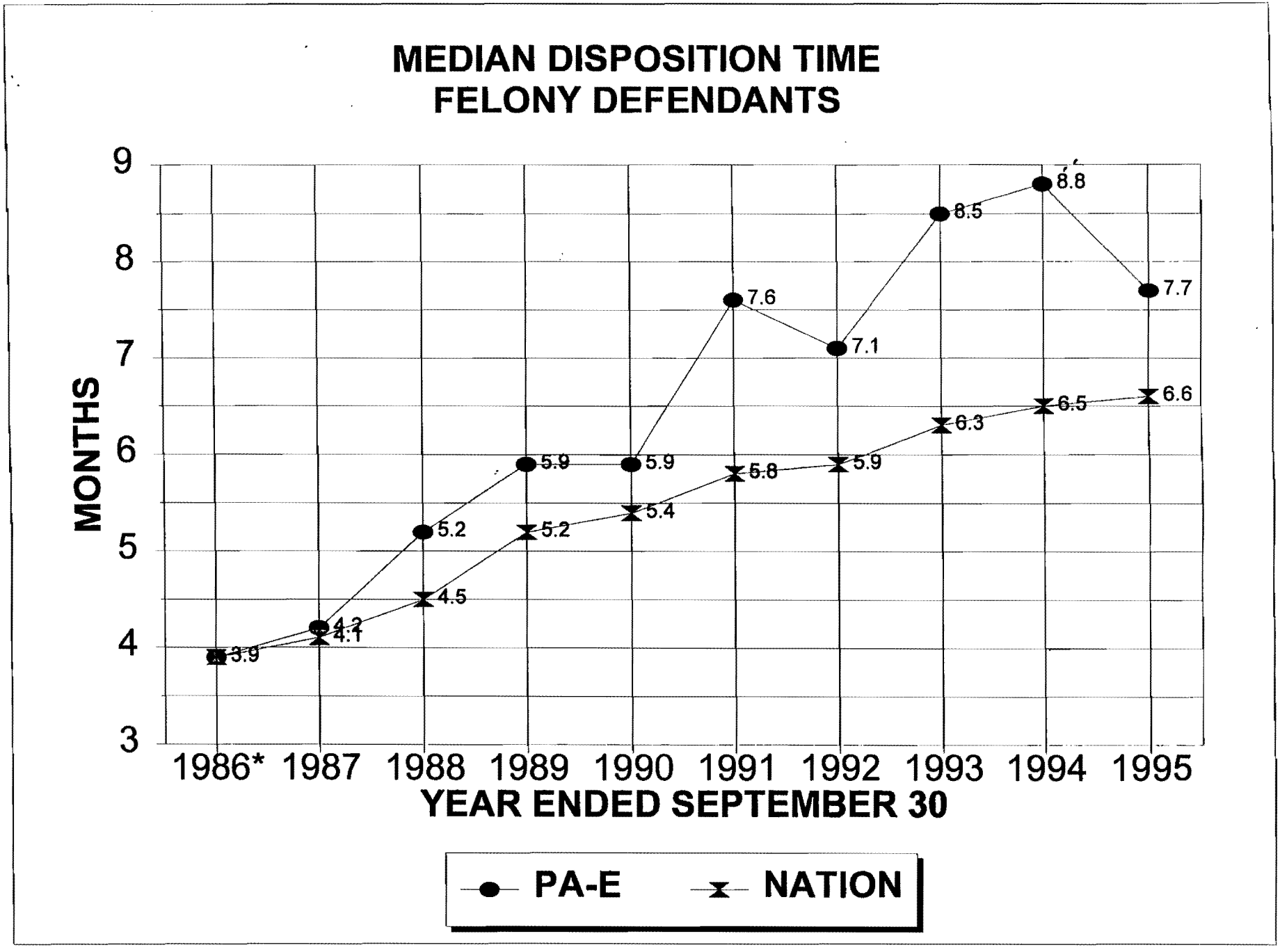


TABLE XIII



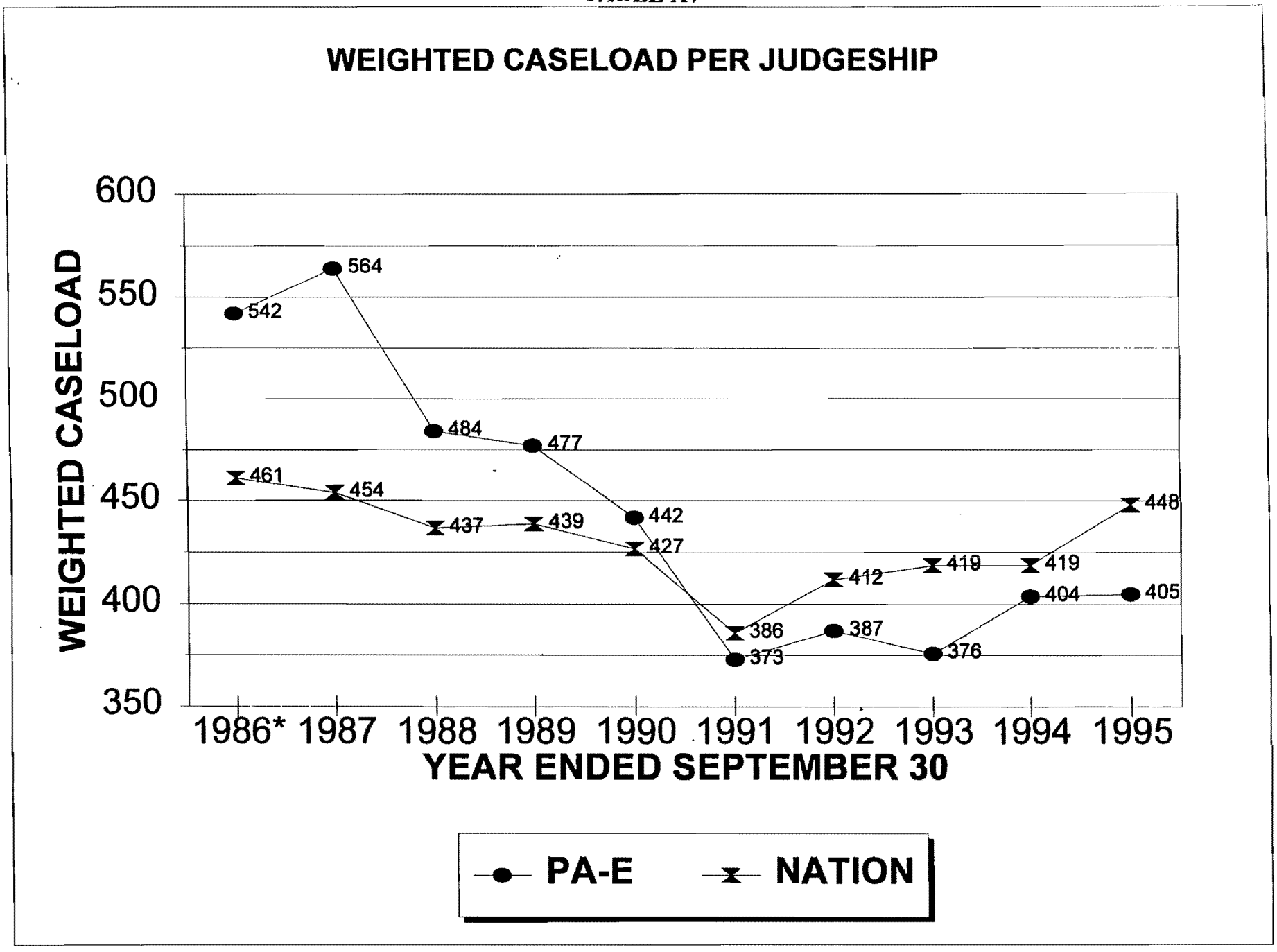
* YEAR ENDED JUNE 30

TABLE XIV



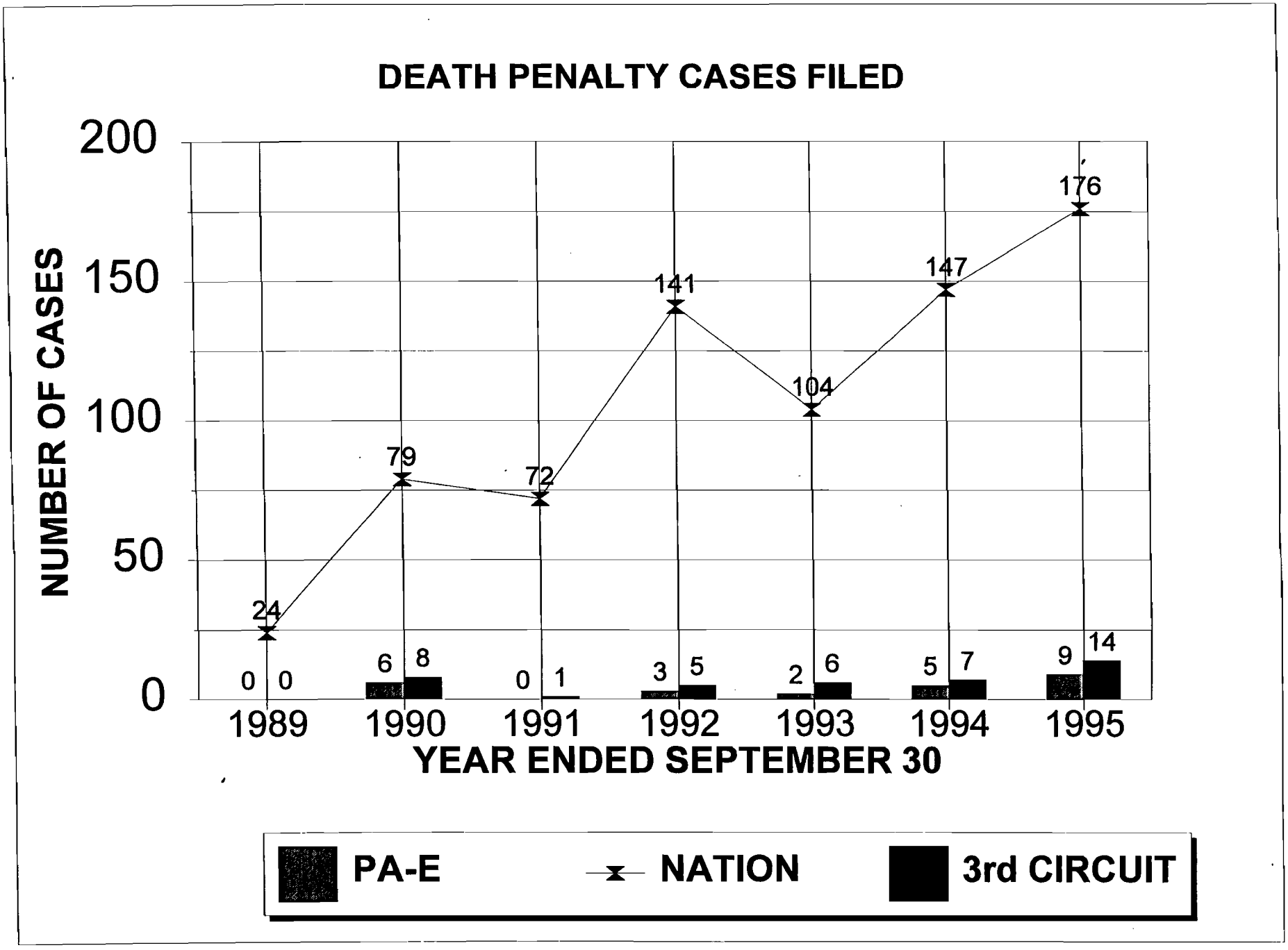
* YEAR ENDED JUNE 30

TABLE XV



* YEAR ENDED JUNE 30

TABLE XVI


DEATH PENALTY CASES FILED
NUMBER OF CASES
200
150
100
50
0
24
79
72
141
104
147
176
0 0
6 8
0 1
3 5
2 6
5 7
9 14
1989
1990
1991
1992
1993
1994
1995
YEAR ENDED SEPTEMBER 30
PA-E
NATION
3rd CIRCUIT

SELF-EXECUTING DISCLOSURE IN THE EASTERN DISTRICT OF PENNSYLVANIA

A Study by the District's
Civil Justice Reform Act Advisory Group

Appendix A

Advisory Group

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Honorable Edward N. Cahn
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Honorable James R. Melinson
Michael E. Kunz, Clerk of Court

A. Leo Levin, *REPORTER*
Dr. Abba Krieger, *ADVISOR*

SELF-EXECUTING DISCLOSURE IN THE EASTERN DISTRICT OF PENNSYLVANIA

A Study by the District's Civil Justice Reform Act Advisory Group

One of the more innovative, and at the same time more controversial, provisions of the Eastern District's CJRA Plan is the provision imposing on litigants the obligation to provide their opponents with entire categories of information, including copies of certain types of documents, without awaiting a formal request.[1]

The basic idea was simple enough: the recipient of the information would be spared the need to resort to formal discovery with respect to any material that her opponent was obligated to disclose, the process would be speeded up,[2] and, it was hoped, the requirement itself would communicate the appropriateness of a level of civility and cooperation that would reduce the amount of wasteful quibbling about the technicalities of the discovery process.[3]

This district was not alone in experimenting with the basic idea. The 1993 amendments to the Federal Rules of Civil Procedure introduced in Rule 26(a)(1) the concept of "initial disclosures" of material that was to be turned over to the other party without awaiting a request, including names, addresses, and telephone numbers of certain witnesses; copies of documents or, in the alternative, information concerning them; and certain computations of damages.

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[1] Section 4:01, Civil Justice Expense and Delay Reduction Plan. The full text is included in Attachment 1 to Appendix A of this Report. This obligation does not apply to cases on the Special Management Track, which are governed by other provisions designed to facilitate exchange of information with dispatch and efficiency.

[2] The "effect would be to accelerate the preparation and disposition of actions." William W Schwarzer, Symposium: The Future of Federal Litigation: The Federal Rules, The Adversary Process, and Discovery Reform, 50 U. of Pitt. L. Rev. 703, 723 (1989).

[3] The rule would "make it clear the witnesses are required to disclose material information even in response to poorly phrased questions, and [that] obstructionist tactics are out of order." Schwarzer, supra n. 2 at 722.

One might have hoped that implementation of an innovative provision of a national rule would yield valuable data, or at least useful information, by which to come to a conclusion as to the utility and desirability of this requirement. The national rule, however, allows each individual district to opt-out of its provisions, and over half of the federal districts have done so.[4]

To complicate matters further, a district opting-out of the national rule may nonetheless choose to provide for self-executing disclosure, but with the obligation defined as it chooses rather than as provided in Federal Rule 26(a).[5] Moreover, individual judges remained free, under the terms of the national rule and under the terms of local alternatives, to fashion their own provisions. Depending on the precise terms of a district's rules, judges might even choose to opt-out of the opt-out, as it were, with or without fashioning a substitute.

In the Eastern District of Pennsylvania the present rule governing disclosure was modeled on a proposal then before the national Advisory Committee, a proposal that appeared headed for promulgation. The Advisory Committee on Rules of Civil Procedure, however, decided against any requirement of initial disclosures, then changed its mind and decided in favor of a provision imposing the present requirement, one that differs substantially from what had been previously circulated.[6]

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[4] It has been reported that 52 of 94 districts have opted out of the provisions of Rule 26. However, 16 "districts have voluntarily included some form of prediscovery disclosure in either their CJRA plan or in local rules." Joseph R. Biden, Jr, The Civil Justice Reform Act of 1990, For the Defense (September 1995) 4, 7.

Cf. Frank W. Hunger and Cynthia C. Lebow, The Civil Justice Reform Act and the Rulemaking Process: Where Do We Go From Here? For the Defense (September 1995) 8, 11: "Fifty-two CJRA plans provide for some form of mandatory disclosure....Rule 26(a)(1) is in effect in thirty-two districts, while thirty-one districts 'opted out' in some fashion; in the remaining districts the provision to opt in or out was 'provisional.'"

For more recent data see note 5 infra.

[5] The most recent account of the status of self-executing disclosure, by district, is Donna Stienstra's, *Implementation of Disclosure in the United States District Courts, with Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Federal Judicial Center, March 22, 1996) reprinted at 164 F.R.D. lxxxiii, et seq. (April, 1996).

Some twenty pages of tables illustrate the variations between districts. A brief summary is to be found at lxxxv.

[6] "The committee abandoned an earlier, much broader definition that called for disclosure of anything that "bears significantly on a claim or defense...." Ann Pelham, Federal Court Watch: Panel Flips, OKs Discovery Reform, The National Law Journal, Apr. 20, 1992 at 22.

There is one other important difference between the rule governing disclosure in this district and those prevailing in many other districts. In this district, the rule imposing an obligation to disclose does not apply to complex litigation or, in more technical terms, cases on the Special Management Track. This was made abundantly clear by the court in its order of December 11, 1995, extending the district's Civil Justice Expense and Delay Reduction Plan until December 31, 1997, which states: "the court hereby clarifies that the duties of self executing disclosure ... do not apply to cases on the Special Management Track."

It is not that disclosure would not be helpful in these cases; it is rather that the special procedures provided for complex cases were designed to custom tailor specific requirements, including timetables, to the needs of the individual case. For that reason, the present report does not deal with cases on the Special Management Track.

It is likely that at some point the national experience will yield useful information. However, already in 1994 it appeared clear to the Advisory Group that it would not be prudent to postpone examination of the operation of our present rule until such information became available. The local requirement has been in effect in this district since the effective date of this district's original plan promulgated pursuant to the CJRA, December 31, 1991. By the end of calendar year 1995, it would be law in this district for fully four years. Moreover, planning for what would happen at the end of the period provided by the Congress for the CJRA Plan to remain in effect, the court has asked for the recommendation of the Advisory Group concerning what action it should take either to continue, to modify, or to abrogate these provisions.

This was a propitious time to learn how the present rule was working. Accordingly, the Advisory Group undertook to find out what the experience of judges and lawyers has been under the new rule. Does it save time? Money? Does it make it possible to represent the client more effectively? Or has the rule proved counter-productive? Does it operate smoothly as originally envisioned, or has it spawned satellite litigation and a proliferation of motions?

We were interested in detailed information based on actual experience, and we were also interested in the opinions that had been developed by bench and bar as a result of that experience. Moreover, we desired to learn whether the rule appeared to work better in certain types of cases than in others and whether opinions concerning the rule related to background variables of the lawyers: age, type of practice, size of firm. There was anecdotal evidence aplenty, but more

credible data were needed before recommendations to the court could be formulated with any level of confidence.

To that end the Advisory Group retained the services of Dr. Abba Krieger, Professor of Statistics in the Wharton School of the University of Pennsylvania;[7] developed a suitable questionnaire with his help;[8] and proceeded to send the questionnaires to about one-half of the almost 9,000 attorneys of record in cases subject to the rule governing self-executing disclosure in this district.[9] At the same time, again under the guidance of Dr. Krieger, the Advisory Group developed an analogous instrument to learn the experience and gain the benefit of the views of the judicial officers of the district.[10] This instrument, modified to reflect the differences in perspective, served as the basis for interviews of United States District Judges and Magistrate Judges by members of the Advisory Group. Thirty-four interviews provided a significant data base, which will be discussed below.

On the order of 1,200 questionnaires were returned,[11] of which approximately 1,100 were usable, 1,090 to be exact.[12] This was within the range of usable responses that was set as a goal when the project was designed. Whether and to what extent these respondents are typical of the total population of litigating lawyers is another question, one that we shall address in due course.

This report presents and analyzes the data generated by that questionnaire. It was also enriched by questions and comments of members of the Advisory Group during the course of a preliminary presentation of the results of the study.

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[7] Dr. Krieger also holds appointments as Professor of Marketing and Professor of Operations and Information Management, all in the Wharton School.

[8] The questionnaire is reprinted in Attachment 2 to Appendix A.

[9] The procedure used to select the recipients of the questionnaire is detailed in Attachment 3 to Appendix A. Attorneys of record in all cases subject to the rule came to 78,000. However, duplications (and address verification) reduced the number very substantially.

[10] The text is set forth in Attachment 4 to Appendix A.

[11] The yield was, roughly, as anticipated. We were hoping for a response somewhere between 1,000 and 1,200. No attempt at follow-up of any type was made following the initial mailing of the questionnaires.

[12] Some of the responses had too much data missing to be useful.

Structure of the Questionnaire

The questionnaire consists of three sections. The first focuses on the lawyer's last case "that was concluded at the district court level and to which the promulgated rule governing self-executing disclosure applied." Within this section questions are of two types: background questions and outcome questions, all focusing, however, on that single, most recent experience.[13] The early questions seek information about the case and the attorney's role in it: What kind of a case was it? Tort? Contract? Civil rights? Which side did the respondent represent - Plaintiff? Defendant? At what stage was the case terminated?

Then comes a series of questions designed to provide information on what are termed outcome variables: To what extent was there compliance with the rule: On your part? On the part of your opponent? To what extent did the rule decrease time, if at all? Were the results of the case any different as a result of the rule? All of the responses, quite obviously, simply provided the attorney-respondent's opinion on these questions, but they were opinions concerning very specific facts and all were limited to the respondent's opinion with respect to that one case.

A second section of the questionnaire relates to general views of the respondent about self-executing disclosure. Do you have problems with the rule? What is your opinion, in general, about the rule? And, again, there are questions seeking background information, about knowledge, for example: In how many of your cases has self-executing disclosure applied? Finally, the third

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[13] The data show that in 22.3% of the cases, all of which had been terminated, a trial had begun. This is substantially higher than the published statistics would have led one to expect. For example, in statistical year 1993 in all federal courts only 3.4% of all civil cases terminated that year even had a trial begin. Table C-4, Annual Report of the Director of the Administrative Office of the U.S. Courts (1993).

One should note, however, great variations between cases involving different subject matter and also between courts. Thus, for the same year the percentage was more than three times as large (10.6%) for employment civil rights cases. Id. Arkansas Eastern, for example, had an overall average of 11.6% reaching trial, with certain categories of tort cases no doubt much higher. Id.

That year in the Eastern District of Pennsylvania 3.8% of the terminated civil cases reached trial, id., but in many categories (e.g., prisoner petitions and social security cases) the percentage would have been much lower while in others very significantly higher.

However, the most likely explanation for this figure may lie elsewhere. It has been suggested that respondent lawyers, thinking back to the most recent case in which the rule on self-executing disclosure applied, tended to ignore cases that were settled early in the process, increasing the percentage of those in which a trial is commenced.

section of the questionnaire is simply a list of background variables concerning the attorney -- a list of demographics. What percentage of the time are you on the side of the plaintiff versus the defendant? What size is the law firm in which you practice?

The Background Variables

Who were the respondents? Whom do they typically represent? We asked each to provide the percentage of cases, instituted since the beginning of 1992, in which he or she appeared on the side of plaintiff and on the side of defendant (III-1). The average was 42.1% for plaintiff, 57.9% for defendants. The subject matter of these cases (III-2) is set forth in Table I, and the results correlate nicely with the responses to a similar question asked about the most recent case.

Personal injury cases represent the largest category (31.1%), to which should be added 7.9% for personal property damage resulting from tort. Insurance contract litigation (10.2%) and other contract cases (14.4%) account for almost one-fourth of the respondents' filings. If one adds prisoner petitions (1.6%) and other civil rights cases (14.1%), we have accounted for approximately four-fifths of the cases brought by these lawyers.

TABLE I: Description of Background Variables

III-1. Average Side:

Plaintiff	42.1%
Defendant	57.9%

III-2. Case:

Contract-Insurance	10.2%
Other Contract	14.4%
Personal Injury	31.1%
Tort-Personal Property	7.9%
Prisoner Petitions	1.6%
Other Civil Rights	14.1%
Labor	5.8%
Social Security	.4%
Other	14.5%

III-3. Age:

Under 30	74	6.8%
30-39	453	41.6%
40-49	375	34.4%
50-59	143	13.1%
60-over	45	4.1%

III-4. Gender:

Female	216	19.8%
Male	874	80.2%

The age of the respondents (III-3), also set forth in Table I, shows relatively small percentages below 30 (6.8%) or above 60 (4.1%). More than three-fourths of these lawyers were between 30 and 50 years of age. The gender of the respondents (III-4) approximates what might have been expected from this cadre of respondents:[14] 19.8% female and 80.2% male.

Years in practice (III-5): Only a little more than one-third of the respondents have been in practice nine years or less, and less than one-fourth have been in practice twenty years or more (Table II).

TABLE II: Further Description of Background Variables

III-5. Years in Practice:

Less than 4 years	128	11.7%
5-9 years	268	24.6%
10-14 years	237	21.7%
15-19 years	195	17.9%
20-29 years	192	17.6%
30 years or over	70	6.4%

III-6. Size of Firm:

Fewer than 5	281	25.8%
5-9	154	14.1%
10-29	262	24.0%
30-49	39	3.6%
50-99	79	7.9%
100 or more	275	25.2%

Correlation Among Background Variables

	PLAINTIFF	AGE	GENDER	YRSPRAC	LAWYERS
PLAINTIFF	1.000	.144	-.150	.142	-.485
AGE	.144	1.000	-.269	.818	-.215
GENDER	-.150	-.269	1.000	-.317	.184
YRSPRAC	.142	.818	-.317	1.000	-.203
LAWYERS	-.485	-.215	.184	-.203	1.000

[14] This is less than half the percentage of women currently enrolled in law schools, but this group of litigators in federal court reflect both a choice of specialization and the fact that when these respondents were in law school the percentage of women was far smaller.

If we define small firms as those with fewer than five attorneys and large firms as those with 100 or more, we find (III-6) that 281 respondents come from small firms, almost identical with the number (275) who come from the large firms (see Table II.) In this connection it is important to remember that we did not sample firms, but rather attorneys. These data suggest that there are far more small firms than large firms, perhaps on the order of 20 or even 25 to 1.

We examined the relationship among various of the demographic variables. Some of the results are quite intuitive, almost to the point of providing a validity check. Thus, for example, there is a very high correlation between age and years in practice, precisely what would be expected. Females tend to have been in practice a shorter period of time than males, a result that would be expected in view of the history of women at the bar.

Whatever the reason, defense lawyers seem to be concentrated more in the big firms. This is an important relationship because when we study the relationship of demographic variables to opinions concerning self-executing disclosure we will find that defense lawyers, as a group, tend to have a less favorable view of the present rules than do plaintiff lawyers. To say that large firms also have a less favorable view of the present provisions than do some other groups is basically to repeat ourselves; we are reporting on the same phenomenon.

Comparing background variables in section one, dealing with the type of practice respondents have and the responses to the same type of questions in section three, which focuses on the last case this attorney had in which the rule concerning self-executing disclosure was applicable, we find some remarkable similarities. Thus, 42% of the respondents reported that they generally represented plaintiffs, and 43% of the respondents reported that they represented plaintiff in their last case.

Similarly, our respondents reported that 32% of the last cases were personal injury cases, consistent with the 31% response to the earlier question concerning the nature of the respondent's practice generally. Thus, to the extent that their responses are accurate, the last case appears to be representative of the caseload of these respondents more generally.

Almost 14% more of the respondents to the questionnaire represented defendants in the last case reported on, 56.9% compared to 43.1%. In terms of raw numbers, there were only 470 lawyers representing plaintiffs, compared to 620 representing defendants, a difference of 150 respondents. It may be that there are more cases with multiple defendants than there are cases

with multiple plaintiffs, an example of what is often alleged as the familiar phenomenon of suing "everyone in sight."

There may, however, be a simpler explanation. In general, more defense attorneys were unhappy with the obligation to disclose than was true of plaintiffs; defense attorneys were among those who exhibited the strongest feelings, for example some bitter complaints that they were being made to do the work of opposing counsel.[15] This may have motivated a greater response rate among the defense bar. If so, the overall results that we report below are the more striking.

At What Point in the Litigation Were These Cases Terminated?

Focusing on the last case subject to the rule on self-executing disclosure, we asked at what stage in the litigation it had been terminated: Before self-executing disclosure? After self-executing disclosure, but before discovery had been completed? After discovery had been completed, but before trial had commenced? During trial or after trial? (The results are set forth in Table III.) One-fourth of the cases (24.9%) were terminated before discovery had been completed. Of these, close to one-fifth of all the cases (18.4%) were terminated after self-executing disclosure, but before the completion of discovery. These data indicate the possibility that self-executing disclosure had some influence in facilitating settlement, although without comparative data shedding light on what happens without the rule, it is not possible to draw any significant conclusions.

[15] Some members of the bar had expressed concern about the impact of the rule on the adversary process, more specifically that it unfairly required one side (typically the defendant) to "do the opponent's work for him." One is reminded of Justice Jackson's concurring remarks on work product in a case initiated in the Eastern District of Pennsylvania: "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." Hickman v. Taylor, 329 U.S. 495, 516, 67 S. Ct. 385, 396 (1947) (Jackson, J. concurring).

TABLE III: Background for Last Case

I-1. Side:

Defendant	620	56.9%
Plaintiff	470	43.1%

I-2. Type of Case:

Contract-Insurance	105	9.6%
Other Contract	152	13.9%
Personal Injury	349	32.0%
Tort-Personal Property	87	8.0%
Other Civil Rights	167	15.3%
Labor	68	6.2%
Prisoner Petitions, Social Security, Other	162	14.9%

I-3. Case Terminated:

Before Self	71	6.5%
After Self, Before Full	201	18.4%
After Full, Before Trial	576	52.8%
During Trial	55	5.1%
After Trial	187	17.2%

I-4. How Terminated:

Settlement	763	70.0%
Verdict	327	30.0%

A second question is relevant to the stage at which these cases were terminated. Still focusing on the last case subject to the rule on self-executing disclosure, we asked how it was terminated, by settlement or by verdict. A surprising 30% responded that the case in question had been terminated by verdict. The remainder, 70%, said that termination had been by settlement.

At first blush, two difficulties present themselves in understanding these data. First, they appear inconsistent with the responses to the earlier question that asked, still with respect to the last case subject to the rule on self-executing disclosure, at what stage in the litigation the case had been terminated. As shown in Table III, only 17.2% had stated that this last case had been terminated after trial. This is far short of the 30% terminated by verdict and it is hard to square termination by verdict for cases in which there has been no trial.

A number of factors, probably in combination rather than any single factor operating alone, may account for what appears to be a significant difficulty. We begin with an analysis of the question itself. After exploring the stage at which the case was terminated, and its relationship to self-executing disclosure, the question sought information on how the case was terminated, offering only two alternatives: settlement or "verdict or judicial action." The term verdict in reporting the responses to this question, is clearly shorthand; it properly includes case dispositive

motions, both those that avoid the need for trial, and those that come after the trial, such as motions for judgment n.o.v., now known as judgment as a matter of law.

The order of magnitude of the discrepancy makes it unlikely that it can be accounted for by case dispositive motions alone. Some of the difficulty may be accounted for by cases that went to verdict, but were terminated thereafter by settlement rather than by judgment on the verdict. In one sense these were cases terminated by the influence of the verdict; in another sense they were terminated during the trial process, before post-trial motions had been acted upon. Adding some or all of the cases that respondents reported as having been terminated during trial reduces the discrepancy.

Some may perceive a second difficulty. The data appear inconsistent with an oft-repeated statistic that far fewer than five percent of all civil cases terminated in federal court even get to the point of having a trial begin.[16] Moreover, this phenomenon is quite consistent with the experience of state courts. A finding that 30% of these civil cases were terminated by verdict clearly raises questions.

To a great extent the difficulty is more apparent than real. The figure given for civil litigation generally includes a great many civil cases not subject to self-executing disclosure and evidencing very different litigation patterns. These include prisoner petitions, suits on defaulted government loans, and some types of social security appeals, for example. If we examine the data for categories of litigation relevant to our concerns, the discrepancy is substantially reduced.

Another phenomenon may also be at work, one which may help explain the responses to this question and which also may be relevant to an understanding of the responses to the question discussed earlier. Asked to deal with the last case subject to the rule on self-executing disclosure many lawyers may exclude from consideration cases that settled almost immediately upon filing: those really aren't "cases" worth discussing in the context of how the rule is operating. Indeed, such exclusion may be done subconsciously. Phrased differently, the inconsequential fades from our memories more rapidly.

It is true that in answer to the earlier question our respondents reported 6.5% of the last cases terminated even before self-executing disclosure, but to the extent that we have meaningful

[16] See detailed discussion footnote 13 supra.

data against which to evaluate this figure, there is reason to believe that this figure is quite low. Excluding the cases that settle so early in the process will yield a low figure for "early washouts" and a higher figure for verdicts as distinguished from settlements. Nor can we rule out the possibility that some respondents were inconsistent in dealing with these two questions.

What Happened in Your Last Case?

The first question concerned the level of compliance with the rule, on the part of the respondent and on the part of the respondent's opponent. To what extent did you comply and to what extent did your opponent comply? The results are set forth in Table IV. Of course, there is an asymmetry in the results, as one would expect. People believe that they have complied to a far greater extent than their opponent thinks they did; that's human nature. The striking thing is that over two-thirds of our respondents (67.1%) thought that their opponents had complied more than minimally. Over 90% (91%) thought that they themselves had complied more than minimally; only 4.8% thought that they had not complied at all.

Table IV

I-5, 7. Last Case Results - Level of Compliance:

	You		Opponent	
Not at all	**52**	**4.8%**	**134**	**12.3%**
Minimally	**46**	**4.2%**	**225**	**20.6%**
Partially	**157**	**14.4%**	**449**	**41.2%**
Fully	**835**	**76.6%**	**282**	**25.9%**

It seems fair to characterize the level of compliance as high. This is particularly true when we recognize that patterns of behavior, the mores of the profession, tend to change slowly and we are dealing here with a rule still in its infancy. Moreover, it is a rule that, in terms of its effort to change fundamental attitudes of litigating lawyers, can be considered revolutionary.

There followed a series of questions designed to determine whether self-executing disclosure makes any difference. Specifically, does it save time, reduce litigation costs for the

client, improve the lawyer's ability to represent the client? Finally, perhaps most important of all, does it have any impact on the outcome of a case?

In drafting the questionnaire, we were sensitive to the fact that experience up to this point would not reflect complete compliance by all parties. Yet, we wished to elicit the opinion of each respondent based on what actually happened, but also on what would likely have happened if there had been full compliance. The questions were therefore phrased in the alternative: e.g., did/would self-executing have saved costs? For the same reason, the final question in this series reads: "if the rule had been followed by both sides..." And to emphasize the point, that question begins: "Whether or not your opponent complied with the rule on self-executing disclosure...."

Did self-executing disclosure save time? We are dealing here with the perceptions of the respondents, not only on the question of whether they saved any time but particularly on the question of whether their opponents saved time. Moreover, inherent in the question is an ambiguity: did it save any time for me, for my opponent, or for either? It is likely that when the Advisory Group reviewed the questions before they were finalized different members of the Group read the question in different ways.

There is a further difficulty. Savings to me or to my client would normally come as a result of compliance with the rule by the opponent. It will be recalled that the perception of the respondents clearly was that they had complied to a far greater extent than had their opponents. Is it logical to assume that lawyers will be of the view that an opponent in any case is likely to comply to a lesser extent than the respondent would?

In any event, slightly more than one fourth of the respondents thought that their own compliance saved or would have saved time, and almost one half of the respondents thought that substantial compliance by the opponent would have decreased time. The results are displayed in Table V.

Table V

I-6, 8. Decreased Time:

	You		Opponent	
Strongly Disagree	293	26.9%	197	18.1%
Mildly Disagree	262	24.0%	193	17.7%
Neutral	238	21.8%	196	18.0%
Mildly Agree	232	21.3%	350	32.1%
Strongly Agree	65	6.0%	154	14.1%

Would substantial compliance with self-executing discovery decrease litigation costs? Here the questions, both with respect to the opponent's compliance and the respondent's compliance, specified that we sought to learn whether the cost of litigation "to your client" was or would have been reduced. More than a fifth of the respondents answered in the affirmative in terms of their own compliance, and over two fifths thought litigation costs of their own clients would have been decreased by substantial compliance on the part of their opponents. The results are displayed in Table VI.

Table VI

I-6, 8. Decreased Cost:

	You		Opponent	
Strongly Disagree	329	30.2%	212	19.4%
Mildly Disagree	260	23.9%	199	18.3%
Neutral	246	22.6%	212	19.4%
Mildly Agree	182	16.7%	315	28.9%
Strongly Agree	73	6.7%	152	13.9%

I-6, 8. Improved Ability:

	You		Opponent	
Strongly Disagree	279	25.6%	177	16.2%
Mildly Disagree	180	16.5%	147	13.5%
Neutral	361	33.1%	276	25.3%
Mildly Agree	193	17.7%	331	30.4%
Strongly Agree	77	7.1%	159	14.6%

I-9. Outcome:

	Number	Percentage
Same	969	88.9%
Somewhat Different	100	9.2%
Greatly Different	21	1.9%

Even fewer thought that self-executing disclosure did or would have improved the lawyer's ability to represent her client, but a large number of respondents were neutral on the issue (see Table VI.)

The correlations between responses to these three questions are very high. A perfect correlation is represented as 1. Thus, correlations of .8 and .9 are very high indeed. It may well be that reduced time does in fact reduce cost and that combination results in a better quality of client representation. It may also be, however, that respondents do not tend to discriminate a great deal: an affirmative perception of the utility of self-executing disclosure generally is translated into

affirmative results with respect to each of the variables. Accordingly, those responses tend to be very similar. The correlations are displayed in Table VI-A.

Table VI-A: Correlations

	YOUCOMP	TIME	COST	ABLTY	OPPCOMP	TIME	COST	ABLTY	OUTCOME
YOUCOMP	1.000	.040	.019	.092	.433	.049	.048	.070	-.058
TIME	.040	1.000	.859	.667	.127	.648	.614	.515	.183
COST	.019	.859	1.000	.686	.118	.618	.673	.523	.203
ABLTY	.092	.667	.686	1.000	.120	.576	.585	.662	.179
OPPCOMP	.433	.127	.118	.120	1.000	-.025	-.014	.000	-.068
TIME	.049	.648	.618	.576	-.025	1.000	.888	.760	.183
COST	.048	.614	.673	.585	-.014	.888	1.000	.772	.183
ABLTY	.070	.515	.523	.662	.000	.760	.772	1.000	.197
OUTCOME	-.058	.183	.203	.179	-.068	.183	.183	.197	1.000

We turn to the question concerning impact on outcome. Almost ninety per cent of the respondents (88.9%) answered in the negative; disclosure did not have an impact on the outcome. The question concerning outcome afforded the respondents three choices: Greatly different, Somewhat different, The same. If we think of outcome only in terms of which party prevails, it hardly makes sense to talk of an outcome that is "somewhat different." However, so many cases are terminated by settlement, it is quite possible that outcomes in the sense of the amount of the settlement, or, indeed, of the size of a verdict, might be affected. In this context, it is important to ask, not only whether the outcome was the same, but whether, if it was not, whether the difference was or was not great.

The data show any difference in outcome to be relatively infrequent, and great differences to be relatively rare. The former were reported 9.2% of the time; great differences in outcome were perceived by fewer than two percent (1.9%) of the respondents.

Correlating the Nature of the Case, the Parties, and the Impact of the Rule

In analyzing the results of this study, it becomes important to consider whether and to what extent plaintiffs differ in their perceptions and their opinions from defendants. As we go through the responses to the questionnaire, it becomes clear that those on the side of plaintiffs react far more favorably to the rule than do those on the side of defendants. This is true with respect to the rule itself as well as with respect to certain positive outcomes that the rule might be said to produce.

It is not true, however, that plaintiffs' perceptions will differ from those of defendants with respect to every question. Thus, in responding to what extent there was compliance with the rule, there was no difference between the perceptions of plaintiffs and those of defendants, neither with respect to their own compliance nor with respect to compliance by their opponents.

However, in terms of the effects of opponents complying with the rule -- reducing time and cost and improving the ability of the lawyer to represent the client -- plaintiffs were much more positive in finding favorable results than were defendants.

This is not to say that plaintiffs were positive in an absolute sense, simply that they were more positively inclined than were defendants. For example, with respect to self-executing disclosure saving time (in the last case), on a five-point scale with 3 representing a neutral position, plaintiffs' responses averaged 2.8, still below neutral, but defendants' averaged only 2.4, reflecting less positive (or more negative) perceptions than those of plaintiffs.

It has already been pointed out that lawyers representing defendants tended to be in the larger firms. By the same token, lawyers representing plaintiffs tended to be in the smaller firms. Accordingly, just as the views of the larger firms tended to mirror those of the defense bar, so, too, the views of the smaller firms tended to mirror those of the plaintiffs bar. However, as already pointed out, this is not an additional finding; it is simply another way of stating the same thing.

Nothing really interesting resulted from an analysis of the data on the stage at which the case was terminated. What was statistically significant, however, was the correlation between compliance with the rule and settlement before there was an opportunity for the rule on self-

executing disclosure to operate. To state this, however, is to state a tautology, because there could hardly be compliance where the case was terminated at that early stage, and so it is fair to say that nothing helpful emerged from analysis of these responses.

How the case was terminated, i.e. whether by settlement or by trial, was another matter. Respondents were more positive in assessing the level of their opponent's compliance and in finding that the rule reduced costs when the case was settled.

The subject matter of the litigation yielded no significant correlations in terms of the impact of the rule. To some, this result appeared counter-intuitive. It had been thought that the reaction of the bar to the requirements of the rule in a relatively straightforward action for personal injuries would be quite different from what would be true in a complicated contract action, perhaps involving insurance coverage, in which there would ultimately be a flurry if not a blizzard of documents generating discovery disputes.[17]

This was particularly true, it has been suggested, since there was at one time a culture in the Eastern District of plaintiffs gladly "turning over the file" in personal injury litigation to stimulate settlement. Indeed, a local rule had long provided for a form of self-executing disclosure with respect to medical examinations of plaintiffs in such actions. However, the extent to which that culture has persevered and its significance in litigation today may well have been overestimated.

It should be remembered that complex cases are assigned to the Special Management Track. They are not subject to the rule on self-executing disclosure, not because disclosure would necessarily be inappropriate in those cases, but rather because they are subject to special procedures for case management, including disclosure matters.

Moreover, it is the parties themselves who, in the first instance, determine whether a case is "complex" enough for special management. And, in theory, complex tort actions can also be assigned to the Special Management Track and thus exempt from application of the standard rule governing self-executing disclosure.

[17] Indeed, statements to the same general effect are to be found among the general comments in a subsequent section of the questionnaire: the rule works better, some said, in simple cases and poses more problems in complex cases.

Views of the Respondents Concerning the Rule Generally

Part II of the questionnaire moved from the individual case, the last case involving self-executing disclosure, to the rule more generally. However, before eliciting the respondents' views we sought to gain some background information relating to their experience with it and their understanding of it.

In how many of their cases since the institution of the rule did the rule apply? Slightly over 70% responded: from zero to five. (The detailed results are displayed in Table VII.) In what percentage of these cases was the rule followed to any extent by any party? Well over half of the respondents (56.8%) reported that the rule had been followed in at least 70% of those cases.

Table VII

II-1. Frequency of Cases in which Self-Executing Disclosure Applied:

0-5	765	70.2%
6-10	207	19.0%
11-19	62	5.7%
≥20	56	5.1%

At the time it became relevant in those cases, to what extent did you have knowledge of the rule? Almost 85% of the respondents said that they had a general or working knowledge of the rule. Only 11% of the respondents reported that they were unaware of the rule. Some find the relatively low number of practitioners who reported that they were unaware of the rule to be quite surprising. This reaction to the data underscores, of course, that during the relevant period the rule was still quite new, some might say in its infancy. However, we learn from the judges' comments that many made it a practice of routinely mentioning the obligation to disclose at a status conference or in the course of a conference to discuss discovery problems. This should certainly be expected to reduce substantially the number of lawyers who could claim to be totally unaware of the rule.

The respondents were offered four possible reasons for not following the rule and asked, as to each, whether or not it would generally apply to them. In none of these did a majority of the respondents say that it would generally apply to them. However, over one-third (33.9%) did say that the belief that their opponents would not comply was a reason for their own non-compliance, a perfectly understandable reaction. This was the reason that drew the greatest affirmative response. Next came the belief that the judge would not enforce the rule, with almost exactly one-fifth of the respondents responding affirmatively. (The detailed results are displayed in Table VIII.)

Table VIII: Reasons for Noncompliance

	Hurt Case		Don't Believe Opponent		Don't Believe Judge		Didn't Know Rule	
Yes	110	10.1%	370	33.9%	226	20.7%	152	13.9%
No	980	89.9%	720	66.1%	864	79.3%	938	86.1%

One of the alternatives was that the respondent did not know the rule. Here 13.9% responded affirmatively. This is slightly more than the percentage who reported in response to the previous question that they were unaware of the rule, hardly a shocking discrepancy. Yet, even here there may be an explanation. Failure to comply because of lack of knowledge may speak to the details of the provisions, of precisely what a litigant was required to disclose, rather than to awareness of the existence of the rule.

Motions for sanctions did not loom large in the picture of how the rule is operating. Only 87 of 1090 responding lawyers (8%) reported that a motion for sanctions had even been made in any case in which they participated. The number reporting that such a motion had been granted was, of course, much lower: 34 out of 1090 or 3.1%. This, it should be stressed, is not the percentage of cases in which a motion for sanctions is made or one granted. It is the percentage of responding lawyers who reported such a motion in <u>any</u> case in which they had participated.

The questionnaire asked for the lawyers' perception of the judges' attitudes about the rule. Judicial hostility to the rule was rare, reported by fewer than one percent of the respondents. The

largest number (38.4%) reported neutrality, with 29.5% perceiving the judges' attitudes as favorable. Almost a quarter of the respondents reported that judges' attitudes varied. Seventy-six lawyers (7%) reported that the "Court seemed unaware of" the rule.

Much debated has been the relationship of the requirement of disclosure with work product protection and attorney client privilege. We asked whether any of the respondents had encountered any difficulty with either. Close to one half (47.9%) of the respondents had not encountered any difficulty and another 33% reported that they had encountered some difficulty, but the difficulty was easy to resolve. The remainder, 19.1% had encountered difficulties which they found difficult to resolve.

To some extent these results are mirrored by the responses to another question: Has the obligation to disclose caused any problem with your clients? Eighty percent (81.2%, to be exact) responded in the negative and 18.8% responded in the affirmative.

Advice for the Future

We sought the views of the respondents concerning four proposed modifications of the present rule, asking them to assume that some type of self-executing disclosure rule would remain in effect. The first proposed change would permit a party to institute discovery without awaiting any developments regarding self-executing disclosure. Thirty-five percent of the respondents expressed strong agreement, an additional 19.7% expressed mild agreement, and 11.2% were neutral. The remainder, roughly one-third, disagreed. (The results are set forth in Table IX.)

Table IX: Proposed Amendments to the Rule

	Discovery Before Disclosure		Discovery After Disclosure		Define the Obligation		Expand the Obligation	
Strongly Disagree	201	18.4%	87	8.0%	45	4.1%	309	28.3%
Mildly Disagree	170	15.6%	81	7.4%	34	3.1%	176	16.1%
Neutral	122	11.2%	118	10.8%	160	14.7%	228	20.9%
Mildly Agree	215	19.7%	280	25.7%	317	29.1%	160	14.7%
Strongly Agree	382	35.0%	524	48.1%	534	49.0%	217	19.9%

The second proposed modification drew greater support. It would permit a party to institute discovery once that party had made its own self-executing disclosures without necessarily waiting for the opposing party's self-executing disclosure. Over two-thirds of the respondents were in favor (48.1% expressing strong agreement and 25.7% expressing mild agreement) with 10.8% neutral and the remainder opposed. (The results are displayed in Table IX.)

A third proposal would "define more specifically to what the obligation of disclosure applies." Over three-fourths of the respondents reacted favorably to this proposal (49.0% agreeing strongly, 29.1% expressing mild agreement) with 14.7% neutral and only 7.2% opposed. Finally, a proposal to expand to what the obligation of disclosure applies was rejected, 44.4% opposed compared to 34.6% in favor with the remainder neutral. As we shall see, the judges were even more against expanding the obligations imposed by the rule so that expansion does not have significant support. (The results are displayed in Table IX.)

Two general questions of very significant import remain. The first asked for the lawyers' opinion of the present rule, the second asked whether some rule requiring self-executing disclosure should remain in effect. The respondents gave a very mild endorsement to the present rule: slightly over 50% were either mildly or strongly in favor, compared to 34.6% opposed with the remainder neutral. (The data are displayed in Table X.) In view of the large number of respondents who favored amendment of the present rule, this result is hardly surprising.

On the question of whether some rule requiring self-executing disclosure should remain in effect, the responses were unequivocally affirmative: 61.2% said yes compared to 38.8% who said no. In evaluating the response to this question it is helpful to remember that plaintiffs are much more positive on the rule than defendants. Plaintiffs alone would be much more positive than that, defendants would be much more negative. However, our sample has more defendants than plaintiffs. There are only 40%, roughly, on plaintiffs side in the sample.

Table X

II-8. Opinion of Current Rule

Strongly Against	182	16.7%
Mildly Against	195	17.9%
Indifferent	166	15.2%
Mildly in Favor	382	35.0%
Strongly in Favor	165	15.1%

II-9. Some Rule Remain in Effect

Yes	667	61.2%
No	423	38.8%

General Comments

In an open-ended question we invited general comments. Only about half of the respondents (523 out of 1090) offered comments and these tended to be negative. Of those commenting, about one third (175 or 33%) found the rule not effective: it is not followed (61), it is not enforced (44), no sanctions are imposed if it is not followed (33), it is not enforced uniformly (18), and it does not aid discovery (13).

About one-fourth of those commenting (129 or 25%) asserted that the rule had undesirable consequences: it slows down the process (40), it adds work (39), it adds expense (37), it compromises attorney-client relationships (16).

Some (84) found the rule unnecessary; others (82) complained that it was unclear. Some (59) identified features that they disliked: not enough time given (23), too narrow (18), too broad (16). Some (41) complained that the rule aids the undeserving: it helps lazy attorneys (22), it aids litigants unfairly (20), e.g., it requires a defendant to assume plaintiff's theory.

There were positive comments (91), which tended to be fairly generic: it is a good policy (38), saves time (20), aids in discovery (15), and reduces costs (7). Some comments (72) were neutral: all parties should participate (27), it is too soon to know (15).

Finally, there were comments to the effect that the self-executing disclosure rule works better in simple cases and poses more problems in complex cases.

Relationships Among the General Results

Correlations between the various responses yield a number of results, some obvious and some not so obvious. (See Table XI for display of the full data.) As might be expected, those who have a high opinion of the present rule want the rule kept. Furthermore, they are positively inclined not only to the present rule but to a rule, i.e., they favor keeping some rule requiring disclosure. Similarly, those who want the rule expanded obviously have a higher opinion of the rule.

Examining the correlations with knowledge of the rule yields some results which may be surprising. It suggests that the greater one's knowledge of the rule, the lower one's opinion of it. This is not an assertion of causality, i.e. learn more about it and you will like it less. It may be associated with a number of factors. Is it because big firms, which tend to be opposed to the rule, are more effective in educating their lawyers concerning such recent developments? Would the correlation be the same if we excluded personal injury litigation? Are there some other factors at work? These are questions which, at this juncture, we are not in a position to answer.

There are some further correlations worth noting and it may be appropriate to repeat one or two of those already described so that they appear in a new context.

Among the general result variables: Those who want to keep some rule are less in favor of instituting discovery before self-executing disclosure has been completed. However, they are more in favor of expanding the rule and more favorable in their opinion of the current rule.

Relationship with general background variables: Those who have been exposed to the rule more tend: (1) to be more in favor of allowing discovery after a party has made its own disclosure without awaiting completion of the disclosure process; (2) not to need a more precise definition of the rule; (3) not to be in favor of expanding the rule; and (4) to have a lower opinion of the

present rule, (5) to prefer that no rule remain in effect, and (6) to have had problems with their clients.

Once again, it is important to note that these are not asserted as causal effects, nor do we know what factors contribute to these correlations. Is being associated with the rule more frequently a result of practice in a large firm? Is the nature of the practice reflected in the nature of the case and of the clients?

Those who report more faithful compliance with the rule (1) tend to be against permitting discovery before disclosure has been completed; (2) to have a higher opinion of the present rule: and (3) prefer that a rule governing self-executing disclosure remain in effect. Again, the caveats with respect to causation are applicable.

Those who responded that generally they would not comply with the rule if they felt that doing so would hurt their case or if they felt that the opponent would not follow the rule, tend to have a lower opinion of the present rule, not exactly a surprising result.

Those who reported a lower level of knowledge of the rule tend not to see problems with it and, indeed, tend to want to see the rule expanded. Is this a case of what you don't know can't hurt you and, therefore, more of the same can't hurt you either? Those who see the judges' attitudes as positive tend to have a higher opinion of the rule and to want to expand it.

Finally, those who report issues of work product or attorney client privilege that were difficult to resolve tend to want a more specific definition of the obligations under the rule and are less favorable to the rule generally.

Table XI: Correlations

	Q7PERMIT	Q7AFTER	Q7DEFINE	Q7EXPAND	OPINION	Q9	Q10	KNOWLEDGE
Q7PERMIT	1.000	.276	.080	-.049	-.254	-.236	-.010	-.070
Q7AFTER	.276	1.000	.096	-.041	-.055	-.050	-.079	151
Q7DEFINE	.080	.096	1.000	.227	-.022	.011	.060	010
Q7EXPAND	-.049	-.041	.227	1.000	.449	.390	-.227	- 163
OPINION	-.254	-.055	-.022	.449	1.000	.808	-.341	- 119
Q9	-.236	-.050	.011	.390	.808	1.000	-.301	- 082
Q10	-.010	-.079	.060	-.227	-.341	-.301	1.000	082
KNOWLEDGE	-.070	.151	.010	-.163	-.119	-.082	.082	1 000

The headings refer to questions 7 through 10 of Part II of the questionnaire, the full text of which is set forth in Attachment 2 of this report. Question 7 has several parts; the headings proceed in order through those parts. Specifically, Permit refers to "Permit a party to institute discovery without awaiting any developments with respect to self-executing disclosure." After refers to allowing a party to institute discovery once it has made its own disclosure. Define refers to defining the obligation more specifically and Expand refers to expanding the obligation to which disclosure applies.

Opinion refers to question 8, which asks for the respondent's views on the current rule. Q9 refers to question 9 that asks whether some rule requiring self-executing disclosure should remain in effect and Q10 refers to question 10 that asks whether the obligation to disclose has caused any problem with clients. Finally, Knowledge refers to question 3 in Part II that asks: "At the time it became relevant in these cases, what was your knowledge about the self-executing disclosure rule?"

Relationships Between Background Variables and Opinions

In view of what has come before, nothing in this section is surprising. Those who are more on the side of plaintiffs have a more favorable opinion of the rule and want to see it expanded. Larger firms are, relatively speaking, against the rule and tend not to want to see it expanded. Finally, those with more years in the practice tend to be against the rule and want to allow discovery before disclosure has been completed.

THE VIEWS OF THE COURT'S JUDICIAL OFFICERS

We sought the views of each of the court's judicial officers, district judges and magistrate judges, but did not think it appropriate to utilize the same procedure as was followed in case of the lawyers. Instead, each judge was interviewed by a member of the Advisory Group. Altogether there were 34 interviews.

To insure uniformity in the questions and comparability in the responses, we fashioned a written instrument based on the questionnaire sent to the lawyers. Indeed, the questions were changed only slightly, the changes dictated by the very different role played by the judges. In addition, responses were written down during the interviews and the results tabulated thereafter. General comments were invited and recorded.

What experience had the judges had with self-executing disclosure? Thirty-three of the 34 judges surveyed had more than 20 cases to which the rule applied; the remaining judge had six. To what extent did the judges feel that the rule was being followed in these cases? Nine thought there was compliance in over 90% of the cases, five additional judges placed compliance between 70 and 90%, three estimated compliance at between 10 and 30%. Sixteen judges did not respond to the question, meaning of course, that they felt they had insufficient personal knowledge for a meaningful response, an understandable position in many cases, particularly where no problems have arisen.

Crucial to the success of a requirement of disclosure is the smooth operation of the rule. Were it to engender a satellite motion practice, preliminary to further skirmishes in the course of traditional discovery, the requirement would be self-defeating. Accordingly, we asked the judges whether, in any case before them, any party had made any motion addressed to any aspect of disclosure. Of those responding, 21 judges responded in the negative, with 12 responding that there had been.

It seems clear, however, that no disruptive motion practice has developed. Many motions were made informally, some by telephone, and some were made in resisting traditional motions to compel.[18] At least one judge, after responding that a motion had indeed been made, took occasion

[18] For example, a litigant would defend failure to comply with a discovery request on the ground that the party complaining had not yet made disclosure.

to add that it was "easily resolved."[19] As a percentage of the total number of cases subject to the rule, it seems fair to characterize the number of motions as minuscule and the effort required to resolve them as virtually de minimis.[20]

Do judges take occasion to mention the rules governing self-executing disclosure to the litigants? Twenty judges responded that they have had occasion to do so, some as a regular practice, others in connection with an objection or a request by one of the parties.

We asked the judges what level of knowledge of the rule they thought the attorneys had. Four judges responded that, in their view, lawyers were generally unaware of the rule and its requirements. Eight thought the attorneys had general knowledge of the rule, and ten said they thought the lawyers generally had a working knowledge of the rule. Ten said that the attorneys' knowledge of the rule varied, and two judges did not answer.

Shaping A Rule for the Future: The Judges' Views

We put the major-premise question to the judges directly: Should some self-executing discovery rule remain in effect or not? An impressive 85% of the judges responded in the affirmative: 29 said yes, 4 said no, and one did not respond.

This, however, should not be read as uncritical enthusiasm for the rule that is currently in effect, as the responses to a series of questions demonstrated. First, when asked their opinion of the current rule, only 12 were strongly in favor, 14 were mildly in favor, 3 were indifferent, 2 were mildly against, and 3 were strongly against.[21]

We were, of course, interested in the judges' views concerning the desirability of specific changes that have been proposed. As was done in soliciting the views of the lawyers with respect

[19] In another case, the judge reported that the offending party complied as soon as the rule was called to her attention.

[20] This characterization is based in part on the effort to learn more about the details and the disposition of the motions that were made. The judges hardly recollected anything about almost any of them.

[21] These responses are, of course, entirely consistent with the strong endorsement of having some rule requiring disclosure. Moreover, 26 judges, or 76% of the respondents, were in favor of the present rule.

to specific changes, we asked the judges to assume, in answering these questions, that a "rule requiring some kind of self-executing disclosure will remain in effect."

Should a party be permitted to institute discovery without awaiting any developments concerning self-executing disclosure? Fourteen of the judges were in favor, 13 opposed and 7 were neutral. However, on the question of whether a party should be permitted to institute discovery once that party has made its self-executing disclosures without necessarily waiting for the opposing party's self-executing disclosure, 25 judges were in favor with only 4 against. Four were neutral and one did not respond.

Should the rule define more specifically to what the obligation of self-executing disclosure applies? Only 10 were in favor, 13 were neutral and 11 were against. On the question of whether the rule should be amended to expand "to what the obligation of disclosure applies," only 4 were in favor, 17 were against, 11 were neutral, and 2 did not answer.

A series of questions attempted to gain the judges' views as to how the present rule was working, addressed in terms both of costs and benefits. Does the present rule cause the lawyer problems with clients? Ten responded in the affirmative, 11 in the negative, and, understandably, 13 said "maybe."

Does it raise questions of confidentiality? Sixteen said yes, 12 said no, and 6 said maybe. Does it result in reducing the cost of litigation? Seventeen judges responded in the affirmative, 9 in the negative, and 11 "maybe."

Does the rule reduce delay? Fourteen judges said yes, 9 said no, and 11 were in the "maybe" column. Some of the "maybe" responses emphasized that it depended on the case, and some judges noted the possibility that in some cases the rule may increase delay.

Is the rule frequently not complied with, we asked the judges, "because each side expects no compliance or minimal compliance from the other side?" The judges thought not. Sixteen said no, compared to 6 who said yes, although 12 said maybe.

Finally, is the rule frequently not complied with "because individual judges are considered unsympathetic to the rule?" As might be expected, there was a decisive vote in the negative. Twenty-five judges said no, as against only 2 who said yes, with only 7 responding "maybe."

CONCLUSIONS

Bench and bar with experience with the rule requiring self-executing disclosure clearly want some type of requirement to remain in effect. An impressive 85% of the judges are of this view, and so are over 60% of the attorneys surveyed.

Reaction to the rule is not uniform among all types of litigators. Plaintiffs tend to favor the rule far more than defendants, and associated with this phenomenon is the fact that lawyers in large firms tend to favor the rule less than sole practitioners and those in smaller firms.[22]

It is true that a majority of the lawyers responding to our survey[23] and three-fourths of the judges are in favor of the present rule, but an even greater number are of the view that it can be improved and ought to be changed. The strongest support is for an amendment that would facilitate speedier disposition of litigation by allowing a litigant to proceed with traditional discovery as soon as its own disclosure obligations had been discharged, without awaiting disclosure by the opponent.

The purpose of this survey has been to provide data for the consideration of the Advisory Group as it attempts to formulate its recommendations to the court concerning whether this rule requiring disclosure, some other rule, or no rule should be adopted by the court. We would, of course, like to hope that the opinions reflected and the facts reported in this account will also be

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[22] We have no evidence that this bias has skewed our results, but if it has, the result is to understate approval of the rule. We asked the respondents whether they were on the side of the plaintiff or the defendant in the last case to which self-executing disclosure applied. Only 43.1% were on the side of the plaintiff compared to 56.9% on the side of the defendant, a differential of almost 14%

The percentage representing plaintiff is almost identical to the percentage who, in response to an earlier question, reported that they typically were on the side of plaintiffs: 42.1%

One may speculate concerning the reason for the discrepancy. While it is true that we think of the prototypical case as being between one plaintiff and one defendant, it is a familiar phenomenon that plaintiffs have reason to join additional defendants virtually whenever the opportunity presents itself.

It may also be that a greater proportion of defense lawyers, who view the requirement of disclosure as depriving them of a tactical advantage previously enjoyed and giving plaintiffs an undeserved "bonus," and who give evidence of feeling more intensely about the rule than do plaintiffs, may have responded to the questionnaire than did the plaintiffs.

[23] Adding those mildly in favor of the rule to those strongly in favor yields 50.1% of the respondents. Eliminating those who are indifferent (15.2%), raises the percentage approving to 55%.

of assistance to the court as it determines whether to continue, to amend, or to repeal the present provisions.

Decisions about the specific recommendations to be made by the Advisory Group and the appropriate time for change, if change is to be recommended, are beyond the proper scope of this report. Moreover, we recognize that there may be factors relevant to what is best for the short term that are not necessarily relevant to what is best for the long term.

The Judicial Conference of the United States will in due course receive and examine the report of the Rand Institute for Civil Justice and, thereafter, formulate its own report to the Congress and its recommendations concerning the efficient operation of the federal judicial system.[24] The experience of other districts, possible changes in other rules that may affect the desirability of self-executing disclosure and the specific provisions that should govern it, will all be relevant. This report is submitted in the hope that it, too, will be useful in the enterprise.

[24] See P.L. 101-650, Dec. 1, 1990, §105 (c)(1) and (c)(2), as amended.

Attachment 1

CHAPTER IV. DUTY OF SELF-EXECUTING DISCLOSURE[20]

Section 4:01 - Discovery - Duty of Self-Executing Disclosure

(A) Required Disclosures

(1) Unless otherwise directed by the court, each party shall, without awaiting a discovery request, disclose to all other parties:

(a) the name and last known address of each person reasonably likely to have information that bears significantly on the claims and defenses, identifying the subjects of the information;

(b) a general description, including location, of all documents, data compilations, and tangible things in the possession, custody, or control of that party that are likely to bear significantly on the claims and defenses;

(c) the existence and contents of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy part or all of the judgment that may be entered in the action, or indemnify or reimburse for payments made to satisfy the judgment, making available such agreement for inspection and copying as under Local Civil Rule 24;

(d) unless the court otherwise directs, these disclosures shall be made (i) by each plaintiff within thirty (30) days after service of an answer to its complaint; (ii) by each defendant within thirty (30) days after serving its answer to the complaint; and, in any event (iii) by any party that has appeared in the case within thirty (30) days after receiving from another party a written demand for early disclosure accompanied by the demanding party's disclosures. A party is not excused from disclosure because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosure, or, except with respect to the obligation under clause (iii), because another party has not made its disclosures.

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[20]. See 28 U.S.C. §473(a)(4), reprinted in Appendix II, and Report of the Advisory Group (pages 78-80), reprinted in Appendix III of this Plan (pages 64-66).

(B) Timing and Sequence of Discovery -- Except by leave of the court or upon agreement of the parties, a party may not seek discovery from any source before making the disclosures under subdivision (a)(1), and may not seek discovery from another party before the date such disclosures have been made by, or are due from, such other party.

(C) Supplementation of Disclosures -- A party who has made a disclosure under subdivision (a) is under a duty to reasonably supplement or correct its disclosures if the party obtains information on the basis of which it knows that the information disclosed was either incomplete or incorrect when made, or is not longer complete or true.

(D) Signing of Disclosures -- Every disclosure or supplement made pursuant to subdivision (a) or (c) by a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney shall sign the disclosure. The signature of the attorney or party constitutes the certification under, and is consequently governed by, the provisions of the Federal Rules of Civil Procedure, and, in addition, constitutes a certification that the signer has read the disclosure, and to the best of signer's knowledge, information, and belief, formed after reasonable inquiry, the disclosure is complete as of the time it was made.

(E) Duplicative Disclosure -- At the time the duty to disclose arises it may over matters already fully disclosed in the same civil action pursuant to an order of the court, to a requirement of law or otherwise.[21] In that event duplicative disclosure is not required and a statement that disclosure has already been made discharges the obligation imposed under this section.

[21] Cf. Local Civil Rule 26, Mandatory Exchange of Medical Reports in Personal Injury Claims.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: :
ORDER EXTENDING CIVIL :
JUSTICE EXPENSE AND :
DELAY REDUCTION PLAN :

ORDER

AND NOW, to wit, this 11th day of December, 1995, it appearing that on October 25, 1991, this Court entered an Order adopting the attached Civil Justice Expense and Delay Reduction Plan, effective December 31, 1991, and

it further appearing that the said Plan was adopted by this Court as a pilot program and is currently scheduled to lapse on December 31, 1995, and

it further appearing that authorization for this pilot program has been extended by 28 U.S.C. §471, as amended, and that the Congress has authorized promulgation and extension of the Civil Justice Expense and Delay Reduction Plans and,

it further appearing to the court that when the Plan was adopted, the duty of self-executing disclosure was only made applicable to cases on the Standard Management track, it is hereby

ORDERED that the court hereby clarifies that the duties of self executing disclosure prescribed by this Plan at the time of its adoption do not apply to cases on the Special Management Track, and it is further

ORDERED that the attached Civil Justice Expense and Delay Reduction Plan shall remain in effect until December 31, 1997, and it is further

ORDERED that the Civil Justice Expense and Delay Reduction Plan is promulgated by this court pursuant to 28 U.S.C. §§471, 472 and that this Plan, as it may be amended from time to time, shall be maintained in the Office of the Clerk of Court for public inspection, and, it is further

ORDERED that the fact of the Civil Justice Expense and Delay Reduction Plan's extension shall be published by the Clerk of Court to inform members of the bar and public of its adoption and extension and to afford opportunity for public notice and comment.

FOR THE COURT:

EDWARD N. CAHN
Chief Judge

Attachment 2

Questionnaire on the Self-Executing Disclosure Rule

I. As a reminder, the rule for self-executing disclosure is as follows.

> The term "self-executing disclosure" as used in this questionnaire refers to the obligation imposed by Section 4.01 of the Plan promulgated by the United States District Court for the Eastern District of Pennsylvania under the Civil Justice Reform Act of 1990.
>
> That section imposes the obligation on each party to turn over to all other parties, without any formal request having been made, the following: (1) the name and last known address of each person likely to have information relevant to the claims and defenses in the lawsuit; (2) a description of all relevant documents, data compilations and tangible things; and (3) insurance policies that may satisfy any resultant judgment, including making the documents available for inspection and copying.
>
> The provisions of this section do not apply to any cases assigned to the Special Management Track (special procedures govern those cases). For that reason, this questionnaire does not cover what is generally known as "complex litigation."
>
> The terminology has been anything but uniform. What we have termed "self-executing disclosure" is sometimes referred to simply as "disclosure" or "voluntary exchange of information among litigants and their attorneys." It is to be distinguished from "discovery," the process of using interrogatories, depositions, requests for admission, and other formal mechanisms for gaining information from one's adversary.

In thinking about your last case that was concluded at the district court level and to which the promulgated rule governing self-executing disclosure applied:

1. Were you on the side of a defendant?

   ___ Yes ___ No

2. In which of the following categories was this case (check one)?

   ___ Contract-Insurance
   ___ Other contract
   ___ Personal injury
   ___ Tort-Personal property
   ___ Prisoner petitions
   ___ Other civil rights
   ___ Labor
   ___ Social Security
   ___ Other

3. When was the case terminated?

   ___ Before self-executing disclosure
   ___ After self-executing disclosure but before full discovery
   ___ After full discovery but prior to trial
   ___ During the trial
   ___ After the trial concluded

4. How was the case terminated?

   ___ By settlement or other voluntary dismissal
   ___ By verdict or judicial action

5. How would you characterize **your** level of compliance with the self-executing disclosure rule?

   ___ Fully
   ___ Partially
   ___ Minimally
   ___ Not at all

6. Whether or not you complied with the rule on self-executing disclosure, indicate to what extent you agree or disagree with the following statements: Substantial compliance **by you** did/would have

	Strongly Disagree	**Mildly Disagree**	**Neutral**	**Mildly Agree**	**Strongly Agree**
• decrease(d) the time spent on the case.	___	___	___	___	___
• decrease(d) the cost of litigation to your client.	___	___	___	___	___
• improve(d) your ability to represent your client.	___	___	___	___	___

7. How would you characterize **your opponent's** level of compliance with the self-executing disclosure rule?

   ___ Fully
   ___ Partially
   ___ Minimally
   ___ Not at all

8. Whether or not your opponent complied with the rule on self-executing disclosure, indicate to what extent you agree or disagree with the following statements: Substantial compliance **by your opponent** did/would have

	Strongly Disagree	**Mildly Disagree**	**Neutral**	**Mildly Agree**	**Strongly Agree**
• decrease(d) the time spent on the case.	___	___	___	___	___
• decrease(d) the cost of litigation to your client.	___	___	___	___	___
• improve(d) your ability to represent your client.	___	___	___	___	___

9. Whether or not full self-executing disclosure occurred in this case, if the rule had been followed by both sides, compared to no self-executing disclosure by either side, the outcome of this case would likely have been:

___ Greatly different
___ Somewhat different
___ The same

II. Now think about the self-executing disclosure rule more generally:

1. In how many of your cases that were instituted since the beginning of 1992 did this rule apply?

___ 0–5 ___ 6–10 ___ 11–19 ___ More than 20

2. Of these cases, in what percentage was the self-executing disclosure rule followed to any extent by any party?

___ Less than 10%
___ 10% up to 30%
___ 30% up to 70%
___ 70% up to 90%
___ More than 90%

3. At the time it became relevant in these cases, what was your knowledge about the self-executing disclosure rule?

___ Was unaware of the rule
___ Had general knowledge of the existence of the rule
___ Had working knowledge of the rule
___ Knowledge of the rule varied from case to case

4. Which of the following reasons for not following the self-executing disclosure rule would generally apply to you (please check yes or no).

• Would hurt my case	___ Yes	___ No
• Did not believe my opponent would comply	___ Yes	___ No
• Did not believe the judge would enforce it	___ Yes	___ No
• Did not know the rule	___ Yes	___ No

5. (a) In any case in which you participated, was there a motion for sanctions relating to self-executing disclosure?

___ Yes ___ No

(b) Was any such motion granted?

___ Yes ___ No

(c) In general, what is your perception of the judges' attitude to the self-executing disclosure rule?

___ Favorable
___ Neutral
___ Hostile
___ Court seemed unaware of rule
___ Varies

6. In applying the self-executing disclosure rule, have you faced any issue of attorney-client privilege or of work product protection?

___ Yes, but easy to resolve
___ Yes, but difficult to resolve
___ No

7. Assuming some kind of self-executing disclosure will remain, what are your feelings about the following?

	Strongly Disagree	Mildly Disagree	Neutral	Mildly Agree	Strongly Agree
• Permit a party to institute discovery without awaiting any developments with respect to self-executing disclosure.	___	___	___	___	___
• Permit a party to institute discovery once the party has made its self-executing disclosures without necessarily waiting for the opposing party's self-executing disclosure.	___	___	___	___	___
• Define more specifically to what the obligation of disclosure applies.	___	___	___	___	___
• Expand to what the obligation of disclosure applies.	___	___	___	___	___

8. What is your opinion of the current self-executing disclosure rule?

___ Strongly in favor
___ Mildly in favor
___ Indifferent
___ Mildly against
___ Strongly against

9. Do you think a self-executing disclosure rule should remain in effect?

___ Yes ___ No

10. Has the obligation to disclose under the self-executing disclosure rule caused any problem with your clients?

___ Yes ___ No

11. Please indicate any general comments you might have about the self-executing disclosure rule:

_____

_____

_____

III. At this point we would like to obtain a little background information about you. Please be assured that this information is for survey purposes only, and all such data will be amalgamated across respondents to ensure confidentiality.

1. In what percentage of your cases that were instituted since the beginning of 1992 were you

   ____ on the side of a plaintiff?
   ____ on the side of a defendant?

2. Of the cases you handled in which suit was filed in the Eastern District of Pennsylvania since the beginning of 1992, what were the percentages (to add up to 100%) in the following categories:

   ___ Contract-Insurance
   ___ Other contract
   ___ Personal injury
   ___ Tort-Personal property
   ___ Prisoner petitions
   ___ Other civil rights
   ___ Labor
   ___ Social Security
   ___ Other
   ___ Total (must equal 100%)

3. In which category does your age fall?

   ___ Under 30 years ___ 30–39 years ___ 40–49 years ___ 50–59 years ___ 60 years or over

4. What is your gender?

   ___ Female ___ Male

5. How many years have you been in practice?

   ___ Less than 5 years
   ___ 5–9 years
   ___ 10–14 years
   ___ 15–19 years
   ___ 20–29 years
   ___ 30 years or over

6. What is the number of lawyers in the firm in which you practice (at all offices)?

   ___ Fewer than 5 ___ 5–9 ___ 10–29 ___ 30–49 ___ 50–99 ___ 100 or more

Thank you for completing this questionnaire.

Attachment 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

PROCEDURES FOR THE RANDOM SELECTION OF ATTORNEYS TO RECEIVE THE CJRA SELF-EXECUTING DISCLOSURE QUESTIONNAIRE

The first step was selecting all counsel of record in all civil cases filed from January 1, 1992 to January 1, 1994, excluding Special Management Track Cases, Pro Se Cases, Habeas Corpus Cases, Bankruptcy Appeals and Social Security Cases. Counsel was selected on pending and terminated cases. This selection criteria produced a file of approximately 78,000 names sorted alphabetically.

The next step was removing all duplicate attorney names. If an attorney represented more than one party in a case, his/her name appeared for each party represented. The next step was to verify addresses for attorneys listed with more than one address. After removing all duplicate names and verifying addresses a total of 8,703 names remained.

A starting countdown number of "two" was selected randomly. Therefore, starting with the second name on the list every other name was selected until a total 4,300 names were selected.

Attachment 4

PROTOCOL FOR INTERVIEWS OF JUDGES
January 1995

Name of Judge _____ Name of Interviewer _____

Date of Interview _____

Time Interview Commenced _____ Concluded _____

NOTE TO INTERVIEWER: Except when the instructions specify otherwise, this Protocol is intended as a text that you can use verbatim. Having the questions posed to the judges in substantially the same form is designed to assure uniformity.

I. INTRODUCTION AND PRELIMINARIES

1. Thank the judge in your own words for his or her willingness to be interviewed.

2. I am asked to begin with a statement of how we are using certain terms: the terminology has been anything but uniform. What we have termed "self-executing disclosure" is sometimes referred to simply as "disclosure" or "voluntary exchange of information among litigants and their attorneys." It is to be distinguished from "discovery," the process of using interrogatories, depositions, requests for admission, and other formal mechanisms for gaining information from one's adversary.

3. I am also asked to mention that the term "self-executing disclosure" as used in this interview refers to the obligation imposed by Section 4.01 of the Plan promulgated by the United States District Court of the Eastern District of Pennsylvania under the Civil Justice Reform Act of 1990.

4. This means, of course, that this interview does not apply to any cases assigned to the Special Management Track, because special procedures govern those cases. However, if at any point in the interview you think it would be helpful to mention your experience with such cases, please do so, simply indicating that you are drawing on experience with a Special Management Track case or one involving what we call "complex litigation."

II. MOTIONS RELATING TO SELF-EXECUTING DISCLOSURE

1. Has any party made any motion in a case before you addressed to any aspect of the rule governing "self-executing disclosure"?

   (If more that one motion, elicit the relevant information concerning each such motion, unless too numerous. In that event, elicit the information for three such motions, preferably the most recent three, and also inquire as to total number of motions made. If more than one motion was made in any one case, please so indicate.)

2. If so, which party made the motion? What relief did the movant seek?

3. What was the ruling on the motion? (If it was withdrawn, so specify.)

4. In which of the following categories was that case?

____ Contract-Insurance
____ Other contract
____ Personal injury
____ Tort-Personal Property
____ Prisoner petitions
____ Other civil rights
____ Labor
____ Social Security
____ Other

5. When was the case terminated?

____ Before self-executing disclosure
____ After self-executing disclosure
____ After full discovery but before trial
____ During the trial
____ After the trial

6. How was the case terminated?

____ By settlement or other voluntary dismissal
____ By verdict or judicial action

7. How would you characterize the level of compliance of the party against whom the motion was directed?

____ Full
____ Partial
____ Minimal
____ None
____ Not Applicable

8. How would you characterize the movant's level of compliance with the self-executing disclosure rule?

____ Full
____ Partial
____ Minimal
____ None
____ Not Applicable

III. REFERENCES TO SELF-EXECUTING DISCLOSURE

1. Have you had any occasion to mention the rule governing self-executing disclosure in the course of any conference with the parties in any case?

   ____ Yes ____ No

2. If so, was the case one in which

   ____ the rule was applicable

   ____ the rule might have been applicable

   ____ the rule was not applicable

3. If you have had occasion to make such a comment, then (for each case in which you did comment)

   (a) what was the nature of the comment?

   (b) what were the circumstances leading to the making of the comment?

4. Has any of the litigants appearing before you made any comments relating to self-executing disclosure?

   (a) either (1) in the course of a conference with you, or (2) in the course of any other proceeding?

   ____ Yes (specify which) _____

   ____ No

   (b) If so, (1) detail the substance of the comment, (2) the circumstances, (3) the party who made it, and (4) any comments that followed on your part or on the part of other parties to the action.

IV. YOUR VIEWS ABOUT SELF-EXECUTING DISCLOSURE MORE GENERALLY

1. In how many of the cases before you that were instituted since the beginning of 1992 would you estimate that the rule applied?

   ____ 0-5 ____ 6-10 ____ 11-19 ____ More than 20

2. Of these cases, in what percentage was the self-executing disclosure rule followed to any extent by any party?

   ____ Less than 10%
   ____ 10% up to 30%
   ____ 30% up to 70%
   ____ 70% up to 90%
   ____ More than 90%
   ____ This is just a rough estimate
   ____ I have no basis for making any estimate

3. Assuming a rule requiring some kind of self-executing disclosure will remain, what are your feelings about the following

	Strongly Favor	Mildly Favor	Neutral	Mildly Oppose	Strongly Oppose
•Permit a party to institute discovery without awaiting any developments with respect to self-executing disclosure	____	____	____	____	____
•Permit a party to institute discovery once the party has made its self-executing disclosures without necessarily waiting for the opposing party's self-executing disclosure.	____	____	____	____	____
•Define more specifically to what the obligation of disclosure applies.	____	____	____	____	____
•Expand to what the obligation of disclosure applies.	____	____	____	____	____

4. What is your opinion of the current self-executing disclosure?

   ____ Strongly in favor
   ____ Mildly in favor
   ____ Indifferent
   ____ Mildly against
   ____ Strongly against

5. Do you think a self-executing disclosure rule should remain in effect in this court?

   ____ Yes ____ No

6. In general, I believe that the average member of the bar's knowledge of the self-executing disclosure rule is best characterized as follows:

   ____ Is unaware of the rule
   ____ Has general knowledge of the existence of the rule
   ____ Has working knowledge of the rule
   ____ Knowledge of the rule varies from case to case
   ____ Knowledge of the rule varies too much to make any generalization useful

7. Do you think that the obligation to disclose under the self-executing disclosure rule

   (a) causes problems with clients?

   ____ Yes ____ No

   (b) raises questions of confidentiality?

   ____ Yes ____ No

   (c) results in reducing the cost of litigation?

   ____ Yes ____ No

   (d) results in reducing delay?

   ____ Yes ____ No

   (e) results in increasing delay?

   ____ Yes ____ No

   (f) is frequently not complied with because each side expects no compliance or minimal compliance from the other side?

   ____ Yes ____ No

   (g) is frequently not complied with because individual judges are viewed as unsympathetic to the rule?

   ____ Yes ____ No

8. (a) Do you have any additional comments concerning self-executing disclosure?

   (b) Do you have any suggestions for modification of the rule, if the rule is to remain in effect?

Thank the judge in your own words for helping the Advisory Group.