CIVIL JUSTICE REFORM ACT ADVISORY GROUP

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(Meeting called to order)

MR. LANDIS: Okay. Just in time. A full complement of members today. We had a couple of people who said they couldn't be here, but I think at this hour we ought to get on with it. As I'm sure you all know, under the act each advisory group is required to file an annual report of its -- on its work and on the progress under the plan, so that's what we're about. We had considered meeting earlier and looking at things a little sooner, but we realized that until a whole year of experience had been built up, there wasn't a lot of purpose in trying to assess things and trying to check with the lawyers, the litigants, and the court as to how things are progressing. So we're here this morning to start work on that. And while we haven't looked ahead to a target date for completion of the report, we can discuss that in the course of our meeting.

First, I think -- I know I speak for the Advisory Group, to thank Mike for these handsome volumes of the report that we did last year. It's a wonderful addition to the -- to our libraries, and I don't know any others that have one of these handsome bound volumes to commemorate the work that they did. But we all --

MR. KUNZ: Well, it's appropriately dated August 1st, 1991.

MR. LANDIS: That's right. That's right. We all --

and that was a deadline that we certainly broke through. And I take it that the chief is not going to be here?

MR. KUNZ: No, he will not be here this morning.

MR. LANDIS: Okay. Right. All right. Well, then Mike is going to lead off with a report on the statistics during the period through November 30th, 1992. So, Mike, why don't you take the floor.

MR. KUNZ: Thank you, Bob. First, good morning and welcome back. I enjoyed very much these meetings last year. Actually it was '91 on the Civil Justice Reform Act. The statistics we've compiled, and there's a set for each of you, have been assembled by our staff from cases filed during 1992, which was the period covered by the Civil Justice Reform Act Plan.

I'd like to take a moment to express my appreciation to Marlene Anderson who's here. Marlene, do you want to stand? And Fred Stakelbeck who's been designated the individual who will be maintaining all the Civil Justice Reform Act statistics. So as we expand the surveys and studies, Marlene and Fred will be attending meetings and available to assist in compiling any statistics that are required for the advisory group.

I'd like to preliminarily say that the case management track designation form which was included as part of the plan has worked very well. It really -- there have

been no instances where there have been any problems in the designation of the cases by case management track. As far as I know, I think there are only two cases where the track has been changed, and I think only in about ten cases was the designation clearly wrong. But the designation was made by a person, a litigant who describes himself as God. So ...

But other than those couple instances, it really has worked very, very well. The clerk's office does not have any burden whatsoever. Chambers staff have not seemed to have any problems and we're particularly well pleased that that aspect of it has worked so very well.

MS. CLARKE: Mike, in those two instances where the designation was changed, were -- was it changed because the parties disagreed?

MR. KUNZ: In the first case the plaintiff designated the case special and defense counsel filed a form and said standard. And there was a meeting of the minds and the judge just changed it to standard. So there was a difference between attorneys. I personally think it was an instance of someone just not being careful when they filled that form out.

The second one I believe was a case designated as standard and then the second designation came in as special management track. But to think of all these cases being filed, it's worked very, very well.

As far as accurately determining whether there's been

equal distribution of the management track cases across the various judges, that appears to be working very well, but that there's a congruence between the random assignment system and the track designation. There's only one judge who has a much higher number, and he has about 35 related securities cases. They were all reassigned. So we can determine that readily.

The caseload interestingly, if we could take a look at page one, has broken out the filing by case management track designation and also whether those cases have been terminated or pending. And you can see that the cases are divided pretty much the way we predicted they would across the case management track. And, in fact, it's almost amazing that it is so close. We deal with the percentages a little further in the report.

Overall filings, if we could go to page two, show that on non-asbestos cases there was 7,582 cases, and that's down about three percent from 1991. Asbestos cases, 442, that's down about 45 percent. And that's asbestos cases filed in our district. It does not include -- when we talk about asbestos cases, it does not include the MDL cases, the 30-some thousand that Judge Weiner is administering. They're maintained through statistics on the judicial panel of multi-district litigation.

Terminations on the non-asbestos docket are up about eight percent, and are pending is down about eleven percent.

Asbestos cases -- and again, these are the cases that were filed in our district and 697 of those cases were closed out, and they were some old cases. Judge Weiner's had very, very good success in settling a number of those cases. The asbestos caseload for this district is down about five percent at 5,346 cases.

The criminal docket, of course, continues to be a matter of concern. I know the work of the group is basically the civil docket, but certainly you should be aware of the criminal docket and the workload. And our indictments are up about 600 -- or two percent to 692, and defendants there was 1302 defendants indicted during that time period.

Terminations are up 30 percent, 641 cases and 1201 defendants, which is about 27 percent over the prior year. The pending criminal caseload is up about seven percent as to cases and defendants, and those cases do consume a good bit of the judge's time, there's no doubt about that.

I'd like to just shift to page three, and if there's any questions as we go through this process, please feel free to interrupt me.

MS. CLARKE: Mike, are all the MDL cases out or just the asbestos cases?

MR. KUNZ: All the asbestos MDL cases are out. The other MDL cases would be in the statistics.

MS. CLARKE: Okay.

MR. KUNZ: Because they're transferred into this district. But I'm not aware -- Marlene, do we have any large numbers of asbestos --

MS. ANDERSON: Of asbestos?

MR. KUNZ: -- or MDL, excuse me.

MS. ANDERSON: No.

MR. KUNZ: Of any MDL cases coming in, I don't know that there's much more than 10 or 15 cases. But that's something we can take a look at and note. Page three is just a breakdown of asbestos, arbitration, and non-asbestos cases, and basically shows you what occurred on assignments and terminations. And it's just informational. The middle bracket shows how the cases are distributed by majority of the nature of suit, and that might be helpful to review as we get more information on terminations.

One of the things I think we should bear in mind at this stage, we're looking at statistics on cases filed in 1992, and those that are terminated are those which probably would be terminated in any event. I don't know that the plan has had a substantial impact on those cases.

MR. CHURCHILL: Mike, the reason why there are 9751 cases on this page and 8,000 on the other is because this includes arbitration cases that aren't included in there? Or what's the difference?

MR. KUNZ: The difference would be -- these are

triables, aren't they?

MR. LEVIN: Yes, they're triable cases.

MR. KUNZ: And that would include previously filed?

MR. LEVIN: Yes.

MR. KUNZ: I think -- that's right. This chart includes all the cases, where the other chart is dealing with the planned cases. As you look at the lower portion of the caseload, you can still see that other than the asbestos cases, over three years old where I like to start is only 89 non-asbestos cases. That's the lowest in the history of the court. We've never been below 95. That was the best we ever did. And I -- I'm confident that's the lowest figure of any district in the nation, except for the smaller jurisdictions.

Asbestos cases are at 2851 and our total of 2940. But 30 percent overall of the docket is over three years old. But if you take the asbestos cases out, that figure drops dramatically. Two to three years old, again, 15 percent of the cases, and then from the period one to two years, it's about 14 percent. And less than one year is almost 40 percent of the cases, 39.4. So I believe that these charts show a good illustration of how the caseload is distributed in our district.

Page four shows cases that have been terminated, and these are only cases filed during the period covered by our plan. And the method of termination, the largest group being

54 percent that have been settled, about 1,964 cases, and then the others are distributed across the docket.

MR. LANDIS: Mike, tell us again what a statistical closing is.

MR. KUNZ: Statistical closing is a case where there's agreement that the case cannot proceed, but there is not an agreement that it should be settled or dismissed or some type of order, and the judge agrees to statistically take it off the docket. And then at some later point in time, it comes back on the docket.

MR. LANDIS: That still doesn't quite get through to me. I'm not quite sure I understand -- can you illustrate what that would be?

MR. KUNZ: Well, let me take an instance where a case is filed and there's a bankruptcy proceeding and everyone agrees that until that bankruptcy --

MR. LANDIS: I see.

MR. KUNZ: -- proceeding is terminated, --

MR. LANDIS: Okay.

MR. KUNZ: -- the case cannot proceed, and rather than keep it as a pending, active case on the docket, it's put on what's known as the suspense docket, and a statistical closing is entered.

MR. RAYNES: What's that, transferring remand and 1403A's transfer, you're talking about? How does that break

down between the remands and the 1403A's?

MR. KUNZ: The transfers would be the 1403s, and I believe we have -- well, no, wait a minute, I'm sorry. That would include both, both the transfers to other district and the remands. But I think you would find a very high percentage of those are remands. We can break that out, can't we, Marlene? Yes. We can do that for you for the next meeting to show which are transferred and which are remanded.

MR. ROSENBLEETH: Mike, is there any -- are there any numbers or percentages in terms of how this period stacks up to the other periods?

MR. KUNZ: We haven't done that yet, and I wanted to raise that as an issue at some point during my presentation, whether you wanted us to go back one or two years to see what the statistics look like in prior years. And certainly we're most willing to do that, if you think it would be useful.

MR. LANDIS: I think particularly on some of the specific aspects of the recommendation, for example, setting early firm trial dates to see whether the provision that's in the plan for dealing with that has made any significant change in the comparable period, that's one that comes to mind, and there may be others.

MR. RAYNES: Mike, there's another statistic in here. You see -- of 3631 cases, it says only seven were disposed of by judgment or jury verdict, and the most that were settled,

54 percent. But to make that a more meaningful figure, how many of those cases were settled when they at least picked a jury or started putting on testimony? Because otherwise it looks like only .190 and less than two percent of the cases were tried. But to bring Bob's point home, if you have a trial date and cases are -- maybe it should be broken out, you know, listed for trial, picked a jury, because I think that number would come -- you know, would be a more meaningful number than just got settled because it went through the system.

MR. CHURCHILL: Well, look, this is a very misleading set of numbers or strange set of numbers anyway. I mean, these are just the cases that were filed in that year. Most of them, of course, half of them weren't even in the pool for six months. So it's obviously going to be --

MS. BALLARD: The cases that were filed and terminated within that year.

MR. CHURCHILL: Year. So --

MS. BALLARD: So all the cases that didn't get finished are not in there.

MR. KUNZ: Still pending.

MR. LANDIS: Yeah, that's right.

MR. CHURCHILL: Right. And what would be useful, if we could figure out some way, would be to actually track this cohort in the future. In other words, that we know how long

it took for the first year's cases to actually get done at some time because -- and that's what we can sort of make a comparison on in the past. But some of these cases have not even been there for any significant length of time.

MR. KUNZ: Sure.

MR. CHURCHILL: And it's obvious -- it's clear that what's happening in some of these anyway is the filing of the suit leads to some real settlement negotiations, rather than the threat of an actual trial itself leading to it because many of these have not gotten to that stage.

MR. RAYNES: I had a case that was listed within four months of the date that I filed the lawsuit, and it was settled a week before the trial. So, I mean, some of them --

MR. CHURCHILL: Right. There are some.

MR. RAYNES: -- that do break out that way.

MR. CHURCHILL: Well, I didn't mean to interrupt in a sense. Mike, is it possible to actually distinguish and find which of those cases where it is happening that settlements are occurring on the eve of trial?

MR. KUNZ: Yes. We could take the cases that have been set for trial. That's the cases you're talking about. I think what this report does well, it sorts these cases out from those, and the ones I believe that are on the docket now are the cases that are going to be in the category you're talking about. But many of these, even without a Civil

Justice Reform Act Plan, would have taken the same route that they have during this year, and maybe that's what we've captured very well. The trial date settings, there's I think something close to a thousand. During the first year there was about 1200 total, 1,000 cases there was trial dates set. And we can match those up and see which ones settled on the eve of trial.

This terminology, we could consolidate some of these categories, but they're the basic statistical categories that are used and some I think are duplicative in the sense that whether it's dismissed other or dismissed voluntarily, I don't know what the difference on that is. I mean, there's some statistical definition of that that we use.

MR. LEVIN: Mike, I think, and this goes to Arthur's point, some statistics are kept nationally, such as whether a trial "begins," and whether it settled after a trial begins. I think these it would be easy to break out and that would be relevant. Now, how much additional Mike can do and how firm it will be in terms of trial date "set," that would be fine. I'd leave that to his discretion. Some of it is available because it's reported nationally. I suspect that's -- trial begins if a jury is picked, something like that would be my guess.

MS. CLARKE: To follow up on Mike's point, is it possible to continue to track the 1992 universe?

MR. KUNZ: Yes. We are going to continue to do that. And I think as that continues on, we'll then start to get the information, Arthur, you're looking for.

MR. RAYNES: I think it just -- it's confirmatory of what -- we had like three, four discussions here during the year when the report was being written about single most important thing is listing a case for trial. And I just thought it would be interesting to find out whether or not that's true. My guts tell me that it is true, but it'd be nice to see it reflected in statistics rather than less than two percent.

MR. KUNZ: Right. I can say one thing, and this is anecdotal, but the staff has observed since the Civil Justice Reform Act Plan has been adopted, the judges are documenting trial dates by orders, and if it's reset, it's done by order. And time frames in cases are now more documented by order. Continuances at the request of someone are documented in the order and set forth. So that there's been a change in how we manage the cases, I think, clearly.

Page five is just merely an illustration, a chart which shows the -- or graph that shows the method of termination, just to give us a little information on how they're done, how they're terminated.

Page six, again, I think the statistics are preliminary, but we looked at median times and we'll continue

tracking this as we go through for the 1992 universe and the years thereafter. But the chart shows the case management track across the top, and then the median time and days is the second column down. And that shows the median time for each case management track for cases terminated. And the third column shows the total number of cases that were terminated in that track. And overall these statistics look good. I think as we get further on and get additional statistical information, those times will change somewhat. But I'm favorably impressed at the social security statistic. That in my experience, that's not a typical time frame. And if that could hold up, I think that would be most desirable.

MR. LANDIS: Right. How would it compare to what you call a typical time frame?

MR. KUNZ: Well, I --

MR. LANDIS: Just roughly.

MR. KUNZ: I really would look for something like eight months there.

MR. LANDIS: Eight months.

MR. KUNZ: It would not be -- in the past one of the greatest problems has been getting the record, the social security record.

MR. LANDIS: Yeah.

MR. KUNZ: And that I think is most impressive. The other figures I think all look good. I don't see anything out

of line or that's real high.

Next I'd like to go to page eight, which is the requirements we have under the Civil Justice Reform Act, the reporting of motions pending over 180 days, bench trials submitted over six months, and civil cases pending three years or more. And the three-year-old cases, the district's cases are reported, but do not include asbestos cases, and they do not include the MDL asbestos cases. All asbestos cases are kept in a separate report, the Administrative Office, U. S. Court, and they report them separately nationally.

But you can see how the court has made a conscientious effort to deal with these motions pending over 180 days, and the other two categories, bench trials and civil cases. I prepare -- well, I -- Marlene and her staff prepare a report monthly for each judge which shows every case in which the judge has motions, and they're aged by the various time frames starting with over 30 days. And I think that's had a dramatic change in the way we do things here. When we first sent those reports around, the numbers were much, much higher. For the most recent report that we sent around, the numbers were way down. One judge went from 22 motions over 180 days on a regular consistent basis to this report he had zero. And I think that's a substantial improvement.

MR. LANDIS: Mike, I -- I know I've been going around the country making speeches on this stuff, and I can't

remember where this was, but one very, very seasoned judge from California, as I remember, one of the courts in California said these things don't bother us because we can handle them very easily, we just dismiss the motion without prejudice and subject to renewal. Now, that was possibly a slightly facetious and cynical observation, but he didn't sound that way to me. Is there -- maybe I shouldn't --

MR. KUNZ: That's not occurring in the Eastern District of Pennsylvania.

MR. LANDIS: Okay. All right.

MR. KUNZ: And I'm looking at Marlene and Fred.

MR. LANDIS: Okay. Good. Then I'm glad I asked the question.

MR. KUNZ: We -- in generating these reports, we also look at how they're termin -- how the motions are being terminated. And this is an example of the report that I send to the Chief Judge and it lists every judge's motions and the various stages. And he personally reviews this list and consults with each judge at our judge's meeting. It's an agenda topic. There's a conscientious effort to make certain that these reports are in such a state that the numbers are not high. And I think it's changed the way the judges do business in this district.

MR. LANDIS: That's right.

MR. KUNZ: They're concentrating on those motions.

And then the final thing that's done is, we send a report, and it will go out January 31st. If today was March 31st, the reporting period, this is what you would have and we'd track back to those that would mature. And I think it's a good system and it's a classic example of what you count affects behavior and clearly this has had a change.

I don't think we're in as good a shape as we thought we were when we started this problem, but I know now that we're in excellent shape from the standpoint of the requirements of the Civil Justice Reform Act.

MR. LANDIS: Well, you remember historically when this act was in the process of being amended and passed through, the heading that had to do with the statistical record-keeping was called Accountability. And as it evolved toward the final form, that was changed to something that sounded much less menacing. But that was originally what it was intended to do, and it obviously has borne out its purpose.

MR. KUNZ: It's also interesting to note that when the first statistics were published, that I think the judge that was identified as one of the worst in the country was Hipo Garcia from San Antonio, and it was really unfortunate because what was done was a computer list was generated, the judge was out, because he had surgery, for about a month and the report was never verified. Nobody took the time. And I

think you have to distinguish those things before you do identify problems.

MR. LANDIS: Sure.

MR. KUNZ: We go through a lot of verifications. We send the list up to the judge. The judge signs, these are my motions. But I think it's important as you go around the country to make sure that there's a verification process.

Now, if we could look at page nine, and I think this may be a matter of genuine interest to you today, and that shows the time interval on the case filing date to the date setting the trial on again our -- what I'd like to describe, our '92 cases. And you can see the distribution of the cases, the number -- the total number of cases, then the cumulative figure. And we developed a percentage in a cumulative percentage.

So it's pretty clear to me that there is a conscientious effort on the part of the judges to enter orders setting trial dates or to set trial dates through notices. There's about 1139 cases, and if you sort out the habeas corpus, social security, prisoner litigation, for the most part, and some of the special management cases, that when these reports are prepared probably wouldn't be ready for a trial date, it seems to me that there's a pretty good compliance by the judges early on in the case.

MR. LANDIS: Uh-huh.

MR. KUNZ: Page ten shows what you might expect, and that is that the trial dates are being set, and the largest percentage of cases are standard management track cases, and that's done early on in the case. I was surprised at the number in the special management and particularly that those large numbers were set early on in the case, and we may want to look at that. But I'm not sure that that's what I expected to see.

Page 12 is just designed to show -- 12 and 13. Twelve shows the arbitration program since its inception, and 13 during the period of the year 1992. There was one figure that was not correct on page 13, and I'll substitute in a new chart, and that is on the fourth column down of terminated by judgment on the arbitrator's award. That number should be 26 instead of zero. And I have another chart which I'll circulate to replace that. That's really just a matter of information. I didn't think that we needed to spend a lot of time on arbitration, but we'll continue to furnish you those statistics.

MR. LEVIN: Which figure was being changed?

MR. LANDIS: The top of the second column.

MR. KUNZ: Terminated by judgment on arbitrator's award.

MR. LANDIS: On page 13.

MR. KUNZ: Page 13. The number 26 should be inserted

there.

MR. LEVIN: Instead of the zero?

MR. LANDIS: Instead of zero.

MR. KUNZ: Zero.

MR. LEVIN: Oh, okay. And then the percentages change.

MR. CHURCHILL: Just a -- there's so many figures here. Basically is the percentage of arbitration cases increasing or staying the same or decreasing? I mean, what --

MR. KUNZ: Arbitration is -- well, the caseload's down. Arbitration now is about 13 percent of the caseload. At one time, when the program first started, when the filings were much higher than they are now, it was up as high as 20 percent. Right now it's about 13 or 14 percent.

Included in your materials on pages --

MR. KURLAND: Mike --

MR. KUNZ: Go ahead.

MR. KURLAND: Yeah. Can you go back to page ten?

MR. KUNZ: Sure.

MR. KURLAND: The second column down on the special track, --

MR. KUNZ: Right.

MR. KURLAND: -- which lists those nine cases that were set for trial within 30 to 60 days.

MR. KUNZ: Yes.

MR. KURLAND: I agree with you that's a very strange number, and it doesn't make -- I mean, it -- if in fact that's being done, it's in complete contrary to what we talked about and what we planned.

MR. KUNZ: Well --

MR. KURLAND: Because you're taking a case that's theoretically a complicated case, and before it even gets off the ground, it's being listed for trial. I wonder what happened in those nine cases.

SPEAKER: Well, the ten on zero from 30 --

SPEAKER: What about the 10 from zero to 30?

MR. LANDIS: 19.

MR. KURLAND: Yeah.

MR. KUNZ: Yeah. Those first 19 --

MR. LANDIS: 19.

MR. KURLAND: Yeah, those 19 cases.

MR. KUNZ: Now, I think what we ought to do for you is look at actually the next column, the 18 within 90 days. Those first three I think we ought to take a look at. You remember I mentioned there was one group of cases where there's 35 securities cases that are consolidated. It may be that they're reflected in there. The second group, I forget the gentleman's name that refers to himself as God, I don't know whether they're in there, but we're going to get those moved out. But I think that merits us taking a look at just

to print the cases out and see what the reasonings may be. But I agree with you, Cy, that that's -- I didn't expect to see that at that level.

The mediation program which is new, statistics are contained in pages 14 through I guess about 18 or 21, it looks like.

MR. LEVIN: Could I just ask a --

MR. KUNZ: Sure.

MR. LEVIN: -- detail on 13, where it's the arbi -- toward the bottom, arbitrator's award filed in past 11 months, and then the demands and past 12 months. Is there a -- is that a typo or is there a reason --

MR. KUNZ: Yes, it is. That wasn't changed. That should be a typo. Okay. Because those figures would be --

SPEAKER: And I'll check --

MR. KUNZ: Yeah, that will become relevant in our later discussion. I believe we did this report, we started with seven, eight, nine, ten and eleven and so forth. The mediation program I'd like to suggest to Bob that Judge DuBois come and make a presentation on the mediation program. There's a mediation committee, and at our last meeting I reported to them that this committee would be meeting, and I thought it would be helpful for Judge DuBois to come and make a presentation.

I'm of the view that the mediation program is

maturing. The program is different than arbitration. The skills that mediators need differ from those that arbitrators need. They're more complex cases. And I think it's having a positive impact on the management of our docket and will continue to do so. We have two forums and have developed guidelines for mediators and I think it is maturing, but I don't think it's the kind of program that you get the same results early on in -- as you do from something like arbitration.

But if you take a look at page 21, you can see that the odd cases are starting to settle at a higher rate than the even, and I think those figures would even be more impressive as an overall program if we didn't have the control group. But the control group was recommended to us by the bar committee that put the program in place, and I can say that Rand and those groups that do studies are just so favorably impressed with that aspect of it. But we have not yet changed it. But --

MR. RAYNES: What's the control group?

MR. KUNZ: Well, odd cases go in -- go to mediation and --

MR. LANDIS: And even don't.

MR. KUNZ: -- even cases do not.

MR. RAYNES: So the even cases are the controls originally?

SPEAKER: Right.

SPEAKER: Yeah.

MR. LANDIS: Yeah.

MR. KUNZ: Yeah.

MR. RAYNES: Okay. But on page 14, there's 634 odd cases, 1635 even cases. There were 658 mediation conferences held or scheduled. Is that a statistically significant number? Sixteen more cases settled because of this program than would have settled if -- under the even control group?

MR. KUNZ: I don't think in the first year it was statistically significant. I think in the first year many mediators were bringing counsel in, asking if the case was settled, they reported it was not, they just didn't conduct a mediation conference. The '92 cases I think we're seeing a more dramatic impact.

The final area I'd like to cover is we've just put in a chart, the last one, on page 22, which shows the vacant judgeship months, and you can see that we're finally in October of '92, reached the point of zero vacant judgeship months, and we'll hope that that will last well into the future. But I think that's something that this group identified and should be continued to be monitored.

I brought with me the case management track designation form, which I would ask that you take and pass around. This is the form which is used in the clerk's office

to place the cases on the management tracks, and it has worked very well. As to whether this should be expanded to include things like bankruptcy, appeals, and so forth, I think might be addressed during the future meetings.

MR. LANDIS: How are they handled at this point? How are they designated on the filing?

MR. KUNZ: They're going on the standard.

MR. LANDIS: On the standard?

MR. KUNZ: Yes.

MR. LANDIS: Uh-huh.

MR. KUNZ: They would be on the standard.

MR. LANDIS: Yeah.

MR. KUNZ: I just use that as an example, and I might want to recommend that later on.

MR. LANDIS: Uh-huh.

MR. KUNZ: But on balance I must confess and -- well, I'd like to state that the Civil Justice Reform Act from the standpoint of administration of cases has not had any burdensome impact on the clerk's office or the staff of the judges, particularly the courtroom deputies. I think in many ways it was welcomed and caused us to discipline ourselves to do some things that perhaps we should have done before.

MR. LANDIS: You know, that's a very significant observation because one of the at least subsidiary items against it basically was just that, that it was going to build

up layers of paper and complicate record-keeping. So I think that's a very significant observation, Mike.

MR. KUNZ: One last thing. I brought, and it's before you, a copy of an article that Ben Picker wrote in the -- for Legal Times. And then the last thing, and I'll get this for you, I didn't bring it down, it slipped my mind, but the Eastern District of Arkansas, apparently the Civil Justice Reform Act Advisory Group recommended that a pamphlet be prepared, and I have those for you, and it's just astounding the things that are in there, that litigants are required to actually sign statements that they understand Rule 11 and portions of the plan and other factors.

So with that, I'd like to conclude and again thank Marlene and Fred. We're readily available to provide any additional information you need. We'll go back to the drawing board and look at these figures and expand our review and analysis of the trial dates, and also look at those special management cases that have early trial dates. Thank you.

MS. KLOTHEN: Did you say the Eastern District of Arkansas has a pamphlet for litigants as --

MR. KUNZ: Yes. In fact, I'll get one. Would you just call up and ask Joanne to bring them down? But this is the pamphlet, and the thing that I thought was just astounding ...

MR. RAYNES: When do they get that, when the suit is

filed?

MR. KUNZ: I believe so because in the introduction--

MR. LANDIS: What does it cover, Mike?

MR. KUNZ: Our court's history and power, the client/lawyer relationship, your attorney's obligation to others, the judge's obligations, what happens now that the suit is filed, discovery, alternative dispute resolutions, some voluntary options, if your case goes to trial, after the verdict, and then additional information. But there are statements in there, do I have to take my lawyer's advice? Can my lawyer stop representing me, even against my wishes? Can I fire my lawyer if he's not diligent and competent in representing me? If I'm not happy the way my lawyer handles my case, what can I do? That's under the section lawyer/client relationship.

MR. CHURCHILL: Well, I assume the clerk's office gets -- here gets calls raising those very questions. What do you do when those calls come in?

MR. KUNZ: We tell them that we're not permitted to advise litigants with respect to their cases pending in our court in any matter -- in any manner.

MR. LANDIS: Well, it's not unique to have this kind of thing. I know that in Florida they have a statement of client's rights that a lawyer has to give to a client at the time the client comes in, and the client signs it and the lawyer has to sign it, too, telling stuff like this, what can

a client do and all of that. That's been in -- used in Florida in the State Courts for, I don't know, at least a few years. It raised a lot of furor when it was put in, but it's now become a regular practice.

In the Northern District of California, there's a pamphlet that's put out that describes the practice there, and particularly the -- what you might call the cultural practices of taking depositions. And it's a fairly elaborate statement of how things are done in the Northern District of California for use of the lawyers and litigants there, and also particularly for the visiting firemen so that when they come in, they'll know how to behave. So that I -- those are two instances that come to mind, so that this is -- this is something that would be worth looking at.

MR. KUNZ: In the introduction there's a welcome to the District Court, and the second paragraphs starts out with the following: "The statement which you must sign and return to the court says that you have read and understand Sections 2, 3, 4, 6 and 7" -- I assume that's in the plan -- "and Rule 11." I'll have copies for everybody.

MR. LANDIS: Yeah, I'd like to see that.

MR. KUNZ: That was the District -- Tom Eisele sent it to Lou Bechtle, and of course Tom Eisele and Ray Broderick for years --

MR. LANDIS: Tom --

MR. KUNZ: -- had a battle going on --

MR. LANDIS: Tom is the guy who thinks that the -- that the court of arbitration is a -- is unconstitutional, is a violation of Article III of the Constitution.

MR. RAYNES: But this isn't?

MR. LANDIS: Apparently not. Yeah, he's a real zealot. Are there any other questions --

MR. RAYNES: Are their pro se filings up because of this? I'm only kidding.

MR. KUNZ: Just one last thing, if I can, Bob.

MR. LANDIS: Go ahead, Mike.

MR. KUNZ: And that is the Administrative Office of the U. S. Court put together a nice document which is very, very impressive from my standpoint, and it's described as the model plan for reduction of expense in delaying civil cases. And I'll get copies for everyone or those who may want them. But the Eastern District of Pennsylvania, they go through every aspect of a plan, what it should contain, and I can say that the Eastern District of Pennsylvania's plan and references to the advisory group report is generally -- generously mentioned throughout this document. And I think that's a great tribute to this district. And if anyone wants copies of this, I have them.

MR. LANDIS: Yeah, I'd like to have one of those, Mike.

MR. KUNZ: Okay. Fine.

SPEAKER: Maybe I ought to --

MR. LANDIS: I think I might have had one, but it would be worth having it for everybody.

MR. KUNZ: Okay.

MR. LANDIS: Is there any other questions of Mike or comments on this aspect of the meeting? Did you have a --

MR. RAYNES: The only thing I have, and maybe you're going to cover this later, but I understand from my civil lawyers that a number of the judges believe that once -- if a case is in the special management track, that the voluntary disclosure rules don't apply. And that's --

MR. LANDIS: That's been -- that's an interpretation that comes from the top. We discussed that with Chief Judge Bechtle. It's a question that has arisen, and it's one that I think we will address and perhaps make explicit. But that is -- that's the way it's supposed to be.

MS. CLARKE: The reason being that the special management track itself provides for the parties to sit down and agree upon categories of documents and information to exchange.

MR. RAYNES: Okay. Well, there's some confusion, but that will help make it clear.

MR. LANDIS: Yeah. We're definitely going to do that.

MS. CLARKE: In our report -- the report says that, but unfortunately the court didn't append that particular portion of the report to the plan.

MR. RAYNES: Well, I don't know whether we're going to get to this point now on the discussion, but now that you've brought it up, it still is the most discussed part of the plan.

MR. LANDIS: One of the things we wanted to do, Arthur, is as we get down toward the -- down particularly under four, is to go around the horn and discus questions like that because obviously that was certainly the most revolutionary, the biggest culture shock, and at least we want to discuss that. And then as we go ahead, we'll need to address that. Well, now, Leo, would you -- yes, Cy.

MR. KURLAND: I'd like to ask a question. Mike, do you have any information on whether any of the judges tried alternative techniques to dispose of litigation such as, you know, a mock trial or pretrial conferences requiring the presence of clients, or referral to -- you know, to some individual to conduct a mock trial, or some of the things that were mentioned when we discussed alternative methods of disposing of cases other than mediation or arbitration?

MR. KUNZ: Cy, it's being done.

MR. KURLAND: It is being done?

MR. KUNZ: Being done on a very, very limited basis.

I'm unaware of any early neutral evaluation program by a judge, other than perhaps referring it to a magistrate judge for settlement. Now, if that's described as early neutral evaluation, that would seem to me --

MR. LANDIS: That wouldn't qualify under the traditional early --

MR. KUNZ: Traditional. Okay.

MR. LANDIS: -- neutral -- no.

MR. KUNZ: Okay. So that's one technique. As to mini trials and these others, I am not aware that it's done on a regular basis. It would seem to me only in selected cases or maybe on an experimental basis.

MR. KURLAND: How about in either jury or non-jury civil cases where a judge would refer the case to another judge instead of a jury for settlement discussions? Do we have any -- do we know whether that's --

MR. KUNZ: That's done.

MR. LEVIN: Is that being done?

MR. KUNZ: That's --

MR. LANDIS: That's commonly practiced, isn't it?

MR. KUNZ: Yes.

MR. LANDIS: Yeah.

MR. KURLAND: In this court?

MR. LANDIS: Sure.

MR. KUNZ: Yes.

MR. LANDIS: Oh, yeah. Judges pair up and butt their cases to each other so that they won't involve themselves in the settlement. Yeah, that's commonly done, Cy.

MR. KURLAND: I wonder how -- if it works. I'm curious about that. Is that the kind of thing we can deal with --

MR. MELINSON: Mike, if I may. More often, Cy --

MR. KURLAND: Is that the kind of thing we could interview judges and find out if they do it and whether they think it's a good procedure?

MR. MELINSON: Oh, I think you can, but one of the things you should know is that most often in this court the judge will refer that to a magistrate judge, who will not try the case, but he'll be there strictly for settlement, and the parties feel that they're able to more or less level with him. He's not going to be the trial judge. We've had great success with that.

MR. KUNZ: Yes.

MR. KURLAND: That works?

MR. MELINSON: It works.

MR. KUNZ: And I think that could be documented by perhaps a few judges who would appear.

MR. KURLAND: I'd be very interested in seeing whether bringing in another judge or a magistrate or both to see how that works in effectuating settlements of cases,

especially the bigger cases.

MR. KUNZ: I suppose one of the things we could do is look at the statistics of the magistrate judges and the number of settlement conferences they conduct, and then that would be a good measure of that.

MR. CHURCHILL: We didn't recommend any changes in that area because I think that was what was going before. But there was a considerable amount of discussion about whether the problems of delay, because of the single judge calendar and the judge being available, should lead to sort of a backup pool or some arrangements to shift cases. What, if anything, has been the experience in the last year and a half on that score?

MR. LANDIS: Do you want to repeat the question?

MR. KUNZ: Mike, just give me it again.

MR. CHURCHILL: I'm sorry. We had talked about the -- and my memory is it was particularly an area of interest to Judge Bechtle, the question of whether there should be a backup arrangement when trial judges were not available for -- because of long cases or some other reasons, and whether in fact there ought to be kind of a backup pool available. What has been the experience in that area?

MR. KUNZ: I don't think we're to that point under the plan or we've matured to that level.

MR. CHURCHILL: Have there been problems with

particular judges being able to get cases to trial because of long criminal cases? I mean, I think that was the example that was being used most frequently.

MR. KUNZ: Limited. There have been limited problems, but it hasn't been to the point of reassigning cases and so forth. But one of the things we've just experienced in the last 14 months, we've added seven judges. So that has given me a built-in safety valve if there was any problems on any dockets to adjust for that. I don't think we've reached the point where we can say cases in '92 under this plan have reached that level. But if there were cases, they were cases that were pending prior to that time.

MR. LEVIN: If I can go back to Cy Kurland's point. One of the things, as we begin to look at what the information is, we may consider the difference between a judge asking in a particular case, do you want to go to a magistrate for settlement or I'm going to suggest it for settlement or another judge, versus a kind of local rule and practice that it becomes routine and that the litigants do not have to ask for it specially, as litigants, you know, are often hesitant to do that. That minor difference of making it a known procedure maybe by local rule may make a difference, if we want to consider at some point whether we want to recommend that. And some districts have it, Kansas for example.

MR. LANDIS: Okay. Now, the next series of items on

the agenda deal with recommendations for further study and things that we need to think about as we look ahead to preparing our annual report. I've asked Leo to present the questionnaire and, Leo, why don't you take it from there.

MR. LEVIN: Yeah, I'll make it very brief. Let me just say that what we considered, this is one of three questionnaires that Bob and Jen and I considered, one was a one-pager, strictly one page, how it's working, something like that. It didn't yield too much. It was very easy to fill out and was not formidable because it was a single page, but it didn't yield very much.

Then we had a rather longer one with more boxes to check and so on, going through every element of the plan. And the suggestion was made, I think it was Jen originally suggested it, look, let's splice these two. And so what you have, and I should give you time to look through it, is something that asks for some conclusory box-checking. Is the plan working reasonably well? If problems have developed, what's the reason? Does it have any effect?

And now we're down to certain specific provisions which represent those where there have really been changes with respect to the plan. Involvement of judicial officers in the pretrial process. And then it goes over to cases on the special management track. Some aspects with respect to that. Alternative dispute resolution. And clearly on self-executing

disclosure, there are some five questions.

And then finally on the last page, the representation by attorney with power to bind. It's an old rule, but this was flagged in our report. And then representative with authority to settle. But also there's the comment over here, if you will, at the end that whoever gets this, and we'll talk a moment about who's going to get it, whoever gets this is invited by phone call, by a comment here, to say, look, I'm willing to talk to one of you, do it by phone that way. Or, here, I'm attaching a letter of comment or some specific additional comments, and we'll see how many are going to come forth with additional information.

If the group approves this, then what the plan is, and Mike Kunz and I and Bob met with a representative of Rand, Rand is going to be studying this district among others to see what in a very hard-nosed statistical way, what's been happening following the plan compared to before. They have no objection to our taking a significantly large sample that won't conflict with theirs. Mike Kunz has made notes and he'll be checking with them, he knows, as long as they don't conflict. And to send them out and to see whether we can get a response rate that would at least give us some a) subjective reactions and b) some highlighting of particular areas that may be trouble spots.

That in a nutshell is the idea of the questionnaire.

And this is not -- this is in addition to not precluding other things such as this group's talking to colleagues, to friends, to members of the firm. This is in addition to what we'll take up about judges, and maybe some other meetings with people. This is one prong of the effort.

MR. RAYNES: In other words, this form is supposed to be our own personal experience or just limited to us, not the -- not our firm or other lawyers we've spoken to?

MR. LEVIN: What we have done on this is we're selecting people who have actually filed cases since the plan went into effect, but there is no attempt to limit it to your own cases. We can bird dog that later if they disclose who they are, but we thought it better at this preliminary stage, it's just the first year, to let them base it on whatever they want to base it.

MR. CHURCHILL: Wouldn't it be reasonable to ask that -- I mean, a person who has one case in the system and a person who has many cases in the system, we'll have some -- be worthwhile distinguishing between them, and I think it would be useful to at least have a question whether you had -- whether you had cases in which track were the cases that you had, okay? I mean, if the person only has experience with the standard track, that would be useful to know or vice versa. Some of my lawyers only have experience with special track cases.

MR. LEVIN: Let me tell you -- let me throw it up to you. I think it's for you to decide what you want to do. We originally had a) the one-page questionnaire and another thing that ran about eight pages. There are lots of things that we want to ask. This is one of them. On the other hand, they may also be drawing not on what happened to them, but what happened to other colleagues.

We thought that for the first year, the first crack and to get people to come back in, which is in large measure to pinpoint for us areas that need studying, and some of the questions are strictly special track questions, that it would get risky. If it looked formidable, the rate of return will be much lower.

And so the question is, are you going to get more information by asking less or are you going to get more information by going further? My hope would be a certain number would say, you can call us up. Then we'll have a whole protocol that we'll talk about.

MR. RAYNES: I would just like -- Leo, I would like -- from my standpoint, I agree with Mike. It's sort of like the questionnaire from the American College when you have to check somebody off, do you know them personally, by reputation, whatever. I think lawyers feel more comfortable in putting down information when they can qualify where they're coming from. For instance, during this whole program,

I had one case in the Federal Court. As you probably know, plaintiffs are not starting -- plaintiff's personal injury lawyers are not starting suit in the Federal Court. They're keeping cases in the -- at least up till now, in the State Court. There may be a change in that, I don't know. And, you know, based upon the one case that I had, and there I think my information that I would fill out on here would be very weak, I don't think anybody would rely on that one case that I processed through the court.

MR. LEVIN: I'll be very pleased to add a few kinds of questions including what you're drawing on, experience of others, your own experience, were they special track, other, I mean, it's easy to put it in and we could get it that way. And it would not -- with that -- if we keep it at that, it would not increase the number of pages.

MS. BALLARD: Yeah, I agree with you, Leo.

MR. CHURCHILL: I just took a quick look at it. It's hard to respond quickly, but this seemed like a reasonable selection of questions.

MR. KURLAND: I don't think you want anything any longer than this. This is enough.

MR. LEVIN: But you'd add these other questions?

MR. KURLAND: You might want to put like a little block in that says based on information other -- based on other than personal information and let them answer, check

that block off. Then people may -- but when opening it up for comments at the end --

MR. RAYNES: No, I'm not suggesting opening up comments. I'm just trying to find out how qualitative this information is. I mean, how many of us that sit on this panel are actively trying cases down here in the Federal Court with the kind of volume that the information that we would be putting in here is meaningful. But we certainly have access to other people and you can send it around your firm, I can send it around my firm and other firms who do work here and see what their thinking is. I'd feel more comfortable in filling out a form that way than just sending in for the few cases that we have down here.

MR. LEVIN: Fine. I think we can work something out that doesn't get too much. But --

MR. KURLAND: As long as you don't mix it too much so that everybody's just talking about what they hear on the street. It's good to get the answers based on personal experience. That's very worthwhile having, and I agree with it. But what Arthur wants to accomplish I think is good, too. You'll get more input. But you do -- I think you do want to keep it in a separate block area so that we don't get the whole thing so mixed up that we don't know what's people repeating on street talk or what it is that's, you know, the actual experience.

MR. LANDIS: Yeah. Let me say, this again is another decision for the group. We could say answer only on the basis of your personal experience during -- since the plan went into effect, i.e. That would raise some problems because the number of cases filed can be very, very small, and some people may have a lot of valuable information from others in the firm based on cases they have filed or friends or so on. I think it might go best to try to get a group of blocks that will try to draw this out and invite comment on what it's based and how limited, et cetera. And let's recognize, too, we're covering a very small period of time because of the first year half of them, as was pointed out before, are only six months old and they haven't gone through the procedures and the processes and so on. So I think for the first time we can try to add a few of these things, put it in, try to distill how much is personal and how much is otherwise, and let's see what we get.

MR. MELINSON: Yeah. Just see what kind of reaction we get. Okay.

MR. LANDIS: Well, then are there any other comments on the questionnaire? Well, then the other items really have to do with how we go about developing the information on the experience end of the act, and you remember how we did it the last time. We had some judges appear, we had other judges who were interviewed, and a combination of those things. Now, again, since we're dealing with a finite period that's

relatively short, I don't think we need to do anything nearly as elaborate as we did the last time to try to bring together all the judicial experience to bear on preparing the plan. But unless there's some sort to the contrary, we thought we'd send a general letter to the judges inviting them to do whatever they'd like to do. If some judges would like to come and talk to us, fine. If others would prefer not to and if they just want to send us something, that would be okay too.

So, Judge, do you have any thought on that -- on how we might deal with this to elicit the experience of the judges?

MR. MELINSON: I would concur with what you just suggested. I think -- I agree with you, it would be a mistake to be as formal as we were --

MR. LANDIS: Yeah.

MR. MELINSON: -- the first time around. Yet let's not preclude anyone from participating. Make it an open-door policy.

MR. LANDIS: Yeah. Well, this was -- we thought we should leave that initiative to the judges themselves and then accommodate to whatever their wishes were. So that's what we'll do, and then in addition to that, obviously we need to reach out to litigants and litigants' groups and the -- and perhaps certain elements of litigants and lawyers in the district. And the same observation would go there, that we

don't need to have the sweep of our earlier investigation. Are there any thoughts on that, whether they're of particular groups of litigants and lawyers that we ought to try to reach, and the extent that it should be -- and the formality by which it should be done, invite them to appear at our meetings?

MR. CHURCHILL: Well, I think there are basically two areas that have been of most concern to the bar. One has been less controversial, and that was the trial date setting.

MR. LANDIS: Uh-huh.

MR. CHURCHILL: And the second, of course, is the voluntary --

MR. LANDIS: Yeah.

MR. CHURCHILL: -- disclosure. And there's been a lot of comment on it within the bar, and I think we ought to invite back particularly the organized bar and the Federal Court's Committee too should be solicited, --

MR. LANDIS: Okay.

MR. CHURCHILL: -- make a presentation on it in some fashion so that we, you know -- so that we allow them the opportunity finally to have it set on the record.

MR. LANDIS: Any -- yes, Eve?

MS. KLOTHEN: I was just going to say, following up on that, we probably ought to really extend special efforts to, you know, the trial lawyers and to Association of Defense Counsel to present comments.

MR. LANDIS: Right. Mike, you were going to say something, too.

MR. KUNZ: Bob, it appears to me that you might want to use the source -- the dockets, the attorneys who are actually involved in the cases as --

MR. LANDIS: Well, that's --

MR. KUNZ: -- to select --

MR. LANDIS: Yeah, that's a good --

MR. KUNZ: -- and invite --

MR. LANDIS: If -- well, obviously they'd be readily available. I guess you can --

MR. KUNZ: We could identify them and give the information to you.

MR. LANDIS: Uh-huh.

MR. KUNZ: The other point I wanted to make was just a little anecdotal story, but I shared it with Jennifer this morning and I think it's interesting. There was an attorney, who shall remain nameless, that when this plan came to his attention in the case he was involved in, called me and said this self-executing disclosure, he said, it's the worse thing in the world. He said, we didn't know this is what we were going to have to do, and he says I'm getting a group of lawyers and we're going to have this plan amended. He said, I've even spoken to a judge and he agrees with me.

And as time passed, I would see this attorney and he

said, oh, he said, we're still working on that, and at the mediation forum, I said, well, listen, we're going to have people from Rand will be attending the mediation forum, people who were involved in the Civil Justice Reform Act Plan, I said, why don't you come to lunch? So this attorney did come to lunch and sat and so forth, and I was talking to him two weeks ago and I said, well, how's your committee doing on having that self-executing disclosure provision of the Civil Justice Reform Act Plan eliminated? He said, oh, no, he says, I've turned around completely on that, he said. I favor that very much.

So as time goes on, that was my observation about that part there, that there was a lot of discussion and debate, and I thought posturing and good lawyering is to what it meant, but I think it's with us to stay.

MR. LANDIS: Well, maybe this would be a good point at which to go around the horn, Arthur, and follow along with the idea that you were going to express a little while ago, about commenting generally on experience or maybe specifically on the self-executing disclosure part.

MR. RAYNES: I'll just state two specific instances that I know about. I had one case down here where since I try to settle cases, I had already made all the disclosure of all the information before suit was started. Matter of fact, it was only when those negotiations broke down that I started the

suit. The case was listed for trial within three months, the case we settled. We had one conference down here before the judge. So I don't know -- you know, I don't know what that does.

I had another case that I started in the State --

MR. LANDIS: It shows that you are a lawyer before your time and before the plan's time.

MR. RAYNES: Another case where I started suit in the State Court. It was removable to the Federal Court. They didn't remove it. Got ahold of the lawyers. It was represented by Texas counsel who wanted to meet with them. They came up and they -- and I said, why didn't you remove the case to the Federal Court? I was just interested to know. Thirty days had passed. We didn't want to get into the self-executing discovery, and we'd be on trial too fast, which led me to a discussion that there was -- this happened to be a howitzer that exploded and two Israeli soldiers were killed in Huma, Arizona.

MR. LANDIS: Uh-huh.

MR. RAYNES: Our investigation showed that the government had determined there was a defect in the gun. They were in a tank with the gun. And it ended up where they admitted liability. It was just a question of what damage -- it was a conflicts of law issue, which damage law applies.

MR. LANDIS: Uh-huh.

MR. RAYNES: But interesting, as a deterrent for people who have documentation that is going to be against them that they feel that they have to turn over, to come into something that is self-executing rather than run the risk of a lawyer who knows what he's doing and asking the right discovery, which I think what we're coming down to here is getting away from games playing, which I see is one of the best things in this book here, a quote, you just gave out this from Arkansas, that Felix Frankfurter said, "Litigation is the pursuit of practical ends, not a game of chess." Maybe that's what the subtitle is on the voluntary disclosure.

I think the only problem that I've encountered in talking to both plaintiffs and defendants lawyers is, it's one thing when you have a pleading, and I say -- and I make allegations and I want to support everything in the allegations, now I have a medical malpractice case and I know that Dr. Jones wrote articles during the last 30 years which I can use in cross-examination of Dr. Jones. Do I have to disclose that kind of information? Not my allegations, but do I have to disclose what I have against Dr. Jones so that he can -- because there's the element of surprise, you know, you're going to test his credibility, is he going to come forward on that. That's the main area that I have found in talking with lawyers. They have no problem with putting in their proofs for their cases that they've pled either as a

plaintiff or defendant. They do have problems in educating the other side as to what they have, any holes in their case.

MR. LANDIS: I don't have a problem with that one. I wouldn't disclose it. That's my premise.

MR. LEVIN: Generically speaking what you're talking about is rebuttal material.

MR. RAYNES: Or cross-examination.

MR. LEVIN: Yeah. Rebuttal. Either cross-examine -- by rebuttal, I don't mean new evidence alone, but material that's going to take down or tear down what's part of the other side's case. And maybe one of the things that's emerging from this is some clarification by -- if there's consensus by the court and so on as to precisely what's involved in certain categories.

MR. LANDIS: I have no problem at all with that one. Anybody else have a problem with that one?

MR. RAYNES: See, there --

MR. CHURCHILL: One of the things I'd be interested in, when we do talk to the judges, though, is how they are handling disputes on that and whether they are getting disputes over that -- those kinds of issues.

MR. RAYNES: I'd be interested to know that.

MR. LANDIS: Yeah. To the extent that -- I've -- as I've run into judges, I've done sort of a little anecdotal just discussion, and it hasn't been widespread, but all the

comments I've had have been really no problems and that it's been fairly well accepted and --

MS. BALLARD: But we only have .7 percent of the cases that have gone to trial, and that's when the problem's going to arise, --

MR. LANDIS: Well, yeah.

MS. BALLARD: -- when somebody tries to put in a piece of evidence that wasn't on their list.

MR. LANDIS: Yeah, that --

MR. RAYNES: You're right. That's exactly right.

MR. LANDIS: That may well be so.

MS. BALLARD: In my field it's going to be a problem, I know, because the law has defined the concept of rebuttal to include about 95 percent of the case. And so, you know, on your reasoning there's a lot that a plaintiff could hold back on and then probably get in trouble for, you know, on the grounds that it's rebuttal.

MR. RAYNES: There's another issue that has to go with lawyering and education of lawyers. A plaintiff has a preexisting condition. Plaintiffs -- good plaintiff's lawyers try to find out whether or not there were any prior problems that that plaintiff may have had because we don't want to be surprised.

MR. LANDIS: Yeah.

MR. RAYNES: And if we know what it is early on,

maybe it's in aggravation or maybe exacerbation or whatever it is of that problem. If you don't know about it, you know, your whole case can fall apart because the defense found out about it. There has to be education of plaintiff's lawyers, and we teach this. You know, find out about the case so that, you know, you lay everything on the table. A lot of plaintiff's lawyers -- not a lot, some plaintiff's lawyers who really don't know how to put the cases together don't want to make disclosure of that. They say that's up to the defendant, which is -- first of all, it's wrong ethically, and it's also bad tactically. And I think it's those kinds of demons that have to be expunged from people who are preparing the cases. So I mean it's something that maybe, you know, you might want to be aware of.

MR. LANDIS: Well, those are two very useful observations that you just made, as well as the other. Judge, do you have any comments that you'd like to make on what your experience has been?

MR. MELINSON: I don't have any specific anecdotes, Bob, but I do have a general impression. I've been involved in a lot of settlement discussions over the past year, I think this has encouraged settlement. I can't say for sure. Lawyers don't say to me, we're settling this case because, but I suspect that they don't want to get into these problems that will meet them down the line with respect to discovery and

whether or not they have met the demands of self-executing discovery. And they settle the case to avoid that in some cases. That's my suspicion.

MR. LANDIS: John, how about you, do you have any experience based on your unique position here in the district?

MR. SCHELLENBERGER: Yeah, I have comments on three parts of the plan, I think probably the three most important parts. The first one on the self-executing discovery, my general impression is that it is not -- hasn't been a problem, but it also hasn't been very helpful.

MR. LANDIS: Has not?

MR. SCHELLENBERGER: Has not been very helpful. It's fairly easy to evade one's responsibilities because there are really no enforcement mechanism, nor am I sure that there is much of an enforcement mechanism you can put into place. I have seen one instance where it led to a dispute where an attorney claimed that -- it was another attorney in my office, claimed that the opposing attorney had not made full disclosure and said, you can't take discovery because you haven't made full disclosure. The dispute died down after some discussion and discovery went forward.

MR. LANDIS: To the point that it came to the court?

MR. SCHELLENBERGER: No, it didn't come to the court.

MR. LANDIS: Okay.

MR. SCHELLENBERGER: No, there was discussions

between the attorneys and never got to the court. So I'm not sure that I see that making a whole lot of difference in litigation.

On trial dates, and again it varies from judge to judge, as it always does, but I'm still -- I'm not seeing a lot of judges give early firm trial dates. I see a lot of judges still using trial pools. On motions, I have noticed that judges seem to be deciding motions more quickly than they had before the plan went into effect. And I also see that judges seem to be, even though they're still -- a lot of them still seem to be using the trial pools, they are moving the cases even more quickly than they were before. So I see expedition in both areas.

MR. LANDIS: Cy, how about you?

MR. KURLAND: Well, my personal experience has been in special management cases, and my experience there has been just about the same. The judges are just doing what they always do. And I think for all intents and purposes, the rules don't exist.

MR. LANDIS: Well, except for the fact that the special management track was really modeled on -- at least we tried to model it on what was going on already, so that perhaps we shouldn't expect too much dramatic change there.

MR. KURLAND: I don't know whether things are working better or worse. I just don't know. I don't think there's

that many cases and that many judges involved. It's almost as if you could take those cases and study each one of them as a thing in itself to see what happens. But my experience and talking to the judges I know that I -- you know, throughout the year, has been that things are just sort of moving along the way they were before. I don't find any great dramatic change. I'm not encouraged that it's accomplishing anything.

Some judges of course will move cases the way they traditionally move cases and try to encourage settlements, and I think other judges follow their own personal patterns that they followed in the past and feel that this is primarily a guideline, you know, to use rather than a procedure that they really should invoke. But I have not had -- this is just personal experience. From a non-personal experience, the lawyers I've talked to that handle the big cases indicate pretty much that things are the way they were and it's okay, that our district works fine, that cases are handled generally all right in our district and I hear no complaints about anything to do with the special management track.

With respect to self-executing discovery, I think I have the same reaction everyone else does. Nobody's really -- everyone's sort of accepted that and working within it, and it's not a problem. Judges I've spoken to have said they have not had to resolve that in any case. The few judges I've actually spoken to about it says they just haven't had that

problem. And so I think that's about where -- how I see what's happened this year.

MR. LANDIS: Alice?

MS. BALLARD: I've gotten a lot of reaction to it and I have some reactions to it, particularly the self-executing disclosure. Back in the old days when I used to work in Michael's shop and Ned Wolf was my mentor, he said, serve those interrogatories with your complaint, and I think from the plaintiff's standpoint that's an important statement to make when you're filing a case and you want the interrogatories to go to house counsel right with the complaint so that when he's trying to decide what to do about your case, he's faced fully with, you know, what you're asking for. And this rule says you can't do that anymore. And I think that's unfair to plaintiffs.

I think you ought to be able to serve your discovery with your complaint. And if the purpose of the rule of, you know, imposing the delay on responding to discovery until the self-executing disclosures are made, it could be served by saying when you serve discovery with the complaint, the response isn't going to be due until 30 days after your opponent's self-executing disclosures are made, that I think we should amend the rule to do that. Because right now I think basically the rule says to plaintiffs, you can't serve your discovery with your complaint, and I think that's really wrong.

Also I view the rule as robbing from me, the plaintiff, two weeks of discovery time. I used to be able to serve my interrogatories with the complaint, they'd be due in 45 days. Now the fastest I can get my answers to my first set of interrogatories is 60 days. I serve my disclosure with my complaint, I serve a demand on them to disclose with the complaint, they disclose their disclosure date, due date is 30 days from then, and then I can serve my interrogatories which are due 30 days hence. So now I'm looking at 60 days I have to wait to get the answers to the questions I want, and at the same time I'm facing Judge Katz' order which says I only have four months to do discovery. So I'm getting a shorter time frame at the back end and a longer time frame at the front end, and I just can't get it done in time.

So I think that that's -- you know, that's the other problem I have, is this extra two weeks, minimum of two weeks, and that's because I know enough to serve a demand with my complaint on the other side to disclose because I'm on this committee.

MR. LANDIS: Uh-huh.

MS. BALLARD: Most people who aren't on this committee don't figure that out until they try to do their discovery and -- you know, and 30 days later they don't get an answer and the defendant says, well, ha, ha, I haven't filed my self-executing disclosure and you haven't demanded that I

do it, so I don't have to answer your interrogatories. That's how I see it. I think it's really added a layer of detail that's unnecessary. I think lawyers who are dealing with their first case in the Federal Court, who may be very, very competent litigators out in the counties, who don't read this rule carefully, get totally caught off-guard. I mean, I've seen it happen to defense counsel in my cases, that they don't realize that they have to do this disclosure before they can take the plaintiff's deposition. They never get around to it, and all of a sudden their four months for doing discovery are up and they don't have 30 days left to get some discovery filed because they didn't voluntarily disclose.

So I don't like it. You know I don't like it. I'm telling everybody I don't like it, and I received many complaints since I'm the sort of voice of the people who don't like it. I get a lot of lawyers calling me complaining about it.

MR. LANDIS: Well, then we have some things to develop in these further hearings, that's obvious.

MS. BALLARD: Yeah, I do think the rule ought to be amended to permit the plaintiff to request discovery with the filing.

MR. LANDIS: Well, what I've been doing when I've -- I've been going around making speeches about how this thing works, and in talking to the practicality, I've been telling

people that this is the way to go about it, that you file your request and you file it at the time.

MS. BALLARD: But that's technically a violation of the rule. It says you may not seek discovery.

MR. LANDIS: Well, but you make the demands, that's what I'm saying --

MS. BALLARD: Well, you file your --

MR. LANDIS: -- to initiate everything.

MS. BALLARD: Yeah, but you can't -- technically under the rule you cannot file additional discovery or document requests beyond the demand for self-executed disclosure --

MR. LANDIS: Yeah.

MS. BALLARD: -- with your complaint. And I think that should be changed.

MS. CLARKE: You will recall, Alice, that our initial recommendation was not to have that waiting period.

MR. LANDIS: No moratorium. We recommended --

MR. MELINSON: The court put that in there.

MR. LANDIS: -- no moratorium, and the judges put that in.

MS. BALLARD: Right.

MS. CLARKE: And so one of the things we should probably consider is bringing the issue to them again on just this narrow issue --

MR. LANDIS: Uh-huh.

MS. CLARKE: -- with support as to the way it's causing delay.

MS. BALLARD: It's really two points. It's the waiting -- it's the extra time period, no chance to get responses to your initial discovery for 60 days, plus the bar on seeking discovery with your complaint.

MR. LANDIS: Well, then the other consideration that obviously we should address, and whether we change it or not, I don't know, but you're aware that in the recommendations of the Civil -- of the Advisory Group to the federal rules, they have changed the standard for making discovery, and they have said, what is it, facts specifically pleaded. And so that's a much sharper and narrower definition of what's called for in the self-executing discovery. I haven't quite got the standard, but it's -- but that's now the rule that's going forward by the -- and has been approved by the Judicial Conference at this point.

MR. RAYNES: I've got to tell you, I was not -- either I didn't read the rule as closely and I'm sitting here listening to this -- listening to you, and maybe too much time has elapsed since we debated this, but I would strongly recommend that we take this back to the judges based on what Alice has said.

MR. LANDIS: Well, we certainly --

MR. CHURCHILL: Well, as Jennifer said, we clearly had stated in our discussions --

MR. LANDIS: Yeah.

MR. CHURCHILL: -- that we did not think there should be a moratorium. I recall that discussion --

MS. BALLARD: Right.

MR. CHURCHILL: -- quite clearly.

MR. LANDIS: Yeah. Well, certainly it's --

MR. CHURCHILL: It would be nice to find out what the experience has been so we can reiterate it.

MR. LANDIS: Well, this is something that obviously we need to deal with in our future meetings. Mike, how about your experience?

MR. CHURCHILL: I'm -- in Cy's case -- position, I think almost all of my experience has been in the special track. There has not been much real difference. It has helped us a little bit to be able to formalize when we wanted to the request for status reports and have that to turn to with some judges that I think would let things slide. So it's been a minor help. I have to say the one problem that any parties can face which is judge's not deciding, frankly, occurred during this year. We had a judge basically sit out on a case that should have been decided promptly, and he took six months basically to then file a one-sentence order approving a matter that -- and I don't think this has solved

that problem. But this isn't designed to solve all problems. We have not had any experience on the self-executing discovery because of the fact that it doesn't apply to special track cases.

MR. LANDIS: Eve, how about you?

MS. KLOTHEN: No personal experience. However, I've heard an awful lot of attorneys complaining about the self-executing discovery, particularly plaintiff's attorneys. My sense was that they were unhappy about being unable to control or structure the discovery the way they might like to. I should also add that I'm in sympathy with what Alice just said, and it certainly does merit a second close look. I think that would have a bigger impact on plaintiff's attorneys and we really ought to take a pretty careful look at that.

MR. RAYNES: Bob, --

MR. LANDIS: Yeah.

MR. RAYNES: -- either the nightmare is going to come when the cases go to trial and somebody has evidence --

MR. LANDIS: You get motions to preclude.

MR. RAYNES: -- that they have not disclosed and they try to get it in. That's -- I mean, up till now we have a couple of anecdotal experiences which are meaningless, especially if they settled. But that's what's going to happen and, you should have disclosed it, I didn't have to, that the rules don't contemplate it and all those things are going to

go back and forth.

MR. CHURCHILL: Is anybody not actually then asking for the same information later in the formal discovery that they're filing? I mean --

MS. BALLARD: Yeah, but they object to it then. You know, there's like -- and you haven't followed-up with your motion to compel.

MR. RAYNES: That's right.

MS. BALLARD: They sort of got it covered.

MR. LANDIS: Well, have you --

MR. RAYNES: That's a big --

MR. LANDIS: Have you actually encountered that, Alice, in your practice, that --

MS. BALLARD: I have never received an interrogatory response to any question I have ever asked a major law firm without getting an objection to it first. Notwithstanding the foregoing three paragraph objection, this is the information we're giving you. Now, I don't know whether they're giving me everything or not. And I'd have to file a motion to -- a hypothetical motion to compel just to find that out, and I'm not going to bother to do that. I'd take the information I'm given and try to work with it.

MR. LANDIS: Uh-huh.

MS. BALLARD: So, you know, these objections are not specific like --

MR. LANDIS: Yeah.

MS. BALLARD: -- let me tell you something, there's something you want that I'm not giving you because I object.

MR. LANDIS: Yeah.

MS. BALLARD: You get -- there's a blanket objection. A lot of times they're stated at the beginning of the response as applicable to every answer.

MR. LANDIS: Cy?

MR. KURLAND: I'd like to go back, if we're through talking about this, --

MR. LANDIS: Yeah, we've made the rounds.

MR. KURLAND: -- go back to the special management track. In my view when we drafted that, the key thing, really key provision was to have that responsible settlement conference after three, four months because that was the juncture at which you either could get rid of the case or else make a reasonable determination based on some realism as to when the case should come to trial and set a schedule.

I have my own view that some judges are just not settlement judges. They don't enjoy it, they don't want to partake of it. It's not the kind of thing they like to do. I'd like to find out, if we can, which judges just don't want to do something like that or it's not in their nature. And these may be very, very fine judges and judges that are good trial judges, they're just not bang the parties's heads

together judges, and they avoid it. And if we're honest about it and say, okay, this particular judge is a wonderful judge, he's fair, he tries a good case, and he's decent to the lawyers, but he just doesn't like to take part in a comprehensive settlement business-type negotiation where he exercised judicial power over parties for purposes of bringing them together, he wants to let them try their case and he'll sit back and give a view. And I think the judges we interviewed that came here, some of them said that, that my job is to sit back and try a case, and that's what a judge is supposed to do; if the parties are going to settle it, fine.

If that's so and we find out that a lot of judges don't want to do it, why can't we have a procedure as we discussed earlier that Leo brought up too, where those cases are automatically sent for a settlement conference to a different judge, and that judge is a judge for whom everyone will have respect and whose judgment would have an impact on clients, and let that judge do it, and then let the other judge try it if he wants to. But I think that the personalities of different judges are so strong that you won't change that. You won't override their personalities and get them to follow a plan if they don't want to follow it, that's not in their nature to follow. They'll just find ways not to do it. It will be the same thing as the lawyers with self-executing discovery.

MR. LANDIS: My own observation to that, Cy, is that having said that, you surely recognize that any plan created for and handed to them ain't going to work either.

MR. KURLAND: I know.

MR. LANDIS: But --

MR. KURLAND: That's why it's something I would like to find out from them, what they think would be the best way to accomplish that.

MR. RAYNES: Well, what about the volun -- going to the magistrate first before you get to the judge?

MR. LANDIS: Yeah. Uh-huh.

MR. RAYNES: That way you don't have to --

MR. LANDIS: Sure.

MR. KURLAND: But the problem with that, Arthur, is that the magistrate doesn't have the inherent power for the lawyers to say, look, we're in trouble, this is what this guy told us.

MR. RAYNES: Yeah, but the -- look, I can't talk about to you the special cases, you know, because we don't handle those class actions. The beauty about going to the magistrate is, and I'm not saying this because we have the judge sitting here, is that they will give you the time to fully ventilate the case and which the trial -- which the district court judges really don't want to do. It takes time. It takes two, three meetings sometimes, going back at the

client. You know, you're saying that there's no causal relationship in this medical malpractice case, where's your report, Mr. Plaintiff? Defendant, you say that there -- you know, where's your report? The judge says, is this case ready to try or is this case ready to settle? That's what they want to do.

Once you've gone through all of that with the magistrate and everybody has finally opened up their briefcase and pulled out their file and gone back and got the expert and got the person from the company with authority and he is there, then when you get to that point and everything is there ready to be resolved, and if the magistrate doesn't have the inherent power to do it, then it goes up to the judge and everything is there. So I think there is value to this going to the magistrate first. And you don't like to go to the judge and say, judge, I really don't want to try this in front of you because you don't have the patience or the skill to do it, I'd rather go to the magistrate first. You know, usually you don't like to say that to a federal judge. But if it were -- if that were done, I think that would be a positive thing.

MR. KURLAND: My personal experience is it doesn't work. The magistrates --

MR. RAYNES: It may not work in your kind of cases. I'll tell you, it works in our cases. It works in the personal injury cases. Matter of fact, that's the system we

put in for the judge pro tem in the State Court.

MR. MELINSON: Cy, in this area, I recently had a lot of experience, and if the District Court judge makes it clear to the lawyers that the magistrate judge has full authority, and that that's the only place it's going to be settled, that he's not going to make an attempt at settlement and it's either settle with the magistrate judge or it's not settled, that helps a great deal.

MR. LANDIS: I'm sure of that.

MR. KURLAND: That would --

MR. LANDIS: Yeah.

MR. KURLAND: That would have an added impact.

MR. MELINSON: In practice, I tell my judges please do that, and they do it --

MR. KURLAND: Because then they'll really pay attention. But --

MR. MELINSON: And it comes in and I reiterate it at the conference, it's either going to settle here -- if you think it's going to settle on the courthouse steps, have another thought coming because this is your only chance right here, and that's the way we work it.

MR. CHURCHILL: I can tell you personally having experienced it, it helps.

MR. KURLAND: Yeah, that's important. And also that if the magistrate's going to conduct that kind of negotiation

and settlement, he has to know the case.

MR. MELINSON: Well, you know, --

MR. KURLAND: And that's another problem.

MR. MELINSON: -- I practiced law for 20 years and I know that I'm not going to know the case as well as you, the lawyer. And I say that up front. But by the same token, in those 20 years I went to a lot of settlement conferences and I know that I've gone in there and I say to the plaintiff's lawyer, Arthur Raynes, what do you think this case is worth? You know, this is the kind I don't conduct. I won't do this, but I've seen other judges do it over the years. And he says a million dollars. And defense counsel, what's the case worth? Zero. He ought to apologize for having brought it. And the judge, as Carnac, $500,000.

If judges cut things down the middle in settlement conferences and conduct five-minute settlement conferences, we're not going to settle cases. But if you set aside a day and you tell him, don't plan anything else, you're here with me, they know you mean business. And if you tell them you're not going to cut it down the middle -- you know, if you cut it down the middle, I know I did this, Arthur Raynes at the next conference says, different case, $10 million. He wants the edge. And defense counsel says on an algebraic scale, it's worth minus $10 million. You get the picture as to what lawyers do. But in a really practical settlement conference

where they know you're going to stay there until it's settled, and it can go into the night, they really start to get practical and they settle, especially if the District Court judge has said, that's it, it's either there or nowhere.

MR. KURLAND: Well, that's what we provided in the special management track. You weren't supposed to have that what do you want; a million; what do you want; zero. You were supposed to have an informed judicial officer conducting it who could say, you're ridiculous, there -- you're too high, but not ridiculous or something, you know, so that the person you're talking to has --

MR. MELINSON: Sometimes one -- people fail to understand. Sometimes one of the lawyers is right. You know, it's not always, we'll figure it's in the middle somewhere. Sometimes one of them is right and one is wrong. Sometimes you have a strong case. Sometimes you don't. They need to be --

MR. KURLAND: Well, you're agreeing with me that a magistrate or a judge has to be informed sufficiently about the case so that he can have valuable input in negotiating the settlement?

MR. MELINSON: I agree a hundred percent, and I --

MR. KURLAND: All right. And that also --

MR. MELINSON: -- have them submit a synopsis of the case to me --

arbitration stuff.

MR. LANDIS: Now, obviously we have -- John, were you going to say something? I'm sorry.

MR. SCHELLENBERGER: I just wanted to raise a quick question.

MR. LANDIS: Yeah. Please.

MR. SCHELLENBERGER: What is the status of the proposed amendment to the Federal Rules on primarily self-executing disclosure? Where does that stand in the process?

MR. LANDIS: It's been approved by the Judicial Conference. The form -- as I said, I wish I could articulate it --

MR. SCHELLENBERGER: Yeah, I know it changed.

MR. LANDIS: -- but they have a -- that's right, isn't it, Leo?

MR. LEVIN: I will have to bring in the text. But it's been approved by the Judicial Conference --

MR. LANDIS: Yeah. But that's where it is.

MR. LEVIN: -- and it's before the Supreme Court. The Supreme Court at this time has asked also for a statement of what are the controversial amendments and the court has not yet acted and decided what to send to Congress, if everything, and what not. The last time the court did not send all the proposed rules that were sent up to the Judicial Conference, it remanded a number of them.

MR. LANDIS: But the articulation of the new standard is something like facts specifically pleaded. I think that's the --

MR. LEVIN: Yeah.

MR. LANDIS: Something like that. So that it's obviously a narrower definition of what is called for as in self-executing discovery, and that we ought to look at --

MR. LEVIN: Yeah.

MR. LANDIS: -- to the extent that we need to consider that again here.

MR. LEVIN: And will raise some questions, I might add, as to whether that's going to change pleading practices.

MR. LANDIS: Uh-huh.

MR. LEVIN: Because that's the kind of --

MR. LANDIS: Sure.

MR. LEVIN: -- stuff that may get involved with.

MR. LANDIS: Yeah.

MR. LEVIN: But what that would do typically is get rid of the whole quote-unquote rebuttal kind of thing. Now, we may not want to act before a final decision on the rules going through Congress. We may. We may want to simply have clarifications. I mean, I'm not arguing for that kind of phrasing. But at the moment that's where it sits.

MR. RAYNES: Is there any discussion on the timing? Do they still want the timing up front like that?

MR. LANDIS: Yeah, that could be done. Yeah.

MS. BALLARD: -- part of this discussion.

MR. LANDIS: Uh-huh. Okay. Mike?

MR. KUNZ: One of the groups that are near and dear to my heart are the pro se prisoners. We had about 900 cases last year. And we might want to think about the mechanics of --

MR. LANDIS: Well, we did have -- there's -- some of those litigant groups in the prison, and I can't remember the names of some of them, but there are organized offices in --

MR. LEVIN: Legal clinics?

MR. LANDIS: Yeah. So we did get some responses from them, you remember. Yeah.

MR. KUNZ: They tend to would like to come before us.

MR. LANDIS: That's right.

MR. KUNZ: The one thing I -- in addition to the comments that were made, I'd like to modify the statistics on the standard management to break out the prisoner cases and do median times and things --

MR. LANDIS: Yeah, that's a good idea.

MR. KUNZ: -- because that --

MR. LANDIS: Sure.

MR. KUNZ: -- could be distorting those statistics.

MS. BALLARD: Mike, when you --

MR. KURLAND: You mean those aren't civil cases,

other than in habeas cases?

MR. KUNZ: Prisoner, sure. We had about 900 prisoner cases.

MS. BALLARD: Including habeas cases?

MR. KUNZ: No. No. Independent. Yeah, there was this --

MR. CHURCHILL: So out of the 5,000, almost 15 percent are prisoner cases?

MR. KUNZ: No. Yes. Yes. That's why I thought we should break them out because that's going to give you a little different perspective.

MR. LANDIS: All right. Well, thank you all for coming. We will adjourn until the next meeting time, which will be in due course.

(Meeting adjourned)

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C E R T I F I C A T I O N

I, Roxanne Galanti, certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

Roxanne Galanti — Feb. 19, 1993

ROXANNE GALANTI — DATE