UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U.S. COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA PA 19106-1797

MICHAEL E. KUNZ
CLERK OF COURT

CLERK'S OFFICE
ROOM 2609
TELEPHONE
(215) 597-7704

May 7, 1993

Abel Matos
Court Administration Division
Administrative Office of the
United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

Dear Abel:

Enclosed is a bound edition of the Report of the Advisory Group of the United States District Court for the Eastern District of Pennsylvania, as well as a set of the materials which were distributed at the meeting of the Advisory Group on May 4, 1993.

Very truly yours,

Michael E. Kunz
Clerk of Court

MEK:mma
Enclosure

REPORT OF THE ADVISORY GROUP
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990

August 1, 1991

Advisory Group

Robert M. Landis, **Chairman**

Members

Alice W. Ballard
Michael M. Baylson
Michael Churchill
James C. Corcoran
Andre L. Dennis
Eve Biskind Klothen
Seymour Kurland
S. Gerald Litvin
Edward W. Mullinix
Arthur G. Raynes
Richard M. Rosenbleeth
Daniel J. Ryan
John O. J. Shellenberger
J. Clayton Undercofler, III

Ex-Officio Members

Honorable Louis C. Bechtle
Honorable Edward N. Cahn
Honorable Robert F. Kelly
Honorable James R. Melinson

Michael E. Kunz, **Clerk of Court**

A. Leo Levin, **Reporter**

Jennifer R. Clarke, **Assistant to the Chairman**

TABLE OF CONTENTS

TABLES AND ATTACHMENTS

TABLES

ATTACHMENTS

EXECUTIVE SUMMARY

PART ONE: DEVELOPING A PLAN—THE STATUTORY PREREQUISITES

The Present State of the Docket

The United States District Court for the Eastern District of Pennsylvania is among the busiest in the country. In 1990 it had more civil filings than any of the 10 largest (metropolitan) district courts nationwide. Its caseload per judgeship is among the heaviest in the country. When the caseload is adjusted, or weighted, for complexity, this court has the third heaviest load per judgeship of the 94 district courts that comprise the federal judicial system. **(Pages 7–10)**

In 1990 the median time from filing to disposition of all civil cases in this district was seven months, ranking it sixth best among all district courts and second best among the 10 metropolitan courts. **(Pages 8–10)**

Of the civil cases requiring a trial, the median time from when the case was at issue until the trial began was 12 months, the best record among the metropolitan courts. **(Pages 8–10)**

Seventy percent of all civil cases requiring trial were tried within 18 months. As of June 30, 1990, only 2.1 percent of the pending civil caseload in this district was three years old or more, compared to a national average of 10.4 percent. **(Pages 12–22)**

Criminal cases were disposed of in a median time of 6.1 months from filing. **(Page 8)**

The total number of civil and criminal cases filed grew by nearly 82 percent from 1980 to 1990. During that period the number of cases terminated increased by almost 73 percent, reflecting a dramatic increase in productivity, but not enough to prevent a substantial increase in the number of pending cases. **(Pages 13–22)**

The Administrative Office of the United States Courts projects that by the year 2000 the civil caseload of this district will increase by 69 percent and the criminal caseload will increase by close to 40 percent. **(Page 28)**

Vacancies on the Bench

The most serious problem facing this court is vacancies on the bench. If we total the number of months of judicial vacancies for the past five years (1986 through 1990), the total is almost exactly the equivalent of nine district judges each sitting on the bench for one full year—this on a court that, during that entire period, was authorized only 19 judgeships (see Attachment 1). **(Pages 22–25)**

The Advisory Group recommends hearings by the Committees of the Judiciary of the Congress to examine the processes of creating judgeships and filling them. **(Page 26)**

Assessing the Impact of Legislative Proposals

Congress should have available and seriously consider a detailed assessment of the potential impact of legislative proposals on the federal judicial system in order to: avoid ambiguities and omissions in the drafting; examine whether jurisdiction in an Article III court is the optimal choice; and provide added resources necessitated by the legislation in timely fashion. **(Pages 31-33)**

In this connection, Justice Brennan said many years ago that the best disposition of a civil case was an uncoerced settlement between knowledgeable parties. However, if settlements are entered into—and their terms dictated—by the fact that no judge is now, or is expected to be, available for the trial of the case, they can hardly be considered uncoerced—or desirable. **(Pages 33–35)**

Defining Cost and Delay and Exploring the Relationship

The cost of litigation to the parties extends far beyond what they pay for experts, transcripts and attorney fees. The value of time spent in planning the litigation and in participating in the process, the economic cost of an unresolved issue of liability or damages, may be many times the direct expenditures. And clearly Congress had in mind the desirability of reducing the total time from filing to disposition. **(Pages 36–40)**

Delay in terminating a case may increase lawyer's fees, particularly where billing is by the hour. This is not usually true in the case of contingent fees. In neither case is it possible to establish a uniform, universal correlation between elapsed time to termination and the cost of litigation to the parties. **(Pages 41–42)**

Cost of litigation aside, speeding up litigation is not always desirable. Sometimes cases must "season," allowing the litigants to gain a sense of perspective. Sometimes excessive speed increases cost and can be detrimental to the quality of disposition. **(Pages 42–43)**

Two conclusions emerge: Judges should be sensitive to the fact that certain procedures typically increase the cost of litigation and should be utilized only where necessary. Second, we need to know more about the relationship between cost and delay and, with Congressional interest evidenced by the Civil Justice Reform Act itself, further research on the subject should be undertaken. **(Pages 43–47)**

The Principal Causes of Cost and Delay

Two principal causes of cost and delay can be identified in this district. First is the high rate of vacancies in authorized judgeships, discussed above. Second is the extent of discovery, discussed more fully below in the context of specific recommendations for change relevant to this issue. **(Pages 48–54)**

PART TWO: THE SIX PRINCIPLES OF LITIGATION MANAGEMENT

Systematic, Differential Treatment of Civil Cases

The court already identifies four types of cases for the purpose of differentiated treatment: habeas corpus, social security, arbitration and asbestos cases. The Advisory Group recommends continuation of such specialized treatment as well as the creation of two further tracks: a Special Management track and a Standard track.
(Pages 57–60)

The Special Management track is intended for those cases requiring intense or special management by the court because of the large number of parties, complex factual issues, problems of location or preserving evidence, exceptionally long time needed to prepare for trial or settlement or exceptionally short time needed before final disposition.
(Pages 60–63)

Involvement of Judicial Officers in the Pretrial Process

The Federal Rules of Civil Procedure already require a scheduling order in all civil cases except those specifically exempted by local rule. In the view of the Advisory Group, this requirement—when accompanied by a firm trial date, discussed below—represents adequate involvement of the judge in the management of the ordinary case. As the judges themselves have pointed out, they are not, and should not be, super-managers of litigation strategy who replace the lawyers' traditional role in our adversary system. **(Page 64)**

The Advisory Group recommends that the scheduling order be preceded by a conference of the judge and the attorneys; for this purpose a telephone conference will frequently suffice. **(Pages 64–65)**

Early, Firm Trial Dates

The single most effective tool in resolving cases and resolving them quickly is a firm trial date set relatively promptly after the complaint is filed. Except for cases on the Special Management track and cases on the asbestos track, the goal should be trial within 12 months of the filing of the complaint. **(Pages 66–67)**

The month for trial should be set early, usually in the scheduling order, and the precise date should be fixed as that month approaches. Once the trial date is set, no continuance should be granted except for a compelling reason not known at the time a trial date was set. **(Pages 67–68)**

Where the judge is not available on the date set for trial, typically because of the demands of the criminal calendar, and rescheduling before the same judge within a reasonable time is not feasible, the case should be tried before an identified magistrate judge, if the parties consent, or before another judge. **(Pages 68–69)**

Control of Discovery

The most effective technique for the control of discovery is one currently available under the Rules: the imposition of sanctions coupled with advance notice of the court's willingness to use them. The Advisory Group believes that the need for sanctions would be reduced if judges were to make clear that sanctions will be imposed where necessary. **(Pages 69–70)**

The Advisory Group encourages judges to use informal means of resolving discovery disputes, such as telephone conferences. We also encourage judges to set the tone for discovery by discussing discovery issues with the lawyers early in the course of the litigation. **(Page 70)**

The Advisory Group recommends a rule requiring voluntary or self-executing discovery, under which each party is obligated to turn over to the other specified categories of information without waiting for a formal, specific request. Failure to comply would be sanctionable. The concept is already being applied in this district, albeit in limited situations, and is also under discussion at the national level. **(Page 70)**

The Advisory Group recognizes the professional responsibility of lawyers to comply with discovery for which no reasonable objection can be raised and to refrain from seeking discovery interposed for the purposes of burden or harassment. The Advisory Group recommends that the Bar and the Bench sponsor educational programs directed to managing discovery and a lawyer's professional responsibility with respect to discovery. **(Page 70)**

Finally, the Advisory Group recognizes, as does the Act, that litigants have a role to play in controlling discovery costs and can often be effective in doing so. **(Page 70)**

Dispositive Motions

There is an inherent tension between the views of the litigants and of many judges concerning dispositive motions, particularly motions for summary judgment. Litigants consider them a useful means of expediting disposition and reducing cost, but are often frustrated by the fact that the judges neither rule on them promptly nor with due consideration. Judges, on the other hand, view such motions as frivolous or deliberate attempts to delay the proceedings, time-consuming and burdensome. **(Pages 70–71)**

We recommend setting deadlines for the filing of dispositive motions so that they will not interfere with the trial date and, once they are filed, that they be resolved promptly. We further recommend that trial judges make more frequent use of oral argument to assist in separating those motions that have merit from those that are frivolous. **(Page 71)**

Special Treatment of Complex Cases

Complex cases require early and sustained judicial involvement. An initial pretrial conference should define the scope of discovery during the early phase of the litigation and should be followed, after a period of some months, by a second pretrial conference at which settlement should be explored. **(Pages 72–76)**

Where cases do not settle, further pretrial conferences should be held at relatively frequent intervals. **(Page 77)**

Good Faith Effort of Parties to Resolve Discovery Disputes

The local rules of this court already require, as a prerequisite to any discovery motion, a certification by counsel that the parties "after reasonable effort, are unable to resolve the dispute." **(Page 81)**

Alternative Dispute Resolution

This court has been a recognized leader in the field of court-annexed arbitration, compiling an enviable record since the program was instituted in 1978. More recently, the court began a random experiment to test the utility of mediation. Early returns indicate that the program is successful. **(Pages 82–84)**

These programs should be continued and there should be available within the court information concerning other mechanisms of alternative dispute resolution that may prove useful in the relatively rare cases that could profit from their application. **(Pages 84–85)**

PART THREE: COST AND DELAY REDUCTION TECHNIQUES NOT MANDATED BUT CONSIDERED

Joint Discovery–Management Plans

The Advisory Group does not recommend requiring the parties, in every case, to prepare a joint plan for discovery and case management. We do, however, recommend such a requirement for cases assigned to the Special Management track. **(Page 87)**

Representation by Attorney with Power to Bind

The Advisory Group recommends implementation of a provision that permits the judge to require attendance at any pretrial conference of an attorney with power to bind the litigant as to matters previously identified by this court. **(Page 88)**

Party Signatures on Requests for Extensions

The statute invites promulgation by the court of a rule requiring signature by the party, as well as by the attorney, on requests for extension of discovery deadlines or for postponement of the trial. We recommend strongly against such a provision, for it can only be premised on distrust of the attorney relationship with the client. **(Page 89)**

Neutral Evaluation Programs

We recommend that, in assessing the experience with the mediation program, once sufficient data have been accumulated, the court then consider whether a separate program of early neutral evaluation can have any role in aid of settlement. **(Pages 90–91)**

Representatives with Authority to Settle

The statute requires consideration of a rule that would permit the court to require

a representative of the client with authority to settle to attend a settlement conference or to be available by telephone. The legislative history emphasizes the value of client availability in facilitating settlement. This proposal is similar to, although not identical with, a local rule presently in effect in this district, and the Advisory Group recommends adoption of the statutory proposal. **(Page 92)**

Expediting Service of Process

The Advisory Group is of the view that the provision of Federal Rule of Civil Procedure 4(j); which allows a litigant four months to effect service of process, should be amended in the interest of reducing delay. **(Pages 93–94)**

Magistrate Judges and Special Discovery Masters

The Advisory Group recommends that the court avail itself of the new procedures with respect to notifying parties of the availability of a magistrate judge to try civil litigation, that additional magistrate judges be authorized if the resultant workload justifies, and that procedures for funding authorized magistrate judges' positions be expedited. **(Pages 94–96)**

The Advisory Group recommends that the judges of the court feel free to utilize special discovery masters in those specialized situations in which it can be useful to do so. **(Page 97)**

***Pro Se* Complaint Form**

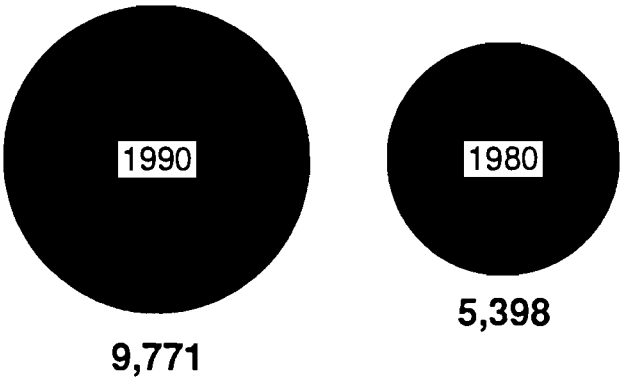
We recommend that the court review the present *pro se* complaint form with a view to improving its efficiency as a mechanism for disclosure of the nature of the complaint and, perhaps, of additional information that would serve to expedite resolution of these cases. **(Page 98)**

CONCLUSION: THE FOCUS OF THIS REPORT

The Civil Justice Reform Act, as well as the committee reports that accompany it, emphasize that the ultimate goal of the legislation is access to the courts, or, as others phrase it, access to justice. We have been animated by the same motivation. Behind the detailed procedural provisions and the distinctions that may seem almost arcane is the recognition that access to justice means the vindication of rights without delay, which renders the vindication meaningless, or expense, which makes the victory a Pyrrhic one. **(Pages 98–100)**

EDPA JUDICIARY CASELOAD AND RESOURCES

CASES COMMENCED ANNUALLY: OVER 80% INCREASE IN DECADE



AUTHORIZED JUDGESHIPS: 0% INCREASE

NOTE: Four additional judgeships were authorized in December 1990, but have not been filled.

LOSSES TO VACANCIES 1986-90: EQUAL TO NINE JUDGES EACH SITTING A FULL YEAR

REPORT OF THE ADVISORY GROUP
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990

INTRODUCTION:
AN ADVISORY GROUP TO A METROPOLITAN PILOT COURT

The Civil Justice Reform Act of 1990[1] is the most significant piece of legislation that the Congress has enacted in the last three decades directed to procedures of the federal courts for reducing cost and delay in civil litigation.

Born of a well-intentioned national survey, bred of acrimonious constitutional dispute, matured in diplomatic bipartite compromise, the statute was enacted in the waning hours of the 101st Congress of the United States.

From the spirited contention between the Senate Judiciary Committee's concept of the needs of judicial management and the Judicial Conference's zealous defense of judicial independence, supported by a House Judiciary subcommittee, a compromise emerged between congressional mandate and judicial discretion. As finally enacted, the legislation provides that there should be a series of pilot programs, based on the operations of certain metropolitan and other districts of the courts, obligated to carry out all the mandates of the legislation; that there should be other early implementation districts to conduct their own experimental programs; and that there should be a model plan or plans, developed by the Judicial Conference from all these activities, which might serve as an alternative plan to be adopted by any of the other courts to achieve the objectives of the Act.

The ultimate goal of the Act is that each of the 94 district courts should have a plan to reduce cost and delay in civil litigation in place within three years.

The Judicial Conference designated the Eastern District of Pennsylvania

---

1. The Civil Justice Reform Act of 1990 is the short title of Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650 (1990), codified at 28 U.S.C. §§ 471-482. Throughout this document, this statute will be referred to as the Act.

to be one of the pilot courts whose experience and plan might be emulated by other courts under this Act.

The fundamental design of the Act was to build from the bottom up, with the establishment of Advisory Groups in each of the district courts to study the courts' operations, to make findings on the state of the docket, taking into account the civil and the criminal responsibilities of the court, and to make recommendations to the court on a whole series of considerations laid out in the statute. Acting on these recommendations, the court itself bears the ultimate responsibility to create its own plan for the reduction of cost and delay in civil litigation. The deadline for creating the plan in each of the 10 pilot courts is December 31, 1991.

Putting aside the controversy that surrounded the development of the Act, the Chief Judge of this metropolitan court convened an Advisory Group in March 1991, representative of the interests of the litigants and the varying interests whose destinies might be affected by such a program. He directed this Advisory Group to undertake this important mission, bringing together its collective experience to the single-minded mission of developing its program, undergirded by his own enthusiastic support.

Fortuitous or not, the designation of the United States District Court for the Eastern District of Pennsylvania as a pilot court was singularly appropriate. Many of the procedures mandated by the Act are already in place in this court. The findings of our survey of this court's procedures demonstrate that it is ideally suited to its mission as a pilot court.

Beyond this, when the Chief Judge convened this Advisory Group, he made three things plain: that we should accept the mandate of the legislation in all its implications; that we should put aside any misgivings about the propriety of congressional direction of the affairs of the federal courts; and that we should carry out our responsibilities as advisors to the court to achieve the Act's objectives.

The makeup of the Advisory Group, as the Chief Judge and his colleagues of the Board of Judges conceived it, was a prototype of the litigants and the practitioners in this court, with a balance of the total range of the affected interests in the complex of litigation that comes before it. They were selected, as he declared, because all of them are experienced in their respective fields and all are committed to the mission set out in this legislation.

At an early stage of our proceedings we concluded that we should operate as a committee-of-the-whole; we determined that we should expand our own experience as widely as we could reach—by bringing together all of the empirical evidence we could command, interviewing all of the active and senior judges, conducting informal and formal public hearings, developing surveys and questionnaires to the litigants and the practitioners in this district and working through these resources to maximize the collective experience that had brought us together.

The development of this report was an exemplar of collegiality. Working with small task forces whose responsibilities were directed to special elements of the statutory mandate, we analyzed the findings on the state of the docket and the practices already in place in this court, with the masterful aid of the Clerk of this court, whose professionalism is nationally acknowledged.

The Act is quite detailed in specifying what the Advisory Groups shall consider in the course of completing their assignments and, to some extent directly and to some extent inferentially, what shall be included in their reports. There are more than 30 such topics and sub-topics to be found in the statute.[2]

In addition, the statute provides for review of the plan of each district court at the national level as well as review by circuit.[3] The review is not to be perfunctory; the reviewing authority is charged with determining whether each of the 94 district courts has "adequately responded" to the conditions in that court and to the recommendations of its Advisory Group. Understandably, those who will ultimately be responsible for this formidable task have made an attempt to impose some uniformity of structure on the individual Advisory Group reports.

The structure of this report is designed to conform in its basic outline with that suggested outline, which in return reflects the structure of the statute. We have attempted to make explicit the theory of the structure and the details of that outline wherever we thought it would be helpful.

We do not pretend that all of our conclusions are supported by assured empirical findings. We have cast our net wide, bringing in all of the anecdotal

---

2. *See* 28 U.S.C. §§ 472 -473 and, for specific examples, § 472(b) (1) - (4), (c) (1) (A) - (D); § 473 (a) (2) (B) (i) - (ii).
3. *See* 28 U.S.C. §§ 474.

experiences of all of the judges of this court, most of the litigants and practitioners before the court and the collected experience of a widely diversified composite of the trial lawyers of the Eastern District of Pennsylvania. We are satisfied that after this intensive collegial experience, we have produced a consensus of views of this Advisory Group that represents our best judgment under the mandate the Act has given us.

We readily acknowledge that because the United States District Court for the Eastern District of Pennsylvania has already put in place many of the innovative procedures of this statute, its own experience has been fundamental to our recommendations. Beyond this, thrusting as they do into the routine practices, customs and habits of this district's judges, lawyers and litigants, our recommendations may send gentle seismic tremors through the system.

To summarize, the report that we have developed embodies existing practices of this court, augmented by our recommendations, and encompasses all of the statutory mandates of the Civil Justice Reform Act, which include:

(1) a determination of the condition of the civil and criminal dockets, identifying filing trends and demands on the court's resources;

(2) an identification of the principal causes of cost and delay, with a realistic recognition that they are elusive and dependent on anecdotal and evanescent evidence;

(3) the impact of legislative and executive policies on the work of the courts;

(4) the specific mandates of the Act

  (a) systematic differential case management;

  (b) early and ongoing control of the pretrial process by involvement of a judicial officer;

  (c) special prescriptions for case management of complex cases;

  (d) encouragement of cost-effective discovery through the voluntary exchange of information, with its concomitant demands upon the lawyers for the exercise of professional responsibility;

(e) the utilization of alternative dispute resolution procedures, many of which are already in place in this court; and

(5) a studied examination of discretionary proposals for cost and delay reduction remedies including, but not limited to, those that are provided in the Act.

The report that follows embodies the collective judgment of this Advisory Group after an intensive, collegial dedication to its mission.

PART ONE:
DEVELOPMENT OF A CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

The Civil Justice Reform Act requires that in developing its recommendations each Advisory Group "shall promptly complete a thorough assessment of the state of the court's civil and criminal dockets."[4] *As part of that assessment, it shall identify trends in case filings, and describe the principal causes of cost and delay. In addition, the report is to "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts."*[5]

The Advisory Group, in developing its recommendations, is also obligated to "take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys."[6] *Finally, it "shall ensure that its recommended actions include significant contributions" by the various participants in the system.*[7]

This part of the report has been prepared in fulfillment of that mandate.

---

4. 28 U.S.C. § 472(c) (1).
5. 28 U.S.C. § 472(c) (1) (D).
6. 28 U.S.C. § 472(c) (2).
7. 28 U.S.C. § 472(c) (3).

I. THE COURT, ITS RESOURCES AND ITS NEEDS

A. Introduction—An Overview

The Eastern District of Pennsylvania is a large metropolitan court serving a district with a population well in excess of five million people and is located in an area of substantial manufacturing and commercial growth. The court's geographic jurisdiction includes the city and county of Philadelphia and the surrounding counties of Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton and Schuylkill. These nine surrounding counties have had an 8 percent growth in population over the past decade and have been an increasing source of filings. Accordingly, the district court has expanded its facilities to accommodate the demographic changes in the district. The court currently sits in Philadelphia, Reading, Allentown and Easton, with two senior judges sitting in Reading and two active judges dividing bench time between Philadelphia and Allentown and Philadelphia and Easton, respectively.

The geographic location of this district, which borders the states of New Jersey, Delaware and Maryland, invites substantial filings based on diversity jurisdiction. For some years, the diversity cases have constituted over one-half of the civil caseload. This district court is one of the busiest in the nation, and the Statistical Analysis and Reports Division of the Administrative Office of the United States Courts projects that by the year 2000, civil filings will increase to 15,666 cases, a 69 percent increase over the 1990 filings.

For a period of 20 years, beginning in 1970, the Eastern District of Pennsylvania has had 19 district court judgeships. In December of 1990 the Congress authorized four additional judgeships, bringing the total to 23. These judicial positions are not expected to be filled until some time in 1992. Moreover, due to several judges taking senior status in the past two years, the district is today operating with only 16 active judges.

The procedures of this court are codified in the *Local Rules of Procedure.* The particular practices of the judges are set out in the *Handbook of Pretrial and Trial Practices and Procedures of Individual Judges and Magistrate Judges of the United States District Court for the Eastern District of Pennsylvania*, the legendary "Redbook" available to all the trial lawyers who practice here.

This section of the report includes discussion of the present state of the docket, filing trends over recent decades, judicial resources and available alternative dispute resolution programs. Also included are forecasts that were prepared by the Administrative Office of the United States Courts.

B. The Present State of the Docket

Since 1970 the Eastern District has operated on an individual judge calendar system. Under this system, each case, civil or criminal, is assigned to a specific judge at the time of the initial filing, and the case remains with that judge until final disposition. The Advisory Group and the court agree that this system has given the judges the incentive and control to manage their caseloads efficiently and has contributed substantially to the court's enviable record discussed later in this report. The Advisory Group expects that the court will continue the individual judge calendar system with departures limited to extraordinary circumstances.

1. Median Times

For 1990,[8] the median time from filing to disposition for all civil cases in this district was seven months,[9] ranking the court sixth best out of the 94 districts that comprise the federal judicial system. During the same period, the median time from issue to trial for those civil cases requiring a trial was 12 months, which ranked the court twenty-first out of the 94 districts. In addition, an analysis of the median time from filing to disposition shows the Eastern District of Pennsylvania to be below the national median time in 36 out of 40 types of civil cases (see Attachment 2). As is developed more fully below, when this court's caseload is analyzed for complexity and the figures adjusted—"weighted"—so that a relatively simple automobile accident case is not considered the equivalent of a class action for securities fraud, the record is even more impressive. On the criminal side, the median filing to disposition time in 1990 was 6.1 months.

---

8. Unless otherwise specified, all references to years are to statistical years, which run from July 1 to June 30.
9. If we include student loans and similar cases, which typically do not require significant judicial resources, the median time would drop to six months.

It is useful to focus on the experience of the largest metropolitan districts. These ten courts obviously encounter substantially different demands than the U.S. district courts in states like Idaho, Montana and North Dakota. In 1990 the Eastern District of Pennsylvania had the largest number of civil filings of any of these ten courts.* It had the best record for cases proceeding from filing to trial and the second best median time for civil cases proceeding from filing to disposition in that group.

It is useful to put these data in historical perspective. Not so very many years ago, medians for this court were markedly higher, as the following table shows:

TABLE 1

MEDIAN TIMES (in months)

EASTERN DISTRICT

OF PENNSYLVANIA

CIVIL

	1968	1970	1980	1990
Filing to Disposition	32	32	8	7
Issue to Trial	39	36	13	12

CRIMINAL

	1968	1970	1980	1990
Filing to Disposition	7.9	12.2	4.1	6.1

The remarkable improvement achieved during the past two decades is a great tribute to the court, one that we readily pay. The data also remind us, however, that as caseloads mount, mandated procedures become more complex and vacancies persist, the risk of retrogression must be viewed as real.

2. Weighted Caseload

It is a truism that some cases that are complex and difficult require more judicial time than others. To reflect these differences and to make caseload statistics more meaningful, the Federal Judicial Center has developed a system in which each type of case is "weighted" against a "normal" or standard-weight case. Thus, a case seeking recovery for a defaulted student loan is not the equivalent of an antitrust case. This

---

* This calculation excludes such cases as student loan defaults, which are regularly excluded by the Administrative office for certain purposes.

system is used by the Judicial Conference in its submission to Congress. Data used for determining the weights have historically been collected in time studies that require judges to record all time spent on a certain case over a period of several months. If a particular case type constitutes 1 percent of all cases terminated but takes 2 percent of the time judges spend on all cases, this case type is given a weight of two. As a result, a district with more complicated and time-consuming cases will necessarily have higher weighted filings.[10]

The weighted caseload per judgeship for the Eastern District of Pennsylvania clearly shows that a disproportionate share of difficult and complicated cases is handled in this district. As of June 30, 1990, this district had a weighted caseload per judgeship of 638 (see Attachment 3). As Table 2 shows, this was the third highest average in the country and was well above the national median of 448 weighted cases per judgeship and the standard of 400, which has long been considered an indication of the need for additional judges.

---

10. We note that the weighting formulas used by the Administrative Office were created 12 years ago. (They are currently being revised by the Federal Judicial Center.) They do not take court-annexed arbitration into account, among other things. As discussed later, this arbitration program has markedly reduced judicial time for the eligible cases. Of course, they do not take into account such cases as civil RICO and asbestos, which appear to have the opposite effect.

TABLE 2

EASTERN DISTRICT OF PENNSYLVANIA NATIONAL RANKING* FOR WEIGHTED FILINGS PER JUDGESHIP

Statistical Year	Ranking
1979	83
1980	34
1981	58
1982	59
1983	61
1984	66
1985	19
1986	11
1987	13
1988	2
1989	2
1990	3

*Ranking is done in descending order, highest value receiving a rank of 1. Thus, the heaviest weighted would be represented by a rank of 1, the lightest by a rank of 94.

The weighted caseload is so heavy that if annual filings remain at the 1990 levels, the addition of the four judges authorized for this district would reduce weighted filings to only 527 per authorized judgeship. This would still be far above the national standards discussed above.

3. Number of Trials

The complexity of the caseload in this district is reflected in the high number of trials as well as in the number of protracted trials. As is well known, a trial is required in only about 5 percent of all civil cases nationally. Most are settled or

otherwise terminated before a trial begins. In this district, an average of 7 percent of all cases reach trial, which ranks it as the fourth highest among the ten metropolitan courts. This figure demonstrates that a large number of cases stay on the docket for the entire course of litigation. Even more significant is the fact that a substantial number of trials last 20 days or more, and a high number of trials last from 10 to 19 days.

4. Age of Caseload

Despite the increase in filings and weighted filings, this court has consistently remained current on its docket. This can be seen from the breakdown, by age, of the pending caseload for statistical year 1990, as set forth below.

a. Cases Pending Less than One Year

The Eastern District of Pennsylvania had 3,599 pending civil cases that were less than one year old as of June 30, 1990. This was approximately 57.3 percent of all pending civil cases and is slightly higher than the national average of 55.8 percent for 1990. Approximately one-third of these cases were asbestos cases.

b. Cases Pending One to Two Years

Approximately 22.2 percent of the 1990 pending caseload was comprised of cases between one and two years of age. The national average for the same period was 22.3 percent. There were 1,315 asbestos cases and 851 non-asbestos cases in this category.

c. Cases Pending Two to Three Years

In 1990, 18.4 percent of this district's pending caseload was two to three years old. This was significantly higher than the national average of 11.5 percent. Asbestos cases accounted for 85 percent of these cases. This is indicative of a potential backlog of three-year-old cases in the future due to the complex nature of these cases.

d. Three-Year-Old Cases

As of June 30, 1990, the Eastern District of Pennsylvania had 209 pending three-year-old cases, representing 2.1 percent of the total pending civil caseloads of 9,784. The national average, which was 10.4 percent in 1990, is considerably higher (see Attachment 4). Almost 60 percent of these cases were non-asbestos cases. However, due to the great number of asbestos cases that were two to three years old in 1990, it is anticipated that the number of asbestos cases that are over three years old will increase substantially in 1991.

C. Filing Trends

As discussed below, the Eastern District of Pennsylvania is one of the busiest courts in the United States. Over the past two decades, the number of civil and criminal filings commenced, terminated and pending in the Eastern District has had a sustained growth (see Attachments 5, 6 and 7). Since 1988 the total number of civil and criminal filings has been approaching 10,000 cases.

1. Civil Caseload

Total civil cases commenced in the Eastern District of Pennsylvania have increased 81.7 percent, from 5,102 in 1980 to 9,271 in 1990. This dramatic rise in civil filings occurred despite an increase from $10,000 to $50,000 in the jurisdictional amount for diversity cases. Although civil filings decreased somewhat since the increase in the diversity jurisdiction amount, which became effective in 1989, historically this type of reduction has been only temporary. The Administrative Office of the United States anticipates that the slight decrease in filings will be reversed in the near future and that the caseload will continue to increase dramatically.

Most categories of civil filings during the last 10 years have either remained relatively constant or increased in this district (see Attachment 8). During this decade, areas of major increase are diversity jurisdiction (including personal injury and contract cases), civil rights, prisoners' filings and asbestos claims. Meanwhile, the number of filings for banking, securities and social security cases has remained fairly level. In addition, weighted filings have increased by 83 percent since 1981.

Other areas of civil filings that have increased significantly are bankruptcy appeals and ERISA cases. These two areas have increased 249 percent and 550 percent, respectively, since 1981. Additionally, civil RICO cases, which were nonexistent in 1981, increased to 71 cases in 1990. Civil RICO filings have steadily increased since 1986 and have doubled in number over the past five years. Copyright, patent and trademark cases, which usually require more judicial time, have increased steadily since 1981. These cases have increased 65 percent, from 98 in 1981 to 162 in 1990.

Product liability cases have also increased greatly over the past five years. Between 1986 and 1990, they increased 198 percent, from 844 cases to 2,513 cases. In 1990 this district had 12.9 percent of all product liability filings in the nation. Additionally, our product liability filings since 1986 have accounted for 11.2 percent of the total of product liability filings in the nation. Clearly, this district has had a disproportionate share of these time-consuming cases.

a. Diversity Cases

Diversity filings in the Eastern District of Pennsylvania have remained at approximately 40 percent to 59 percent of the total civil filings, as can be seen in Table 3 below. Following the increase in the jurisdictional amount in 1989, the diversity case filings in this district have decreased 16.2 percent, while the total civil filings have decreased only 9.6 percent. Although the increase in the diversity jurisdictional amount decreased the filings slightly, it is not expected to have a long-term impact. From 1980 to 1990, the total number of diversity filings increased from 2,218 to 4,888, or 120 percent. In addition, diversity cases removed from state courts are also on the rise and, as of June 30, 1990, accounted for 10.5 percent of all diversity cases, increasing 207 percent, from 167 in 1980 to 513 in 1990.

TABLE 3

Diversity Filings v. Total Filings

	Diversity Filings	Civil Filings	Percentage of Caseload
1977	1,856	4,315	43.0
1978	1,870	4,543	41.2
1979	2,008	4,793	41.9
1980	2,218	5,102	43.5
1981	2,230	5,308	42.0
1982	2,525	5,787	43.6
1983	2,769	6,422	43.1
1984	2,930	6,502	45.1
1985	3,423	7,392	46.3
1986	3,942	7,988	49.3
1987	4,057	8,103	50.1
1988	6,283	10,569	59.4
1989	5,833	10,255	56.9
1990	4,888	9,271	52.7

The fact that diversity removals jumped from 101 in 1978 (5.4 percent of all diversity cases filed in the Eastern District of Pennsylvania that year) to 513 in 1990 (an increase of 407 percent) may also be indicative of a case backlog in the state courts that does not bode well for the district court's caseload.

Because many diversity cases are submitted to mandatory arbitration, they represent a small portion of the judicial workload. Approximately 24 percent of all cases filed since the program began in 1978 are eligible for arbitration. Thus, the recent increase in the jurisdictional diversity amount has had little effect on the judicial workload.

b. Asbestos Cases

Asbestos cases are and will continue to be a major drain upon the judicial resources of the Eastern District of Pennsylvania. The numbers of filings and parties, as well as the complex nature of the claims, burden the system. Since 1979 the asbestos caseload has increased tremendously. In addition, a recent Rand[11] report, as well as this court's statistical analysis, indicate that this is a long-term problem, not a temporary phenomenon. In 1990 asbestos filings represented nearly 23 percent of all weighted civil filings in this district. In an attempt to alleviate the congestion created by these filings, a district-wide asbestos wheel has been instituted. The Honorable Charles R. Weiner administers this program and has been invaluable in preventing the asbestos filings from overwhelming the court. His efforts in conjunction with the other judges of this court who hear the asbestos cases has given this court the fastest disposition rate in the country.

In 1990 there were 2,114 asbestos cases filed in this district (see Attachment 9). This was approximately 15.4 percent of the national total for 1990, and a 387 percent increase from the number of filings in this district in 1987. The number of asbestos filings in 1990 is 100 times larger than the number of asbestos filings in 1981, when there were only 20. The number of pending cases and number of parties has also skyrocketed, as filings continue to outpace dispositions. In 1990 alone there was a 44.8 percent increase in the number of cases pending and a 42.8 percent increase in the number of parties. The total number of pending three-year-old cases will surely increase as a direct result of the increased filings of asbestos cases.

---

11. The Institute for Civil Justice, *Asbestos in the Courts: The Challenge of Mass Toxic Torts*, Rand, 1985.

Not only are asbestos cases voluminous, but they are also time-consuming, weighted cases. Between 1988 and 1990, asbestos cases represented approximately 20 percent of all of the civil filings in this district and 23 percent of all weighted civil filings. Asbestos cases alone have dramatically increased the number of weighted filings. Because of the number of parties and the complex issues involved, asbestos cases absorb a great deal of judicial resources and are slow to resolve. In 1990, 25,375 new parties were named in the filings for the year, bringing the total number of parties in pending asbestos cases to 84,723.

As discussed before, the Rand study profiling the asbestos litigation problem in our courts called asbestos cases a "major test" of the federal tort system because of the tremendous workload accompanying them. This workload is characterized by the filing of multiple complaints and cross-complaints, with an average of 15 defendants; numerous motions associated with a lengthy discovery process, regulated by judicial orders issued after several judicial conferences; numerous lengthy appeals and bankruptcy proceedings; and a settlement, which occurs after one or more conferences with a judge. As the study correctly noted, statistics presented for asbestos litigation reflect only a small fraction of the actual workload they impose.

Another filing factor affecting the asbestos caseload is a class action, consisting of all public and private non-profit elementary and secondary schools in the nation seeking compensatory damages for asbestos claims, which has been certified to this district. Although this additional asbestos litigation involves a potential of 30,000 claims, the district receives statistical credit for a single case. Based on historical factors, such as the large number of manufacturing facilities in the Eastern District of Pennsylvania and the large number of product liability suits in this district, conservatively, asbestos and other toxic tort cases will continue to drain the judicial resources of this court for the next five to ten years.

Most significantly, on July 29, 1991, the Judicial Panel on Multidistrict Litigation issued its opinion and order transferring 26,963 asbestos cases to this district under 28 U.S.C. § 1407.[12] While the order of the Multidistrict Panel on July 29, 1991,

---

12. *In Re Asbestos Product Liability Litigation*, 875 (J.P.M.D.L. 1991).

reflects an abiding confidence in the management resourcefulness of this court,[13] the impact of this decision on the resources of judicial officers and support staff cannot be evaluated at this time, two days after it was issued.

c. Prisoner Civil Rights Cases

Prisoner civil rights cases are expected to continue to increase because of the State correctional institution in Frackville, Schuylkill County, Pennsylvania completed in 1987 and the new federal correctional institution in Minersville, scheduled to open in November 1991. Together with Graterford Prison in Montgomery County, the new Frackville facility has increased prisoner filings to 11 percent of the total civil filings.

Since 1981 prisoners' petitions have increased 74 percent. Although prisoners' petitions decreased slightly in 1990, the number of prisoners has increased over the past 10 years, as shown in Attachments 10 through 12, which reflect information from the Pennsylvania Department of Corrections. Thus, although prisoners' petitions decreased in 1990, they are expected to rebound and increase steadily. The increase in prisoners' petitions will increase the case assignments for the Allentown/Reading/Easton Wheel.

The Eastern District of Pennsylvania employs two *Pro Se* law clerks to review all prisoner civil rights complaints. The *Pro Se* law clerks screen the petitions and motions and draft appropriate recommendations and orders for the court's signature. In 1990 this court processed over 1,000 prisoner civil rights complaints, the majority of them terminated upon the recommendation of the *Pro Se* law clerks.

---

13. The Multidistrict Panel quoted the *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation*, 1-3 (1991) in its opinion:

> "Judge Charles Weiner, the asbestos case manager in the Eastern District of Pennsylvania, is able to call upon over 20 active and senior judges in the district to handle asbestos cases on a priority basis. In addition to mandating standard, abbreviated pleadings, such as complaint, answer and discovery requests, Judge Weiner meets regularly with counsel and handles on a regular basis all motions and discovery requests. Applying these sophisticated case management techniques, Judge Weiner and his colleagues have disposed of more than 2,000 cases through 1990."

2. Criminal Caseload

The first version of the Civil Justice Reform Act that emerged from the Senate Judiciary Committee was focused entirely on the management of civil litigation in the federal courts. It was soon recognized that no responsible evaluation of the courts' procedures could be accomplished without also including an examination of the courts' criminal dockets. Expanding the inquiry of the Advisory Groups, as the final version of the Civil Justice Reform Act has done, has brought into play both the impact of recent federal legislation extending the reach of federal law enforcement activities, and decisions of the Executive Branch through the Department of Justice in extending areas of concurrent law enforcement jurisdiction that the Department shares with its counterparts at the state level.

The impact of these two influences on the overall caseload of this district is profound. The Eastern District of Pennsylvania has seen an increase of 70.6 percent in criminal filings from 1980 to 1990 (289 to 493). There has also been an increase in the number of defendants per case and in the complexity of the cases. Since May 1990 this district has had fourteen cases of 10 to 15 defendants, eight cases with 15 to 20 defendants, five cases of 20 to 30 defendants and ten cases with more than 30 defendants. Narcotics prosecutions have risen more than any other type of criminal case in the federal courts and now account for about 27 percent of the criminal case filings in this district, an increase of 146 percent since 1980, when narcotics cases accounted for 54 cases as compared to 133 cases in 1990. Narcotics-related cases generally are more complex than most criminal cases because they tend to involve multiple defendants, multiple transactions and complicated factual and legal issues. They require more judicial time and support staff time than other criminal cases.

A more accurate measurement of the impact of narcotics cases on federal filings is the number of defendants involved with each case. Over the past 10 years, the number of criminal defendants has increased over 50 percent. It is common for narcotics cases, especially those related to importation and distribution, to have more than 10 defendants per case. By comparison, the average number of defendants for a nonnarcotics case is approximately 1.2. In the last eight years, the number of defendants in narcotics cases has increased over 100 percent.

The Department of Justice has initiated two major law enforcement programs to cope with the social evils of drug-related and gun-related felonies. In March

of this year Attorney General Thornburgh announced the initiation of a new program, "Operation Triggerlock," under which he directed all of the country's United States Attorneys to bring state cases into federal courts by using federal laws prohibiting the use of firearms to commit violent crimes. The program is so recent that there is no objective measurement of its impact upon the caseload of the district courts; but it must be recognized that, coupled with the requirements of the Speedy Trial Act, it will surely be significant.

In addition, this district has a new criminal prosecution program, known as the Federal Alternative to State Trials, or FAST. The FAST program was created when the United States Attorney in this district decided to "adopt" state cases in which the defendant has a prior history of serious offenses and also numerous outstanding bench warrants. The purpose of the program is to alleviate the crowded conditions in the state courts and to take advantage of pretrial detention, speedier case disposition and mandatory sentences prescribed under federal law for drug-related and gun-related felonies. While only 100 cases have been adopted at this time, the United States Attorney has set a goal of six such cases a week, intending to increase it to eight cases a week in October 1991, a rate of 400 new cases a year. The program is to include all of the county law enforcement agencies in the Eastern District, in addition to a cooperative program already put in place between the United States Attorney and the District Attorney of Philadelphia.

To elaborate further, as the United States Attorney has emphasized, there are two types of adopted cases: The first type consists of the so-called "free standing" cases, which are adopted as firearm cases where federal criminal penalties apply, drug cases when the quantities involved justify federal criminal penalties and drug or firearms cases where the defendant has been repeatedly arrested and is still at large. The second type of adopted cases includes, as the United States Attorney reports, drug distribution or possession cases where the defendant is a target in multi-defendant drug organization conspiracies. The Department of Justice has awarded the District Attorney of Philadelphia a grant of $260,000 to help provide personnel for the prosecution of these cases in federal court.

At the root of these programs are value judgments of important social policies to be served by the federal court system. A statement directed to the Advisory Group by the United States Attorney, who is a statutory member of the Group, has asked

the Advisory Group to endorse the policies that underlie these programs. Because of the Advisory Group's limited mandate under the Act, we have declined to do so. Such support lies more broadly and more deeply in the will of the people who elect their congressional representatives and whose elective franchise influences the direction of law enforcement policies of the Executive Branch.

From the perspective of our responsibilities, as advisors on the management and control of cost and delay in civil litigation, we can do no more than reflect on the obvious. The impact of these federal legislative initiatives and of these aggressive federal prosecutorial initiatives will, absent an increase in resources, necessarily diminish the capacity of the federal court system and of this court to carry out the mandate of the Act to reduce cost and delay in the disposition of its civil litigation caseload.[14]

The Sentencing Reform Act of 1984 and the United States Sentencing Guidelines issued under the Act have a tendency to increase the length of sentencing hearings, thereby increasing the judicial workload. The guidelines apply to all federal offenses committed after November 1, 1987. They require the court to impose sentences within particular, narrow determinations by the court.

The guidelines pose special problems in cases involving offenses for which the guideline sentencing range is established on the basis of the total amount of harm or loss, the quantity of controlled substances involved or some other measure of

---

14. Section 6159(b) of the Anti-Drug Abuse Act of 1988 requires the Judicial Conference of the United States to evaluate the impact of drug-related criminal activity on the federal judiciary needs of the federal courts.

    Pursuant to that requirement, the Judicial Conference issued a report dated March 1989. At that time drug-related offenses already accounted for "about 24 percent of the criminal case filings of the district courts and 44 percent of all criminal trials." The report is not limited, however, to trials and associated judicial activity. There is consideration, for example, of program support including substance abuse programs and educational programs for Third Branch personnel.

    To quote from the report's Executive Summary: "The judiciary clearly has the talent, the systems, and the will to handle the increasing drug-related criminal caseload flowing from the war on drugs. What it lacks is basic resources."

aggregate harm, or if the offensive behavior is ongoing or continuous in nature. Such cases include the multiple defendant drug conspiracy cases to which the United States Attorney is devoting substantial resources. In these cases, the guidelines require the district court to determine the total quantity of controlled substances attributable to the conspiracy, and the amounts attributable to individual members. Although the guidelines allow the parties to reach non-binding factual stipulations on these and other issues, defendants in these cases often have an incentive to insist on full evidentiary hearings because the court's quantity determination greatly affects the applicable prison ranges. Other factual issues, such as whether a defendant played an aggravating or mitigating role in the offense relative to co-conspirators, can also affect the sentencing range. Thus, the sentencing guidelines have increased the significance of factual disputes between the parties in the sentencing process, with a resulting impact on the length and complexity of both the preparation of the presentence report and the sentencing hearing.

The Sentencing Reform Act also gave both the government and the defendant a statutory right to appeal the district court's sentence. Either party can challenge the lower court's interpretation or application of the sentencing guidelines, as well as any sentence outside the applicable guideline range. Prior to the Act, the parties had very few grounds upon which to challenge the sentence. Thus, the Act has created new incentives to file appeals. They are especially strong in drug cases, where the sentences tend to be relatively severe. Furthermore, mandatory minimum sentences and lengthier sentences, both of which are prevalent in drug cases, may increase prisoner filings in this district, thereby adding to the judicial workload. At the present time, we do not have sufficient empirical data to provide us with a basis for estimating how many additional judgeships would be needed to handle the increased workload resulting from lengthier sentencing proceedings and more post-conviction filings.

To manage this expansion of law enforcement responsibilities, the staff of the United States Attorney's office grew from 38 Assistant United States Attorneys in 1976 to 60 in October 1988. And by September 30, 1991, there will be 110 Assistant United States Attorneys in this district.

3. Pending Caseload

Over the past two decades, the number of civil and criminal filings commenced, terminated and pending in the Eastern District has risen steadily. Total civil and criminal cases commenced in the Eastern District of Pennsylvania have increased

nearly 82 percent, from 5,398 in 1980 to 9,771 in 1990. During the same period, the cases terminated increased almost 73 percent, from 5,143 in 1980 to 8,884 in 1990. This dramatic increase in dispositions occurred over a period during which the number of filings, especially weighted filings, was increasing but the number of district court judgeships remained constant. Despite this enviable gain in productivity, and the fact that in one sense the court can be said to be current, the fact is that the continually increasing number of filings has taken its toll. As a result, the pending caseload has also increased 102 percent, from 5,037 in 1980 to 10,198 in 1990.

Despite this increase in pending caseload, 70 percent of all cases that went to trial in 1990 did so within 18 months from the date of the filing of the complaint (see Attachment 14). Thus, without any formalized plan in place, this district has been quite successful in meeting the 18-month standard set forth in the Act. It is even more impressive when weighted caseload statistics and judicial vacancies are considered.

D. Judicial Resources

Limited judicial resources have been a major contributor to the costs and delays associated with the civil docket. Vacant judgeship months have been a chronic problem for the past 10 years in this district and in the nation. For progress to be made in reducing cost and delay in the courts, judicial vacancies must be filled in a timely manner.

1. District Court Judges

The greatest resource in this district is its judges. While weighted and total filings have been increasing steadily over the past 20 years, this district has only recently been authorized additional judgeships. More important, the four district judges last authorized are not expected to be functioning until one and one-half years after the authorization. The vacant judgeship months in this district have been rising for the past 10 years. As of August 1, 1991, they represent an astronomical 78 months of unfilled judicial vacancies since February 1990.

Looked at in another way, the number of vacant judgeship months in this district for the past five years for which data are available (1986–1990) totals the equivalent of nine district judges, each sitting for one full year. This represents lost judicial time that can never be recovered; it does a severe injustice to those litigants who come before the court.

To make matters worse, as a judge takes senior status, replacements are not expected to be functioning until at least one and one-half years after the judge's retirement. This leaves the court with a much higher number of weighted cases per active judge. Although the Local Rules allow the Chief Judge to carry a half caseload, a full caseload continues to be carried due to the inadequate number of active judges.

The Eastern District of Pennsylvania is now authorized 23 judgeships and actually has 16 active judges. For this district to reach the recognized standard of 400 weighted cases per judgeships, 30 judges would be needed, as shown in Table 4.

TABLE 4
CASELOADS MEASURED AGAINST RECOGNIZED STANDARD OF 400 WEIGHTED CASES

	Per Authorized Judgeship	Per Active Sitting Judge	Four Add'l Judgeships	Seven Add'l Judgeships
1986 (Per Judge)	(19)	(18)		
Total Filings	449	474		
Civ. Filings	420	443		
Crim. Filings	29	31..		
Pending Cases	321	339		
Weighted Cases	542	572		
1987 (Per Judge)	(19)	(16.4)		
Total Filings	452	524		
Civ. Filings	426	493		
Crim. Filings	26	30		
Pending Cases	344	399		
Weighted Cases	551	638		
1988 (Per Judge)	(19)	(16.5)		
Total Filings	577	662		
Civ. Filings	555	639		
Crim. Filings	22	25		
Pending Cases	425	489		
Weighted Cases	724	834		
1989 (Per Judge)	(19)	(17.7)		
Total Filings	568	610		
Civ. Filings	540	580		
Crim. Filings	28	30		
Pending Cases	490	526		
Weighted Cases	688	739		
1990 (Per Judge)	(19)	(17.5)	(23)	(30)
Total Filings	514	558	425	326
Civ. Filings	488	530	403	309
Crim. Filings	26	28	21	16
Pending Cases	537	583	444	340
Weighted Cases	638	693	527	404

2. Senior Judges

The Eastern District of Pennsylvania presently has 12 senior judges, all of whom regularly handle cases. In this district, a number of difficult and complex cases are handled by senior judges. Twenty-two percent of the cases terminated in the district for the period ended June 30, 1990, were attributable to the invaluable service rendered by the senior judges. They have contributed greatly to the disposition of cases in this court and provide significant service on court and Judicial Conference committees.

3. Magistrate Judges

The Eastern District of Pennsylvania is currently served by seven full-time magistrate judges in Philadelphia and one part-time magistrate judge in Allentown. It has been authorized two additional magistrate judges, one in Allentown and one in Philadelphia. In statistical year 1990, magistrate judges in this district handled a total of 4,936 civil and criminal matters.

The growth in felony drug prosecutions has had a significant impact on the criminal workload of the magistrate judges since 1986 (in particular, drug-related proceedings such as detention hearings and motions to suppress evidence). Overall, the magistrate judges handled a total of 4,012 criminal matters in 1990 compared with 3,418 in 1987, an increase of approximately 17 percent. Specifically, 1,468 warrants were issued during statistical year 1990, a 63 percent increase over 1987; the magistrates conducted 818 initial appearance proceedings in 1990 compared with 790 in 1987; and the number of detention hearings for the year 1990 totaled 679, approximately the same level as 1987.

Preliminary proceedings in felony cases are handled by magistrate judges on a weekly rotational basis. The volume of these matters is heavy and consumes virtually the full time of the "criminal duty" magistrate judge. Frequently, they are involved in subsequent proceedings in those cases that arose during their duty week because motions in felony cases are referred on a selective basis to the magistrate judge who handled the preliminary proceedings.

For civil cases, the court has a paired arrangement under which each magistrate judge receives assignments from only certain judges. This means that the magistrate judges receive requests from four or five judges rather than from 28. Their civil workload consists primarily of discovery motions, settlement conferences and other

pretrial conferences. Since June 1990 magistrate judges in the Eastern District of Pennsylvania are randomly assigned all state habeas corpus petitions and social security appeals for a report and recommendation to be forwarded to the assigned judge.

The volume of civil matters assigned to the magistrate judges has declined approximately 50 percent in recent years due to the increase in their felony duties. This figure should change as the number of magistrate judges is increased so that they may be available to handle not only the criminal caseload but also civil trials on consent of the parties.

As with district judge vacancies, there are problems with vacancy months among the authorized magistrate judges. The Judicial Conference approved two additional magistrate judge positions for this court in September of 1988. These positions were not filled until March and May of 1990, resulting in a loss of 38 months of magistrate time that can never be recovered. It is nearly an exact measure of the gap between Judicial Conference authorization and congressional fiscal funding. The same delay may be expected for the two newly authorized magistrate judges. Through a suggestion by Chief Judge Bechtle, the Director of the Administrative Office of the United States Courts has developed a plan under which authorization and funding for magistrate judge positions should occur almost simultaneously. This should reduce substantially the time it takes to fill a magistrate vacancy.

4. Places of Holding Court

Allentown/Reading civil case assignments have increased over the past five years. For the statistical year ending June 30, 1990, they constituted 8.3 percent of the district's total civil case assignments. Part of the reason for this increase, we believe, is that the alternative of a federal forum in Philadelphia, Reading or Allentown makes it convenient for more litigants to file complaints in federal court. The new court facility at Easton should also attract cases that will be assigned to these outlying court stations.

E. Alternative Dispute Resolution Programs

The Eastern District of Pennsylvania has developed two alternative dispute resolution programs. The arbitration program has been in place for over 10 years and has been nationally acclaimed. The court instituted an experimental mediation program on January 1, 1991. The results of the mediation program, although quite preliminary, appear to be favorable. The Philadelphia Bar Association Chairman of the program testified that it will be evaluated at the end of 1991.

1. Arbitration

The arbitration program that began on February 1, 1978, is a mandatory court-annexed program that is non-binding. The program now includes all civil cases in which the amount in controversy is not in excess of $100,000, except for Social Security cases, suits alleging violation of a right secured by the United States Constitution and suits in which jurisdiction is based on 28 U.S.C. § 1343. When the plaintiff files a complaint, it must certify that damages recoverable exceed $100,000, and absent such certification, they are presumed not to be in excess of $100,000. Immediately after the answer is filed, the Clerk's Office notifies the attorneys of the hearing date and that discovery must be completed within 120 days. Three experienced attorneys, from a panel of lawyers approved by the Chief Judge, sit as arbitrators. Immediately after the hearing, the panel makes its award without opinion or findings of fact. If a trial *de novo* is demanded, the case is set for trial immediately. If the assigned judge is not available for a trial, the case will be reassigned to an available District Court Judge.

The program is largely administered by the Clerk's Office. The arbitration program has been successful in reducing the time from joinder of issue to arbitration to five months, compared to the median time from issue date to trial, which is typically 12 months. In 1990, 20 percent of all civil filings were eligible for the arbitration program. Of the cases in the program, 44.7 percent were terminated by settlement, and only 2.9 percent proceeded to trial *de novo*. This compares favorably with the approximately 8 percent of non-arbitration cases that required a trial during the first 10 years of the program. Most arbitration cases involve tort and contract claims.

2. Mediation

The Eastern District of Pennsylvania adopted a program of court-annexed mediation effective January 1, 1991. Those cases assigned an "odd" number by the Clerk of Court are placed in the program, except for social security cases, cases in which a prisoner is a party, cases eligible for arbitration, asbestos cases, or cases that a judge determines, *sua sponte* or on application by the mediator or a party, to be unsuitable for mediation.

Mediators must be members of the bar for 15 years and certified by the Chief Judge. After the first appearance for a defendant in an eligible case, the mediation clerk notifies counsel of the date, time and place for the mediation conference. As of June 30, 1991, 955 cases, or approximately 23 percent of all odd-numbered cases were eligible for mediation. Of this number, 145 cases have been settled/dismissed. By comparison, there were 978 even-numbered cases that would have been eligible for mediation, and only 76 of them have been settled/dismissed. Although it is too early for a definitive evaluation of these results, this two-fold increase in the number of settlements for odd-numbered cases is promising.

F. Caseload Forecast

A forecast of the caseload in the district projects that weighted filings will increase to 13,164 in 1992 and to 15,769 in 1997. Assuming that other conditions in the district remain constant, weighted filings per authorized judgeship will be 572 in 1992 despite the addition of four judgeships and will increase to 686 in 1997 without any additional judgeships. The long-range forecast prepared by the Administrative Office predicts that, by the year 2000, civil filings will increase 69 percent to 15,666, criminal filings will increase 38 percent to 713, and the number of criminal defendants will increase 34 percent to 1,238.

Several factors must be considered in assessing the significance of this forecast. They include: the increase in the complex case mix; the demands of lengthy cases, such as asbestos litigation; judgeship vacancy months; and the high number of protracted trials and jury trial days.

G. Office of the Clerk of Court

The Office of the Clerk of Court provides the court with support in the areas of automation, docketing, report generation and case management. In order to continue to provide this support, the Clerk's Office should be staffed at 100 percent of its requirements. This has simply not been true over the past decade due to budgetary constraints. At present, an appropriate staffing level for the Clerk's Office is set by the Administrative Office of the United States Courts based on nationally approved standards. Thereafter, the figure is reduced by a percentage that reflects the short fall in dollars. A fully staffed court support unit with adequate space and facilities, automation

support and educated personnel is an integral component of any well-administered court.

The Office of the Clerk of Court will assume additional responsibilities to cope with the demands of the Civil Justice Reform Act. First, it should be noted that the Act itself contemplates a continuing role for the Advisory Group; it is to be consulted in connection with the court's annual assessment of the condition of its docket.[15] The Act recognizes that the needs of the court are not static, but are subject to continuing change. Moreover, the Act recognizes that "it is necessary to create an effective administrative structure to ensure ongoing consultation and communication regarding effective litigation management and cost and delay reduction principles and techniques."[16] At some point, additional resources will be needed to create that administrative structure.

H. Pretrial Services

A review of data relating to criminal cases processed and those assigned supervision by the Pretrial Services Office reveals a 39 percent increase in both categories from statistical years 1988 through 1991. Cases processed during this time increased from 725 in 1988 to 1,010 in 1991, while cases assigned bail supervision rose from 300 to 417 in the same reporting period. In order to cope with these increases, the Pretrial Services Office staff should have three additional Pretrial Services Officers and two clerical positions. One additional officer and one clerk are currently needed. If the criminal caseload increases any further, the office would be understaffed in 1992. An average increase of 10 percent in caseload would result in a need for two new positions, with a simultaneous increase of space and computer equipment. At present, the office is understaffed by seven people, all of whom are needed at computer work stations that are already set up. The addition of several modems would allow reports to be transmitted electronically to judicial officers.

These increases in personnel, space and equipment would allow the Pretrial Services Office to process and present information about criminal defendants to the court more efficiently. The court in turn would be able to process criminal defendants more efficiently, creating more time for judicial officers to concentrate on civil matters and the goals of the Act.

---

15. 28 U.S.C. § 475.
16. Judicial Improvements Act of 1990, P.L. 101-650 (Dec. 1, 1990) § 102(6).

I. Automation

The Eastern District of Pennsylvania has been a leader in the area of automation in the federal courts. In order to cope with the burgeoning caseload, this district has installed office automation in order to provide the court, the Bar, the litigants and the public with the most effective and efficient court system available within technological and funding constraints. The court now provides all judicial officers and their staffs with personal computers equipped with word processing, Lexis and Westlaw, electronic mail and an electronic interface to CIVIL, the automated civil docketing system used by the Clerk's Office. In addition, personal computers have been provided to the Clerk's Office staff, probation officers, and Pretrial Services employees.

The CIVIL system, an on-line automated civil docketing system, was installed in the Clerk's Office in July 1990. CIVIL is an electronic docketing and case management system that replaces the manual paper system. It has automated the maintenance of the docket sheet; provided case status, document and deadline tracking; automated production of notices and other standard correspondence; provided standard reports to assist judges and court administrators in monitoring case activity; and enabled this court to customize reports to address special needs as they arise. Through the use of the CIVIL system, there has been a substantial reduction in the amount of time required by the courtroom deputy clerks and law clerks to access dockets and prepare reports.

Other technological advances that have been implemented by the Eastern District of Pennsylvania include electronic filing of documents, electronic sound recording as a means to record official proceedings, videotaping to record official court proceedings, broadcasting in the courtrooms, a voice case information system and PACER—public access to court records.

II. IMPACT OF NEW LEGISLATION

The Act mandates that the Advisory Group "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts."[17] We begin that examination by considering what the Federal Courts Study Committee has termed the "two major types of technical assessment of proposed statutes" that an Office of Judicial Impact Assessment would provide.

A. Assessing the Need for Additional Resources

1. Personnel and Material

The most familiar type of judicial impact assessment is a forecast of the additional resources that would be necessary "to dispose of the litigation the bill [under consideration] would create." One tends to think almost exclusively in terms of additional trial-level judgeships that would be required to dispose of the anticipated increase in caseload, because public comments about impact statements have tended to focus on this facet of the problem. This is far too narrow a view; the forecast must inevitably cast a wider net. Trials are only one phase of the process. Criminal statutes with substantial impact can be expected to add to the need for magistrate judges to preside at arraignments and to fix bail, and, as the experience in the Eastern District of Pennsylvania has demonstrated, such demands seriously restrict the availability of magistrate judges for civil litigation.

In sufficient volume, added cases require added deputy clerks and additional computer hardware. Trials spawn appeals and there are also administrative costs to be contemplated at the national level—in the Administrative Office of the United States Courts, for example, as illustrated by a recent impact statement prepared in connection with currently pending legislation.

The increase attributable to a single statute can be serious enough, but our primary concern is with the cumulative impact of many statutes. And it is wise to remember that the Federal Courts Study Committee counted 195 statutes enacted by the Congress in the course of the past four decades that have affected the workload of the federal courts.

---

17. 28 U.S.C. § 472(c) (1) (D).

2. Reshaping Legislative Proposals

With a forecast in hand, there are many choices open to the Congress. Sometimes the legislation under consideration can be shaped to minimize the impact and provide preferable alternatives. The National Childhood Vaccine Injury Act of 1986 provides a dramatic example. As the title of this act indicates, the Congress was providing for redress to individuals injured by a program of vaccination. A large volume of cases was anticipated, each focusing on causation and requiring highly technical evidence. Trial in an Article III court was really unnecessary to accomplish the purpose of the legislation; a hearing before an administrative tribunal coupled with review by a district court would have sufficed. Yet, the Congress, without the benefit of an impact statement, proceeded to enact legislation that called for Article III trials. Finally, there developed virtual unanimity in the view that the statute was impractical. Congress remedied the situation a year later by passing another statute providing for Article III review instead of trials.

In short, assessing the impact of a legislative proposal allows for alternative procedures to be considered and, if viewed favorably, to be substituted at an early stage.

3. Systemic Concerns

Despite this emphasis on the need to provide resources necessary to meet new demands, it would be wrong to conclude that so long as the Congress matches resources and workload one cannot object. As the Federal Courts Study Committee has warned, there is a price to be paid for too great an increase in the size of the federal judicial system. Federal judgeships would no longer be sought by people of the quality we demand and expect. A high volume of routine cases, each of relatively little significance, would transform the federal courts, and there is a risk that they would no longer resemble the judicial system that has played such an important role in the history of our country. Much of the debate in Congress and in the country concerning the transfer of drug-related or firearm-related criminal cases from state to federal courts is concerned with the ultimate size and quality of the system as well as the immediate burdens of looming caseloads.

In short, there are systemic considerations that must enter into the calculus, and assessment of the impact of new statutes helps the Congress focus on them when appropriate.

4. Revised Procedures and the Quality of Justice

It is always open to the Congress, with or without an impact statement, to ignore the problem of added workload and to count on the courts to fashion procedures that will accommodate the additional burdens. There is a limit, however, to how much straw the camel's back can carry.

Even if the judicial system does not break down, there is reason to be concerned about eroding the quality of justice. A voluntary settlement between two knowledgeable parties may be—as Justice Brennan urged many years ago—the best possible means of resolving a lawsuit; but a settlement coerced by the fact that no trial time is available for civil cases is undesirable. Such coerced settlements are undesirable even if a statistical table suggests that, once again, the judges have responded to pressure from the Congress and increased their productivity.

Historically, new legislation has burdened the courts and the litigants. Only after the unmet need for new judgeships has been amply documented has the Judicial Conference requested and the Congress, after an intervening period of varying duration, created new judgeships. Of course, many months, sometimes years, have ensued before the vacancies thus created are filled and the added resources applied to the unmet need. Unhappily, the experience in the Eastern District of Pennsylvania provides documentation.

In a report that responds to the welcome congressional concern about cost and delay in civil litigation, it is hardly necessary to expound on why this is highly undesirable. Assessment of the anticipated impact of new legislation should make it possible to improve this situation.

B. Avoiding the Hazards of Drafting

We turn to the second major function of an impact statement, "spotlighting drafting defects that might breed unnecessary litigation." Phrased affirmatively, it has been suggested that the "primary function" of an Office of Judicial Impact Assessment should be "to assist the committees of Congress in preparing legislation."

Pitfalls to be avoided include both sins of omission and sins of commission. Too often Congress leaves unanswered such questions as: Who may sue under a statute? Is federal jurisdiction intended to be exclusive? Is a private right

created allowing redress when public officials have violated the statute? A handy checklist could assure explicit answers and avoid needless and costly litigation.

Sometimes the Congress uses terms that are intentionally ambiguous. While studied ambiguity may be the price of political agreement and passage of the legislation, there are times when the ambiguity is quite inadvertent. The term "where the claim arose" in a venue statute has been characterized as "litigation-breeding," and with ample justification. That statute was recently amended, but only after years of costly litigation that could easily have been avoided.

Sometimes the ambiguity becomes evident only after the provisions of two statutes are juxtaposed. Does the provision in the Fair Labor Standards Act—that actions under it may be maintained in state courts—preclude removal to a federal court under provisions of the general removal statute? That issue was litigated last year in this district. In *Isaac v. Pflaumer & Sons,* Civil Action No. 90-1622, Judge Shapiro ably reviews the precedents—of course, other judges in other cases had to deal with the problem—and concludes that removal is not precluded. How much better if the issue could have been avoided by a knowledgeable eye providing review in advance.

C. Conclusion

The Civil Justice Reform Act calls upon us to "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation."[18] We do not believe that the statute intended us to quantify our conclusions, nor do we believe it would be useful to undertake that cumbersome task.

When we consider the sheer volume of new legislation that flows from the Congress, when we add changing administrative interpretations of existing statutes that spawn litigation designed to divine legislative intent that might have been clarified initially, when we realize how readily we discovered recent examples of ambiguity that could have been avoided, when we take note of the price exacted from litigants by the failure of the Congress to provide the resources needed as a result of newly enacted statutes, the potential for a very significant contribution by judicial impact assessments becomes clear.

If such impact assessments are provided, will they be taken seriously by the Congress? Will the impact statements really have impact? There can be little doubt

---

18. 28 U.S.C. § 472(c) (1) (D).

that from time to time statutes will continue to reflect ambiguities born of political necessity; that is part of our democratic process and we do not challenge it. We do believe, however, that the process can be and will be improved by focusing on potential problems and attempting to resolve them up front. The very fact that the Civil Justice Reform Act of 1990 obliges us to address this problem is in itself a cause for cautious optimism.

III. EXPLORING THE RELATIONSHIP BETWEEN DELAY AND THE COST OF LITIGATION; NOTES ON THE ROLE OF LITIGANTS AND ATTORNEYS

A. The Statutory Mandate: Sweep and Scope

The Act requires the Advisory Group to take into account "the particular needs and circumstances of the district court, litigants in such court and the litigants' attorneys." It also requires the group to "ensure that its recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts."

These sections define the task of the Advisory Group in two important respects. First, they speak to both cost and delay and they charge the Advisory Group to be concerned with each. Second, they mandate that the Advisory Group's recommendations not be limited to actions that might be taken by the court, but that they include contributions to be made by the litigants and, separately, by the litigants' attorneys.

The latter point bears some emphasis because although the Advisory Group is appointed by the Chief Judge, after consultation with the other judges on the court, and is charged with developing a plan to be presented to the court, it may not confine its concerns to the contributions to be made by the court. Judicial procedures may be the primary concern of the Advisory Group, as indeed they are in the report, but they may not be its exclusive concern. The statute is specific: The court is only one of the participants in the system who are all expected to contribute to the reduction of both cost and delay.

With respect to each of these two points the quoted section is consistent with a number of other sections in the Act, each of which speaks to both cost and delay and each of which focuses on the role of non-judicial participants in the system. The congressional findings in the very first section of the Act identify the litigants and the litigants' attorneys, as well as the courts, among those who share responsibility for cost

and delay in civil litigation and who must contribute to the solutions to the problem.[21] Similarly, in developing its recommendations, the Advisory Group must identify the principal causes of cost and delay in civil litigation and, in doing so, must consider not only court procedures but "the ways in which litigants and their attorneys approach and conduct litigation."[22]

It can hardly be expected that the recommendations applicable to litigants, or to the ways attorneys "approach ... litigation," can be reduced to or have the crisp clarity or impact of a local rule designed to change procedures of the court. Nor should all recommendations addressed to the judges be expected to be uniform in tone or in impact. Faithful to the mandate of the Act, we attempt to address the full range of congressional concerns, each in a manner appropriate to the particular issue.

B. The Needs of the Court, the Litigants and the Litigants' Attorneys

In developing the recommendations that follow, the Advisory Group has considered the views of a broad range of stakeholders. We assessed the needs of the district court through one-on-one interviews with many of the judges, transcripts or summaries of which were made available to the group. Some judges presented their views and answered questions at the regular meetings of the entire group, and some chose to provide their views in writing.

While specific suggestions are discussed elsewhere in the report, two overriding needs of the district court became apparent during these sessions. The first is the critical importance of retaining the flexibility for each judge to design procedures that are consistent with his or her own approach to the judge's role. Not surprisingly, there is a wide range of views on the fundamental question of the relative roles of lawyers and judges in controlling a case and, correspondingly, the degree to which judicial intervention is necessary or desirable. Flexibility to accommodate these varying views is important. It is also essential because with flexibility comes innovation. Judges who are designing their own procedures are thinking of better ways to solve the problems that are presented to them; many suggestions that we received do not fit comfortably within the

---

21. Civil Justice Reform Act of 1990, § 102(2) and (3).
22. 28 U.S.C. § 472(c) (1) (C).

confines of the Act but illustrate the current innovation. To name only two: One judge suggested that the local rules be amended to require service by telecopier to avoid the delays caused by first class mail service; another suggested that the court attempt to predict jury utilization more accurately to prevent delays that occur when jurors are not available.

The second need that became apparent, although it was rarely addressed directly by way of complaints, is the need for relief from the tremendous docket pressure that the judges in this district face. Many judges suggested that there are procedures or tools that they would like to use but simply do not have the time to do so. The reluctance to impose sanctions, for example, appeared to arise not so much from any aversion to them as from the knowledge that the imposition of sanctions may well consume large blocks of time with hearings and subsidiary briefing. Another example of an attitude that may be driven by docket pressure was an often-repeated aversion to dispositive motions, which many judges view as burdensome and unnecessary. This attitude, we believe, is on the whole unfortunate because, as discussed below, dispositive motions are viewed by litigants and their lawyers as an important tool in *reducing* cost and delay to them because, if a case can be resolved at an early stage, the litigants will save the costs and time for extensive discovery and trial.

The Advisory Group assessed the needs of the litigants themselves through several means, its goal being to solicit comments from as many litigants and groups representing litigants as possible. We solicited, through direct mailings, comments from such diverse groups as prisoners, labor unions, city and state agencies, universities and legal organizations representing specific interest groups. We conducted a public hearing at which all members of the public were invited to appear and be heard. We heard testimony from a lawyer representing civil rights groups, the general counsel of a major corporate litigant and the United States Attorney, among others. The most important contribution of these submissions was their focus on procedures that create, we suspect unintentionally, added costs to the litigants. For example, litigants cited as adding to their own costs procedures that require them to complete discovery before arbitration, videotape depositions of all witnesses, travel to the courthouse for early pretrial conferences and requirements that they be ready to start trial on short notice after many months in a trial pool.

In addition to these broad-based efforts, we undertook a limited survey of

litigants by sending a questionnaire to general counsel for the 20 major corporations in the Delaware Valley as well as to the Philadelphia Chamber of Commerce. Each counsel was asked to provide information about cases that he or she had had in the Eastern District of Pennsylvania. Some of the results were surprising; others echoed themes that we heard throughout our deliberations. A significant number of the respondents cited summary judgment as a means to reduce litigation costs. This was interesting when juxtaposed against the view of some of the judges that motions to dismiss and summary judgment motions are often unwarranted and actually increase costs.

Most of these litigants said they take an active role in monitoring their outside counsel. Some require their outside counsel to seek authority before undertaking major projects, and many use in-house counsel to perform time-consuming discovery tasks, such as document searches. Perhaps as a result of this control, few were willing to state that the fees paid to outside counsel were too high. It was not surprising that many of them suggested that cost and delay could be reduced by better control and, indeed, limitation, of discovery; and several suggested that increased court management of the case would reduce cost and delay. Some of the respondents stated that a shorter period from complaint to trial does not necessarily reduce cost, and one respondent stated that an unrealistically short time period can cause increased costs because of the need to add more attorneys to the project.

The group solicited the views of the "litigants' attorneys" through informal meetings with the litigation departments of law firms within the district and through informal meetings with lawyers who handle particular types of cases, such as asbestos and complex cases. The meetings identified the kinds of issues that will inevitably arise with changes in the discovery procedures. From the point of view of the litigators, judicial management is important to reducing delay in civil litigation — management both in ensuring that the case does not languish and in ruling promptly on motions, particularly dispositive motions, the determination of which can often prevent unnecessary trials or facilitate settlement, and on discovery motions, which can develop meaningful limitations on the volume of discovery. Like the litigants, the lawyers expressed concern about unreasonably short periods for discovery, which they maintain drive up the cost of litigation because they have to double- or triple-track depositions.

Finally, in assessing the needs of the litigants' attorneys, the group drew heavily on the experience of its own members, who collectively brought to the process

years of experience in a broad range of cases. This process was both informal, through the regular exchange of ideas at meetings, and formal, through the preparation of written suggestions on all issues and, later, through written presentations on the specific elements of the Act.

C. Perspectives on What We Mean by Cost and Delay

It is clear that the Congress was concerned about the time it takes litigants to have their cases resolved in federal courts. The fact is that the latest available data nationwide show that over 10 percent of the civil cases terminated in the 1990 statistical year took over three years from filing to disposition. Moreover, it was only 20 years ago that in the Eastern District of Pennsylvania the *median* time from issue until trial in civil cases was three years. This concern to assure litigants timely resolution of their disputes is quite independent of the cost of litigating them.

This concern about time does not mean that faster is always better. Cases take time to season. Rushing to judgment sometimes means that a case that could have been settled will require a trial. Litigants sometimes require time to achieve a sense of perspective, a realistic appraisal of the situation. In our deliberations and in our recommendations we have tried to remain sensitive to these practicalities.

Above all, we were mindful that compromising the quality of justice exacts far too high a price no matter what the apparent savings in cost or the reduction in time.

The cost of litigation has many dimensions. Some are obvious, such as money expended for transcripts, for experts and for attorney fees. Other costs may be less obvious, but they are no less real. Litigant time required to deal with litigation, whether in responding to discovery or in making decisions about the course of a case, often called "opportunity costs," is a familiar example, and sometimes proves to be the highest cost of all. The very fact that a matter remains undetermined, that liability remains in doubt, may exact a cost by curtailing a party's freedom of choice in the conduct of personal or business affairs.

We have been mindful of these considerations even though we do not refer to them explicitly at each point in the analysis that follows.

D. Cost as a Function of Elapsed Time

1. How Delay Can Increase the Cost of Litigation

The common assumption has been that the cost of litigation to the litigants increases as total elapsed time increases. A commonly assumed corollary is that expediting disposition will reduce the cost of litigation. The Act itself, along with the Harris survey—which played an important role in shaping it—and the Brookings Report that preceded it, appear to reflect these assumptions. These propositions, however, are far from self-evident and require careful analysis.

We begin with the fact that significant delay in the disposition of a civil case increases the number of hours spent by the attorneys, and hence the cost to the litigants, in many if not most cases. It does so in two principal ways. First, if many months elapse between steps in the litigation process, between the making of a motion for summary judgment and argument on that motion, the attorneys are almost certain to spend additional hours in refamiliarizing themselves with the case. The need to review and rereview a file a significant number of times in the course of extended litigation can have an impact on total hours and total costs.

Second, to the extent that additional time is available, many lawyers will take depositions that otherwise might not have been taken, thus increasing the cost of the litigation.

This analysis rests on the premise that the cost to the client is a function of the number of hours expended by the lawyer. This is true, by and large, where billing is based on the number of hours expended multiplied by the appropriate hourly rates. It is not true with respect to lawyers who are working on a contingent fee. The available evidence, sparse as it is, indicates that just as there is no extra charge to the client in a contingent fee case if the number of hours spent by the attorney increases, so there will be no benefit to the client if those hours are decreased.

Two caveats are appropriate. First, there is evidence that the percentage fixed in contingent fee cases can be affected by market forces. Thus, the percentage typically charged in airplane accident cases, for example, is lower than that set for personal injury cases involving automobile accidents. Whether more efficient procedures leading to accelerated dispositions will operate similarly is, at this juncture, a matter of speculation.

Second, the percentage of recovery earned by the lawyer may depend on whether the case is settled or tried. Settlement before trial would then yield a lower percentage to the attorney than recovery of a judgment after verdict. We need not explore all the variations and permutations. The important point is that an increase in the number of settlements disposing of cases at an early stage of the litigation may reduce not only the number of hours for which an attorney for the defense will bill, but also the fee collected by the plaintiff's attorney.

In any event, concluding litigation more efficiently and more expeditiously is not irrelevant in contingent fee cases. Reducing the cost to the lawyer is also an important consideration.

In short, reducing total elapsed time from the commencement of litigation until its termination may have a salutary impact on cost to the litigant (1) by eliminating non-productive hours spent in a review of the file that could have been avoided; (2) by discouraging excessive discovery or discovery of marginal utility; and (3) by fostering earlier settlements that reduce transaction costs. In many cases the savings to the client may be quite considerable; such empirical evidence as is available supports this conclusion.

2. Dispatch May Not Reduce the Cost of Litigation

The fact that delay has the potential, and probably the propensity to increase the cost of litigation does not mean that dispatch will automatically reduce it, as suggested earlier. On the contrary, compressing the time available for trial preparation may, in some circumstances—as in the case of a party brought into the litigation at a late stage—result in a more intensive schedule that will not reduce the total number of hours expended and may even result in premium billing.

It is useful to apply and to extend this analysis to a common situation—arguing a discovery motion or participating in a status conference—in which it is possible by various techniques, such as telephone conferencing, to reduce the amount of time spent by the lawyer. Whether this will result in savings passed on to the client depends in large measure on the method of billing, as we have seen. Where billing is

entirely on an hourly rate basis, it is likely to be passed on. But the same is not true in contingent fee cases. These two scenarios are not, however, the only alternatives. For instance, if a lawyer bills on an hourly basis with fixed rate minima for certain activities there will be no savings to the client so long as the argument on the motion involves less than the fixed rate.[23]

It is worth emphasizing, however, that a direct relationship between time and cost has not been established; speeding up cases will not automatically result in reduced cost to the client. This is certainly true in contingent fee cases; moreover, even in cases where billing is by the hour, incremental efficiencies in disposition, important in themselves, are unlikely to result in demonstrable, significant savings to the litigants.

We need to learn more of the relationship between elapsed time and transaction costs, particularly in federal litigation. Given the legislative mandate embodied in the Act and the need for a better understanding of how proposed changes in litigation management and techniques are likely to impact on cost as well as delay, it is appropriate for the Advisory Group and the court itself to encourage research in this area by the Federal Judicial Center and by other organizations.

E. Of Causes and Cures

At almost any stage of the litigation, it is possible to increase costs needlessly—due to, for example, an excessive number of unproductive face-to-face conferences; a proliferation of paper that is of little utility; long delays in deciding motions that result in stalling the litigation; and nonproductive reviews of the files. These will all have an adverse effect on cost. As has often been pointed out, a single status conference or argument on a motion can add literally thousands of dollars in attorney fees. Many of the judges of the Eastern District of Pennsylvania have evidenced a sensitivity to this risk and have, by and large, fashioned their procedures with a view to avoiding unnecessary burdens on the lawyers and unnecessary cost to the litigants.

This sensitivity is not shared by all of the judges, certainly not in all its

---

23. This was the result in one of the few empirical studies conducted on the relationship between cost and delay, a study of experimental case management rules and procedures in two Kentucky circuit courts. M. Planet, *Reducing Case Delay and the Costs of Civil Litigation: The Kentucky Economical Litigation Project* (ABA 1984) at 19, reprinted in *Attacking Litigation Costs and Delay* (ABA 1984).

dimensions. Proliferation of paper and conferences of marginal utility are familiar examples. Delay in deciding dispositive motions and crucial discovery motions is a factor in increasing cost, quite aside from its impact on ultimate disposition of the case. This has been of concern to many lawyers, but it is a factor of which some judges, otherwise concerned about efficiency in the management of cases, appear unaware.

Before considering remedies, or even recommendations, it is useful to consider the other side of the same coin: lawyers' conduct. There were some judges who stressed the desire for billable hours as a driving force in attorney conduct and as a factor in the increased cost of litigation. They seemed to believe that this impulse propelled more complex discovery,[24] and also seemed to be reflected in other ways including superfluous motions, sometimes presented in monograph form, as well as by requests for oral argument and multiple conferences.

In our search for empirical evidence, we found none to support or refute the perception that a professional billable hours economy motivates lawyers here to needless discovery and certainly no evidence that can define its dimensions. While this economic formula should be constantly re-examined for its fair measurement of efficient and cost-worthy return to the litigant, in this district this accepted basis for charges has not been fairly substantiated as a source of professional over-reaching.[25]

We do not recommend hard and fast rules to deal with problems of this kind. In our judgment such an approach would be both ineffective and inappropriate. Conferences, for example, are often necessary; early involvement of a judicial officer is mandated by the statute and recommends itself to us on its merits. Sometimes conferences are desirable only because of the possibility that they will be productive. Similarly, oral argument on dispositive motions, particularly on motions for summary judgment, may be the optimal method of focusing the judge's attention on the specific issues before the court. It would be wrong to introduce a regimen of penny-wise and

---

24. Recommendations concerning the cost of discovery are treated in section of VII(C) of this report. It is also useful to point out that the factors leading to more discovery than might have been thought optimal are quite complex. They are discussed in Section IV(C) of this report.

25. *But see, In re Fine Paper Antitrust Litigation,* 98 F.R.D. 48 (E.D.Pa. 1983); 751 F.2d. 562 (3rd Cir. 1984).

pound-foolish procedures.

Moreover, we recognize that in these days of crowded dockets, judges frequently do not have the luxury of choice; they feel obligated to attend to whatever are their most pressing immediate responsibilities. We ask only that judges be aware of and sensitive to the implications of those procedures on cost and delay and that lawyers be aware of their professional obligations to their clients to control costs and that they, too, meet those obligations.

Discussion of the professional responsibility dimensions of lawyer conduct should occur at continuing legal education functions. Bench–Bar programs in which the various participants in the system explore the practical ramifications of such procedures can provide a useful educational dimension.

Accordingly, the Advisory Group recommends:

> Judges should be sensitive to the impact that their practices and procedures have on cost of litigation, including delay in deciding motions, utilization of face-to-face conferences and filing requirements.
>
> Lawyers should be sensitive to their professional obligation to recognize the impact on cost to the client of the lawyer's litigation practices and procedures, including those relating to discovery.

Both Bench and Bar have an interest in the mutual exploration of existing practices and their implications. This is an appropriate subject for consideration by using such existing mechanisms as coordinating committees and Bench–Bar programs.

We turn to the role of the client and what the statute describes as the "ways in which litigants and their attorneys approach and conduct litigation."

This brings us back to a familiar theme. The literature, national surveys and the impressions reported to us by participants in the system within this district have all suggested the desirability of reducing discovery costs. To deal with at least one aspect of this problem some litigants, particularly large corporations with substantial legal staffs, have undertaken cost control measures with respect to the attorneys they retain. In addition, some corporations have issued policy statements intended to guide

in-house as well as outside counsel.

Similarly, under the leadership of the Center for Public Resources, many corporations have adopted policy statements that look favorably on alternative dispute resolution as a means of reducing cost. Indeed, it is appropriate to note that the Bar has been in the forefront of the alternative dispute resolution movement generally, contributing to significant economies in the resolution of disputes. For this reason, the Advisory Group recommends:

Litigants, particularly institutional litigants, should assume the responsibility of exploring with counsel the development of litigation policies intended to achieve efficient, economical and professionally responsible practices.

Is there a role the courts can usefully play in making litigants aware of the cost of litigation as a factor in settlement? Courts are understandably and properly reluctant to interfere or even to appear to interfere with the relationship of lawyer and client. Yet, there are situations in which judges are of the opinion that a more realistic view of the costs and the risks of litigation on the part of the litigant might facilitate settlement.

In this connection it is useful to remember that the Act emphasizes the authority of the court to have the litigant, or someone with authority to settle, present at specified conferences. There is, nevertheless, evidence of judicial reluctance to do this, particularly if insisting on the presence of a principal is read as a reflection on the trial lawyer.

It has been suggested to the Advisory Group that although a judge would be hesitant to pick and choose among litigants ordered to be present at such conferences, if the practice were a general one the net effect would be salutary. We do not address here a general policy of requiring litigant participation in such conferences, nor do we address other details of optimum utilization of this mechanism, such as timing, for example. We do believe, however, that judges have a role to play in assuring that the litigants themselves are made aware of transaction costs and the implications of the costs for settlement and for the appropriate conduct of litigation. For this reason the Advisory Group recommends:

In appropriate circumstances and through appropriate means, judges should assure that the litigants are aware of the significance of cost and delay on decisions relating to the conduct or the settlement of the litigation.

F. Conclusion

In concluding this section of the report we must provide a sense of perspective. None of these preliminary recommendations is offered as a panacea. If, for example, a litigant with deep pockets desires to use discovery as an economic weapon against an adversary who is less fortunately situated, and its lawyer collaborates, client participation in planning of litigation policy will surely not cure the problem. There are other mechanisms for dealing with the egregious case, but we do not deal with these problems here.

We emphasize that this section of the report is of limited scope. The role of the judge in litigation management, procedures to set a firm trial date and discovery are all the subject of independent treatment in this report, at Sections VII, VII(B) and IX, respectively.

We do not harbor the illusion that we, or the court, can fashion a set of rules and practices that will extirpate every last vestige of unnecessary discovery and all "excessive" costs of litigation in every case, much less achieve optimum dispatch at the same time. But we are unanimous in the view that improvement is possible. Encouraged by the Chief Judge and the other judges, we have set out to seek such improvement, and this report is designed to further that goal.

IV. THE PRINCIPAL CAUSES OF COST AND DELAY

The statute requires us to "identify the principal causes of cost and delay in civil litigation" in this district and suggests that we consider court procedures and the conduct of both litigants and their attorneys as likely contributors.[26]

A. The Context

It is useful to remember that this effort to identify principal causes is mandated as part of the Advisory Group's assessment of the state of the court's docket. The legislation assumes that in every district there will in fact be excessive cost and delay, together with causes to identify, but the context is important. The process is to be part of the assessment of the overall situation. We are invited to maintain a sense of perspective.

Overall, the record of the court in this district is exemplary, and it is appropriate to say so. The Act is replete with provisions that reflect a legislative judgment that public accountability is important in achieving the goals of civil justice reform: Advisory Group reports are to be made public; the names of judges who delay matters excessively are to be reported publicly, with details of their docket records.

While we assuredly believe that the public is entitled to know about the operation of the courts, it serves no useful purpose to give a skewed view, to cast blame while avoiding praise. To do so would contribute to a false view that the justice system is bogged down with interminable delays and concomitant costs. This is certainly not true with respect to the Eastern District of Pennsylvania.

To put the matter another way, public accountability is most useful when the public is knowledgeable, but public responses based on an erroneous view of the facts would be counter-productive. There are other reasons that make it important to present a balanced view of the present situation. To disparage important institutions of government and to erode public trust is harmful when it is unwarranted. Public confidence in the federal judicial system has practical consequences of enormous

---

26. 28 U.S.C. § 472 (c) (1) (C).

proportions. Finally, it is only fair and equitable to recognize effective public service on the part of public officials, judges included.

The facts are that the weighted caseload per judgeship in this district is among the highest in the country—well within the top 5 percent of all districts—and that the court nevertheless continues a record of filing to disposition in civil cases that places it well within the top 10 percent of all federal district courts. It has done so, and continues to do so, while bearing the enormous burden of a heavy vacancy rate—empty judicial chairs that remain unfilled despite authorizations.

In terms that mean more to the ordinary litigant: 70 percent of all civil cases that go to trial are tried within 18 months from filing; only about 2 percent of civil cases that have gone through the court's effective arbitration program have required trial *de novo* (531 of 21,110 over a period of 161 months); and the innovative and still experimental mediation program is producing more favorable results than were expected. Beyond this, the median time from filing to disposition of all civil cases in this district was seven months during 1990, the last statistical year for which data are available.

This is not to suggest that there are no deficiencies; indeed there are and some may be potentially serious. We neither trivialize nor minimize this fact. Moreover, threats to the well-being of the system, and of this court, are constant.[27] What may appear to be relatively simple changes in administrative policy can cause enormous shifts in caseload. We do not suggest that conditions warrant complacency. But we do suggest that in focusing on causes of cost and delay, as the Act requires, we should not be understood to ignore the successes that have been achieved.

B. Lack of Resources as a Cause of Delay

If we total the number of vacant judgeship months in this district over the last five years (1986 – 1990), the figure is almost exactly the equivalent of nine United

---

27. In statistical year 1985, 6.6 percent of civil cases in the entire federal judicial system were over three years old. By 1990 that figure had climbed to 10.4 percent. In absolute terms, the number of civil cases over three years old increased during that period from 16,726 to 25,207. It is doubtful that this reflects a concomitant increase in complex litigation. The more likely explanation is to be found in the cumulative effect of judicial vacancies and in an increase of over 30 percent in criminal felony cases.

States district judges sitting for one full year!

The primary harm done by inadequate judge-power is to render trial dates less than firm and less than credible. The Act recognizes the importance of firm, credible trial dates in reducing both cost and delay. Without adequate judge-power and with a burgeoning criminal caseload, measured by the number of defendants even more than in the number of cases, trial dates inevitably carry the unspoken but clearly understood caveat "unless circumstances..."

Elsewhere this report speaks to mechanisms for making trial dates less vulnerable to exception and hence more credible. The first alternative, trial by consent before a magistrate judge, posits the availability of such a judicial officer and here, too, we see the impact of scarce resources: Currently, they are simply not available. We detail the situation and make recommendations for change in section VII(B) below.

The statute underscores the desirability of "early involvement of a judicial officer in planning the progress of a case, controlling the discovery process, and scheduling hearings, trials and other litigation events."[28] Moreover, it mandates the pilot courts to include within their respective plans provision for "ongoing control of the pretrial process through involvement of a judicial officer in... assessing and planning the progress of a case."[29] To a great extent, judges of this district are doing so now, particularly with the more complex cases. Yet, without adequate judicial resources it is simply not possible to fulfill these requirements in optimal fashion, and judges have told us as much.

Again, as developed elsewhere in this report, delay in deciding dispositive motions and important discovery motions is likely to result in added cost to the litigants as well as in a longer period to disposition. But, as we have there recognized, pressing priorities often deny judges the luxury of dealing with civil matters when they would like to. This report has already catalogued the resources required by the court (see section I(G)), in connection with the provisions of § 472(c)(2). We do not repeat all that was said in that section, but we would be derelict if we did not state our view that the lack of resources described in this section constitutes the single most serious cause of cost and

---

28. Pub. L. 101-650, § 102 (5) (B).
29. 28 U.S.C. § 473 (a) (2) (A).

delay.

Judicial vacancies invite a lot of finger pointing. The sheer number of participants in the process invites the attempt to shift blame. Both houses of Congress are involved in authorizing additional judgeships. (We note, parenthetically, that the figures set forth above do not speak to delay in recognizing unmet *needs* by authorizing new positions; they speak only to delays in filling needs that have been formally recognized. Hence they understate the absence of adequate resources.) The executive branch is involved in the selection process, with both the Department of Justice and senior White House staff as active participants. The American Bar Association is involved in evaluation of prospects or nominees. The Senate is involved in the confirmation process, and individual Senators are frequently participants in the initial selection process. When judicial vacancies persist there is blame enough to go around, and recrimination follows.

We have no desire to engage in recrimination, but we do think it is time for the process to be examined in a formal way, from the criteria utilized in determining the need for new positions[30] to the means of assuring a more prompt response once vacancies occur. The preferred mechanism is oversight hearings of the Congress, acting through the

---

30. The Judicial Conference of the United States will not recommend additional judgeships for any court whose weighted caseload does not exceed 400 per judgeship. The basic idea of "weighting" the caseload is to distinguish between the burden imposed by a complicated antitrust class action and a simple tort case in which jurisdiction is based on diversity.
Weighted caseloads are expressed per judgeship. No attempt is made to include vacancies in the computation or the availability of senior judges. In addition, the Eastern District of Pennsylvania has been a "lending" court; judges sit by designation in other districts where the workload has reached emergency proportions, sometimes due to these very factors.
Sometimes one hears that the vacancy rate is not so serious because of the service performed by the senior judges. Indeed, in terms of the federal judicial system as a whole it has often, and justly, been said that without the service of senior judges the system simply could not have functioned. It is important to remember, however, that 400 weighted casefilings per year is a very high number; it assumes a rate of disposition of more than three cases every two working days. Moreover, this pace would have to be in addition to other judicial duties such as discovery dispute hearings and rulings, criminal matters, criminal trials, sentencing and the writing of opinions, memoranda

committees on the judiciary.

C. Abusive and Excessive Discovery

There is widespread agreement among judges as well as practitioners that excessive discovery contributes significantly to the cost of litigation and, perhaps to a lesser extent, to delay in the disposition of cases. The comments we have heard in this district mirror the results of national surveys and support the concerns reflected in the Act.

There is no similar agreement as to what constitutes "abusive" discovery as distinguished from merely unnecessary discovery, or discovery that is disproportionate in light of the facts of the case at hand. It is doubtful that we might effectively pursue these semantic distinctions.

It is more fruitful to try to explore the underlying causes of what is thought to be unnecessary discovery, for an understanding of these causes may help point the way to acceptable remedies. Moreover, we are mandated to attempt to discern and to report on principal causes of cost and delay.

With respect to these matters meaningful consensus is more difficult to achieve. True, references to discovery run like a thread through our entire report, as they do through the Act. A wide variety of underlying causes have been asserted, but we do not claim a high level of confidence with respect to their relative importance or, indeed, in identifying those that should be viewed as "principal."

The concern to "leave no stone upturned" is mentioned often. This motivation can range from concern about malpractice suits, not to be ignored in these days of increasing insurance premiums, to a recognition that the essence of litigation practice these days is not trial but discovery, with the risk of doing too little a cause of far greater concern than the risk of doing too much.

Management practices in law firms have also been suggested as a significant problem: Assigning discovery to junior lawyers generates excessive zeal and excessive caution; it takes greater experience and skill as well as more confidence to limit discovery, to forego finding yet another defect in the opponent's case, regardless of the strength of one's own cause.

The role of billable hours has been stressed, particularly by the judges. That role is, of course, not limited to the problem of discovery or its associated motion practice. Billable hours, one judge suggested, has become a standard of merit, of

compensation and of promotion.

A sense of proportion is essential. If a judge sets out to extirpate every bit of excessive discovery, the cost to the litigants, let alone to the court, would soon exceed any savings that could be achieved. Conferences in chambers, and the motion practice that would inevitably result, also involve billable hours, hours that may or may not move the litigation forward.

The willingness of large corporate litigants to manage the conduct of litigation as conducted by outside counsel does appear to be a significant factor in reducing transaction costs. Whether stated negatively as a problem, i.e., the failure to manage, or affirmatively as a solution, this does give promise for making a genuine contribution to achieving the goals of the statute.

D. What We Choose to Omit; What We Do Not Know

As this report itself makes clear, there are other impediments to achieving "the just, speedy, and inexpensive determination of every action." Inordinate delays in ruling on motions for summary judgment or even what appears to be the refusal of some judges to take such motions seriously, failure of firm trial dates to remain firm and cases languishing in a judge's trial pool for well over a year are some examples of such impediments. We have been asked to identify only the principal causes, and we have attempted to do so.

In assessing the significance of this section, however, it is important to recognize and to acknowledge how few of our conclusions are based on hard empirical evidence. In section III(D) of this report we elaborated on how little is really known about the relationship between total elapsed time and the cost of litigation to the parties. That analysis and the resulting caveat are no less applicable to the discussion in this section.

It is also true, however, that the conclusions concerning litigation practices are based on anecdotal evidence, on the opinion of participants, on impressions and inferences. We have attempted surveys of litigants and lawyers and have had the benefit of the opinion of every judge on this court, active and senior, and of the Advisory Group, which is itself both diverse and broadly representative of the Bar of the Eastern District of Pennsylvania. We have learned much from the witnesses and communications received from our invitations to a public hearing.

None of this substitutes for the kind of hard data generated by a random experiment such as is being conducted in connection with the court's mediation program, or from the painstaking accumulation of data over more than a dozen years from the court's arbitration program. And there is little enough available nationally. The District Court Studies of the Federal Judicial Center focused, for example, on strong judicial controls and case management. While we have no reason to question the major conclusions, these data were gathered in the mid-1970s, and this court, one of those studied, has certainly changed since that time.

There is empirical work being conducted by the Rand Corporation's Institute for Civil Justice, which has an enviable record of valuable empirical research. The Federal Judicial Center's current studies on weighted caseloads should, in due course, provide new insights into the processes of civil as well as criminal litigation. Meanwhile, the important thing is to acknowledge both the need to know and how little we do know. This we willingly do.

V. SHALL THIS COURT SELECT A MODEL PLAN OR DEVELOP ITS OWN?

The Civil Justice Reform Act requires the Advisory Group to include in its report to the court "the basis for its recommendation that the district court develop a plan or select a model plan."[31] The choice offered by the Act is between selecting a model plan developed by the Judicial Conference of the United States and available to any district court that opts for a nationally developed model and a program tailored specifically to fit the conditions of the individual district.[32]

Since this court is a pilot court, the Act surely intends it to create its own plan, not to "select a model plan."

---

31. 28 U.S.C. § 472(b) (2).
32. 28 U.S.C. § 471.

PART TWO:
CONTENT OF CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

The statute identifies six "principles and guidelines of litigation management and cost and delay reduction."[33] *Each District Court, in consultation with its Advisory Group, "shall consider and may include" in its plan each of those principles.*[34] *However, pilot courts, of which the Eastern District of Pennsylvania is one, are mandated to include each of the enumerated principles.*[35]

How these principles and guidelines shall be defined and applied is left to the discretion of each of the pilot courts.

This part of the report analyzes each of the enumerated principles and offers recommendations concerning how they should be implemented in the Eastern District of Pennsylvania.

---

33. 28 U.S.C. § 473(a).
34. 28 U.S.C. § 473(a).
35. 28 U.S.C. § 472.

VI. SYSTEMATIC, DIFFERENTIAL TREATMENT OF CIVIL CASES FOR PURPOSES OF CASE-SPECIFIC MANAGEMENT

The Act directs this court, in consultation with its Advisory Group, to consider certain "principles and guidelines" including "systematic, differential treatment of civil cases."[36] A threshold issue is precisely what goal this particular principle should serve. In the existing state court differential case management systems, the primary emphasis appears to be on the *management* aspect of the system—the systematic, differential treatment of cases is only secondary. For example, a study of the program in Ramsey County, Minnesota, observed that "prior to the DCM [differential case management] program, there were no required pretrial events or deadlines."[37] Most of the existing programs operate in master calendar systems without the discipline and tracking inherent in the individual calendar system. Because the focus in the existing programs is management, they are broad in scope, establishing requirements for case management orders, setting the time for and extent of discovery and establishing firm trial dates. Their ambitious scope requires the addition of staff to administer the program and prepare the paperwork to track it.

The Advisory Group believes that in the Eastern District the principle of differential case treatment should serve a slightly different goal: to distinguish, on a systematic basis, the cases that require more intensive, individual management by the court from those that can be handled in a more standardized manner. In this way scarce judicial time can be targeted to those cases in which judicial involvement is most necessary. It should reduce costs by identifying those cases that do not require time-consuming management techniques such as frequent conferences or detailed case management plans.

---

36. 28 U.S.C. § 473(a).(1). This section provides for "systematic, differential treatment of civil cases that tailors the level of individualized and case-specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial and the judicial and other resources required and available for the preparation and disposition of the case."

37. Bureau of Justice Assistance Pilot Differentiated Case Management Program, Program Summary No. 6; Second Judicial District Court of Ramsey County, Ramsey County (St. Paul), Minnesota (American University).

This interpretation of the principle is not intended to disregard the need for a scheduling order, firm trial dates and control of discovery. The way in which these concepts can be applied differently is discussed below in section VII. But narrowing the focus here to the degree of management appropriate in a given case ensures that this principle does not get lost in the larger, overriding question of docket management. An important corollary to this interpretation is that it does not require the additional layers of bureaucracy that appear to be necessary for the programs whose principal focus is to get the docket under control.

A second threshold issue arises in the Eastern District because differential case management already exists in two senses. First, the existing rules of procedure provide different treatment for the following types of cases: habeas corpus, social security cases, asbestos cases and cases in which money damages only are being sought in an amount not in excess of $100,000 (arbitration cases). In addition some, but not all of the judges review cases at the outset and treat the case differently depending upon whether it appears to be complex or standard. Thus, the Eastern District already provides for differential treatment of its cases and need do little more.

The Advisory Group believes that the court can and should go beyond what is already in place. A significant percentage of the cases does not fall within one of the four areas for which special rules of procedure currently exist. Moreover, the Act's use of the word "systematic" suggests that the group seek solutions beyond relying upon the existing ad-hoc differential treatment. The Advisory Group recommends that a program of systematic differential case treatment be adopted, which specifically includes the existing categories of cases, but also deals with the cases that do not fall within those categories.

The central feature of all the programs existing in the other courts we have studied are the case "tracks." Every existing program has three tracks, variously named, but that distinguish among simple cases, complex cases and all others. None of the programs appears to have attempted to divide cases by subject matter, an effort that the Advisory Group agrees would be futile because cases of like subject matter can be complex or simple, depending upon the facts or the legal issues involved.

The Advisory Group concludes that for this district these "tracks" should include those already in place for habeas corpus, social security, arbitration and asbestos cases. We considered, but decided not to recommend a separate track for cases brought by prisoners alleging violations of civil rights or other claims. Although such cases are treated differently at the outset because they are reviewed by staff attorneys to determine whether the court should appoint counsel, they otherwise are not treated differently as a group; nor should they be because they differ widely in their subject matter and complexity. We explored briefly the idea of expanding the social security track to include other on–the–record reviews of federal agencies but did not have sufficient time or information to reach well-supported conclusions. This may be an issue for further study.

The group also recommends that two additional tracks be established: a Special Management track and a Standard track. The Special Management track would include those cases that do not fall within one of the existing four tracks, cases that need special or intense management by the court due to one or more of the following factors: large number of parties, large number of claims or defenses, complex factual issues, large volume of evidence, problems locating or preserving evidence, large amount of discovery, exceptionally long time needed to prepare for disposition, decision needed within a very short time and need to decide preliminary issues before final disposition. The Standard track would include all other cases.

We do not recommend a separate "simple" track because most of the simple cases are already covered by one of the four existing tracks. In addition, as discussed more fully below in connection with firm trial dates and ongoing judicial management, the group envisions the Standard track as more like the simple track in other programs; in Section VI it recommends some, but not extensive management procedures and in Section VII(B) of the report, the group recommends setting a relatively short goal for filing to disposition.

There are several ways in which the track assignment itself can be made. In some of the differential case management programs, the determination is made by an administrator based upon information provided by the litigants. We believe that this process is unnecessary; instead, we would leave the determination in the first instance to the parties who would designate the appropriate track on a designation form, which could

be a separate piece of paper or a new section of the existing cover sheet. If there is any dispute, the final determination can be made by the court.[38] The programs using this method of determination report very little controversy over track assignment; and, in the view of the Advisory Group, the litigants and their attorneys are usually in the best position to evaluate the need for intensive management in a particular case.

Once a case is assigned to a particular track, the applicable procedures will vary. For habeas corpus, social security, arbitration and asbestos cases, we do not recommend changes in the current rules. Special, intensive management procedures would apply to cases assigned to the Special Management track. The procedures recommended by the Advisory Group for these cases are set forth and discussed separately in section VIII below. All other cases would be subject to the general management principles set forth below in the discussion of ongoing case management and early, firm trial dates (section VII(B)).

The Advisory Group recommends that the court adopt a local rule or plan to distinguish among cases that require different levels of treatment. This rule should be adopted in connection with others, proposed below, which provide for ongoing case management, special management for complex cases and the establishment of early, firm trial dates.[39] A proposed rule follows:

CASE MANAGEMENT

a. Management tracks—Each civil case filed will be assigned to one of the following tracks: habeas corpus, social security, arbitration, asbestos,

---

38. This is consistent with the present practice for asbestos and arbitration cases in which the Clerk of Court assigns the cases to those tracks, based upon the allegations in the complaint.

39. The Clerk of Court has suggested a Bankruptcy Appeal track and a U.S. Government Collection and Enforcement track, but the group has not yet adopted them. In the continuing survey that the Act requires of us and the court, we shall keep them on the agenda.

special management, standard management.

b. Management Track Definitions

(1) Habeas Corpus–Cases brought under 28 U.S.C. §§ 2241 through 2255.

(2) Social Security–Cases requesting review of a decision of the Secretary of Health and Human Services denying plaintiff Social Security benefits.

(3) Arbitration–Cases designated for arbitration under Local Rule 8.

(4) Asbestos–Cases involving claims for personal injury or property damage from exposure to asbestos.

(5) Special Management–Cases that do not fall into tracks 1 through 4 and that need special or intense management by the court due to one or more of the following factors: large number of parties, large number of claims or defenses, complex factual issues, large volume of evidence, problems locating or preserving evidence, large amount of discovery, exceptionally long time needed to prepare for disposition, decision needed within a very short time needed for disposition, need to decide preliminary issues before final disposition.

(6) Standard Management–Cases that do not fall into one of the other tracks.

c. Management Track Assignments

(1) The plaintiff will submit to the Clerk, and serve with the complaint on all defendants, a Designation Form designating the track to which plaintiff believes the case should be assigned. Each defendant will, with its first appearance, submit to the Clerk, and serve on all other parties, a Designation Form designating the track to which that defendant believes the case should be assigned.

(2) If the plaintiff and the first defendant to appear

agree on the management track, the Clerk will assign the case to that track. If the plaintiff and the first defendant disagree on the management track, or if a later appearing defendant disagrees with the plaintiff's track choice, the Clerk will refer the disagreement to the court and the court will make the track assignment.

(3) The court may, on its own motion or at the request of any party, change a case's track assignment at any time.

d. Management Track Procedures

(1) Habeas Corpus Track–Cases will follow the Federal Rules Governing Section 2254 Cases or, in cases brought under 28 U.S.C. § 2255, the Federal Rules Governing Section 2255 Cases. The court may, in its discretion, refer the case to a magistrate judge pursuant to 28 U.S.C. § 636(b).

(2) Social Security Track–Within 10 days after the Clerk has assigned a case to the Social Security Track, the Clerk will enter and serve on all parties an order stating:

(a) Within 10 days after the date of entry of the order the plaintiff shall cause the summons and complaint to be served on the defendant in the manner specified by Federal Rules of Civil Procedure 4(d)(4) and 4(d)5.

(b) Within 60 days after service of the complaint, defendant shall serve an answer and a certified copy of the administrative record.

(c) Within 45 days after service of the answer, plaintiff shall file and serve a motion for summary judgment and supporting brief.

(d) Within 30 days after service of plaintiff's motion and brief, defendant shall file and serve a cross-motion for summary judgment and supporting brief.

(e) Plaintiff may serve a reply brief within 15 days after service of defendant's motion and brief.

(f) The case shall be deemed submitted for disposition 15 days after the service of defendant's motion and brief.

(3) Arbitration Track–Cases will be managed in accordance with Local Rule 8.

(4) Asbestos Track–Cases will be managed in accordance with the Master Case Management Order issued December 16, 1987.

(5) Special Management Track–The Clerk will notify the court immediately upon assignment of a case to the Special Management track. Thereafter, management of the case will proceed in accordance with the Guidelines for Complex Case Management [recommended below in section VIII], unless determined otherwise by the court in consultation with the parties.

(6) Standard Track–Cases assigned to the Standard track shall be disposed of in accordance with the routine practices and procedures of this court.

VII. INVOLVEMENT OF JUDICIAL OFFICERS IN PRETRIAL PROCESS

A premise underlying many of the Act's provisions is the assumption that cost and delay in civil litigation will be reduced with increased judicial involvement in the pretrial process. Thus, the Act requires the court, with its Advisory Group, to consider and to include in its plan a program of "early and ongoing control of the pretrial process through involvement of a judicial officer" in planning the progress of a case, setting early and firm trial dates, controlling discovery and setting deadlines for motions and a schedule for their disposition.[40]

With the exception of the need to establish early, firm trial dates, the Advisory Group does not agree that indiscriminate involvement of a judicial officer in the planning, progress or discovery for every case is necessary, desirable or will meet the ultimate goals of reducing cost and delay in civil litigation. In our searching examination for a prudent balance in case management responsibility we encountered a wise concern expressed by both lawyers and experienced judges to avoid "judicial obtrusion," to recognize that planning litigation strategy is the lawyers' responsibility, and that lawyers who best understand the needs and objectives of their clients should have ample freedom to plan and try their own cases. As one experienced judge expressed it, judges as case managers should not be ordained as "super-lawyers," to sit astride the litigants' strategy and mastermind its development, with their own necessarily limited understanding about each of the many cases that comes before them.

Justice in America, for better or for worse, is based on the adversary system, and this system rests on the professional responsibility of the lawyers. This fundamental principle underlies all of our recommendations; and by our emphasis on assertive judicial management we do not intend to detract from the essential responsibility of lawyers to plan and try their cases as their clients' interests demand.

Nonetheless, in some instances judicial control is appropriate and will effectively reduce cost and delay. The group thus concluded that complex cases most often do require sustained and ongoing judicial management. The group therefore recommends that complex cases be segregated from the other cases requiring such

---

40. 28 U.S.C. § 473 (a) (2).

intensive management and sets forth in section VIII the procedures recommended for complex cases. The other specific points at which we recommend judicial involvement are here set forth below.

A. Assessing and Planning the Progress of the Case

The initial scheduling order required by Fed.R.Civ.P. 16 already requires most of the essential elements for efficient management of most cases. The rule requires the court to enter a scheduling order setting deadlines to join other parties, amend the pleadings, file and hear motions and complete discovery. The rule leaves to the discretion of the court the setting of a trial date in that order and allows it to add any other matters. The rule permits, but does not require, a scheduling conference, allowing the order to be issued "after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means."[41] The rule provides examples of the issues that may be discussed at a conference, if the judge decides to hold one.[42]

The Advisory Group believes that, generally, the existing rule adequately balances the need for judicial control in some cases with a reluctance to impose unnecessary cost and delay for cases that do not need intensive management. As discussed more fully below in section VII(B), we recommend that the court set the trial date in the scheduling order, with some exceptions. We believe that in most cases a pretrial conference is useful because it allows the court and the lawyers to consider, and perhaps resolve, a broader range of issues than those presently required by the rule. Thus we urge that this court adopt a policy or guideline that, in most cases, an initial pretrial conference will be held. To alleviate the concern expressed by some of the lawyers that these conferences add to their costs, and by the judges that they do not have time for such conferences, we suggest that, as a general rule, the conferences be convened by telephone and that the court require personal appearances only when special circumstances justify the added cost to the litigants.

---

41. Fed.R.Civ.P. 16(b).
42. Fed.R.Civ.P. 16(c).

B. Early, Firm Trial Dates

The single most effective tool in resolving cases and resolving them quickly is a firm trial date set relatively promptly after the complaint is filed. The trial date works because many lawyers, whether by choice or circumstance, are "fire-fighters" who focus their efforts on cases that have a deadline. The firm trial date helps to resolve cases because the prospect of trial is the primary force that focuses the attention of the litigants on the risks they face and, thus, makes them pursue settlement seriously. A firm date also results most often in cost savings because witnesses and lawyers need only prepare once. And, of course, expert witnesses need not incur costs in waiting for trial in hotel rooms or incur multiple travel expenses.

The benefits of an early, firm trial date in reducing costs and delays was a theme we heard over and over again from judges, litigants and their lawyers, with a unanimity that rarely occurred on other issues. This assessment is reflected in the Act in requiring the plan to include the involvement of a judicial officer in "setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint."[43]

Notwithstanding the universal acclaim of the concept, it is applied unevenly. Many judges do not establish trial dates at all or until very late in the process. As a result, the salutary effect of moving the case is lost. Lawyers without realistic targets devote their attention to other, more immediate problems. Litigants are not forced to evaluate their cases realistically because "the day of reckoning" has not been fixed.

A separate and difficult problem frequently confronts those judges who do try to set firm trial dates. Pressed with conflicting trial schedules of busy litigators, criminal cases that must be tried within specified time periods under the Speedy Trial Act and the certainty that a large percentage of the civil cases will settle on the "eve of trial," judges who do attempt to set firm trial dates have difficulty maintaining them. Take, for example, a group of 12 civil cases that a judge in January 1991 sets for trial during the three-month period commencing January 1992. Assume further that five criminal cases are filed in November and December of 1991, which *must* be tried within

---

43. 28 U.S.C. § 473 (2) (B).

70 days, i.e., within the same three-month period when the civil trials are scheduled. Or suppose that instead of the five criminal cases, only one is filed, in October 1991, but it is a multiple-defendant case in which trial lasts for the *entire* period when the civil cases were to be tried. Many judges, particularly new ones, indicated that the difficulty of setting a real, firm trial date is a virtually insoluble problem. They tread a fine line between setting a firm trial date that everyone will believe is firm, and letting litigants know when the date is not firm so they will not be forced to incur unnecessary costs in travel, time and preparation.

The recommendation of this group deals with both aspects of the problem: the need to establish a trial date that does not draw out the litigation and the need, once a date is set, to maintain that date. We offer these suggestions mindful, of course, of the statistics in this district that show that we are already resolving the vast majority of cases —70 percent of those required to attend a trial and a far greater percentage of all civil cases—within 18 months of filing. Moreover, it is *not* our purpose to create a second Speedy Trial Act for civil actions. For these reasons, our recommendations here are framed as "guidelines" or "goals," rather than inflexible rules.

We have concluded that a reasonable guideline or goal in establishing a trial date in most cases, except asbestos cases, is a date 12 months from the date of filing. We selected 12 months and not the 18 recommended by the statute because it is our judgment that for Standard Track cases 18 months is too long; a trial date that long from filing would merely be a self-fulfilling prophesy. As discussed above in section VI and below in section VIII of this report, however, the Advisory Group has concluded that complex cases on the Special Management track may warrant more intensive management and may take longer to prepare for trial. It has similarly concluded that asbestos cases may take longer to prepare for trial. For those cases, with the certification exception recognized by the Act, we recommend that the court set as a goal a trial date within 18 months after the complaint is filed.

The trial date should be established early in the litigation. For most cases, the date can be established in the initial scheduling order under Fed.R.Civ.P. 16. For complex cases, we recommend that the trial date be set after a settlement conference, which would occur approximately six months after the complaint is filed. (The procedures for ongoing judicial involvement contemplated for complex cases are

discussed below in section VIII.) Because a precise date some 12 or 18 months hence is unrealistic, given the unpredictability of a judge's docket that far in advance, the trial date set during this initial phase should not be a specific day but, rather, a specific month. The precise day on which trial will begin should be set as the trial month approaches, after consultation with the attorneys to determine their availability and that of their key witnesses, and accounting for preexisting demands on court time. Once the trial date is set, there should be no continuances unless there are compelling reasons.

The second prong of our recommendation deals with the instances in which, because of the demands of the judge's criminal docket or because of a longer than anticipated civil trial, or because of some other emergency or unanticipated situation, it appears that it will be impossible to begin the civil trial on the previously established date. For those instances, we recommend that the court adhere to a protocol that will meet the needs of the litigants and maintain the sense of inevitability that the case will in fact be tried.

If the judge to whom the case is assigned is able to reschedule the trial for a time that is acceptable to the attorneys and their witnesses (i.e., will not cause undue hardship or expense), the trial date will be so rescheduled for some date in the near future. If that is not feasible, the protocol should encourage alternatives, such as trial on the date originally set or a suitable alternate near that date before a magistrate judge or before another judge. We understand that some judges presently undertake this approach informally. We believe the process should be formalized but leave to the court the precise details of such a program.

An example of such a protocol is as follows:

1. Counsel in each such case will be advised immediately (i.e., as soon as practicable after the impediment to trial appears) by the judge or by the deputy clerk so that counsel may advise their clients and witnesses.

2. If, at the time the impediment to trial appears, the judge to whom the case is assigned is then able to schedule a new trial date, and all counsel expect to be available to begin trial on the alternate date without undue hardship or expense to the litigants, the case will be rescheduled to begin trial on the alternate date.

3. If the judge cannot fix a suitable alternate date or if counsel will not be available to begin trial on the alternate date, or if any party is unable to begin trial at that time without undue hardship or expense; and if a magistrate judge is available to preside over the trial on that date, and if all counsel stipulate that a specific magistrate judge may do so, the case will be reassigned to such a magistrate judge for trial.

4. If there is no magistrate judge available or if all parties will not stipulate to an available magistrate judge, and if another judge of the district is or can be available to preside over the trial on the date originally set, the case will be reassigned to that judge for trial.

C. Control of Discovery

The Advisory Group has concluded that the most effective technique to control discovery is one already available through Rule 37 of the Federal Rules of Civil Procedure; that is, the availability of sanctions in appropriate cases coupled with advance notice to the parties that the court is willing to use them. We recognize the reluctance to impose sanctions in this district because of the perception that it engenders satellite litigation, but, to some extent, this reluctance is a self-fulfilling prophesy. If, instead, the court made clear that sanctions will be imposed when necessary, as some judges already do, it is more likely that they would be needed less often.

The Advisory Group considered and rejected a second possible means for controlling the volume of discovery; that is, a limitation on the number of discovery requests or on the time of a deposition. The group considered the fact that such limitations are prescribed by local rule in a large number of districts with anecdotal evidence that they do not cause controversy in those districts. Nonetheless, we rejected an across-the-board limitation because we are not convinced that such a rule would reduce costs or delay without at the same time limiting the right of the litigant to prepare its case fully. If the limitation were set at a relatively high level so as not to curtail the efforts of most litigants, the limitation would not likely reduce costs and might increase costs by encouraging litigants to increase the number of requests to meet that limit. If the limitation were low, a party could have serious difficulties developing all aspects of its case. The group was further concerned that limitations on one form of discovery could well lead to increased use of other types of discovery; for example, substitution of

document requests or depositions under Fed.R.Civ.P. 30(b)(6) for interrogatories.

Two related means for controlling discovery do require limited judicial involvement, but we believe they would result in a net saving of time and money to the court and the litigants. First, we encourage all judges to use informal means to resolve discovery disputes, such as telephone conferences without briefing. Some judges already do this. We also suggest that, in the pretrial conference, the judge should in most cases discuss discovery issues with the lawyers, to set the tone for discovery and explore whether any limitations on the extent of discovery are appropriate to that particular case.

A final source of control over discovery is the litigants and their lawyers. Many of the more sophisticated litigants in this district insist upon approving major projects undertaken by their attorneys and monitor the progress of the case carefully with their attorneys. Some litigants control their own discovery costs by using in-house personnel to perform time-consuming tasks, such as document searches. The Act recognizes that litigants themselves have a responsibility in this process, and the Advisory Group concurs. Of course, the lawyers themselves have a professional responsibility to the court to avoid discovery that is interposed for the purposes of burden or harassment and to comply with discovery for which no reasonable objection can be raised. The Advisory Group recommends that the court develop, in the context of its ongoing educational partnership with the Bar, educational programs directed to discovery management programs and to educating litigants and lawyers about discovery management practices and their responsibilities.

D. Dispositive Motions

The report discusses above the inherent tension between the views of the litigants and their lawyers that dispositive motions are useful means to reduce cost and delay but are often eviscerated by the fact that judges do not rule on them promptly or with due consideration, and the views of some judges that many such motions are time-consuming, burdensome, frivolous and crafted for delay or to avoid later criticism.

These concerns are not easily reconciled. The Advisory Group considered and rejected one proposal, which provided that the parties confer with the court before making such dispositive motions, in the hope that the court could offer advance guidance on the motion. We did not think this would effectively resolve the problem: The court would not necessarily have enough information to provide effective guidance;

and a lawyer who did not submit to the guidance might be inhibited from filing a motion that was genuinely believed to be in the client's interest.

We do suggest several principles that are not novel and are already provided for in the rules or practices of this court. First, in the initial scheduling order the court should set a deadline for making dispositive motions sufficiently in advance of the trial date so as not to interfere with it. Once a party has filed a dispositive motion, the court should resolve it promptly to save litigants the cost of unneeded discovery if the motion is granted and to prevent the inevitable delay as the parties await the outcome. We frame this as a general policy suggestion and decline to recommend any fixed time for decision of motions. To do so would interfere with the essential flexibility of each judge to manage the docket.

Finally, we recommend that the court consider using oral argument more frequently to assist it in separating those motions with merit from those that are frivolous. Federal Rule of Civil Procedure 56(c) contemplates oral arguments for motions for summary judgments: "[t]he motion shall be served at least 10 days before the time fixed for the hearing."[44] And, as the Third Circuit noted twenty years ago:

> In the usual case, it is more appropriate to set a motion for summary judg-ment down for hearing as Rule 56(c) provides, and to make the date of hearing the time limit for both sides in the presentation of their factual claims.[45]

---

44. There is consensus, however, that Fed.R.Civ.P. 78 gives the court the power to order summary judgment without a hearing. *See* 10A Wright & Miller § 2720.1 at 37 (1983).

45. *Season-All Industries, Inc. v. Turkiye Sise Ve Cam Fabrikalari, A.S.*, 425 F.2d 34, 40 (3rd Cir. 1970). This is still the preferred practice. *See* 10A Wright & Miller § 2720.1 at 37 (1983).

VIII. SPECIAL TREATMENT OF COMPLEX AND "OTHER APPROPRIATE" CASES

Section 473(a)(3) of the Act requires that, for all cases that the court "determines are complex and any other appropriate cases," the court consider principles and procedures for "careful and deliberate monitoring through a discovery-case management conference or a series of such conferences." This principle is consistent with the requirement in section 473(a)(2) that for all cases, the court consider "early and ongoing control of the pretrial process through involvement of a judicial officer." Finally, section 473 (a)(1) requires the court to consider a plan to identify on a systematic basis, and treat differently, cases that require more judicial involvement.

The Advisory Group agrees with the concept underlying these two provisions; that is, that active judicial management in specially targeted complex cases will reduce cost and delay. Such judicial involvement will enhance settlement possibilities, and require the parties to organize and focus their discovery early. By recommending such intensive judicial involvement *only* for such cases, the Advisory Group believes that there will be an overall reduction in cost to the system because there would not be such intensive treatment for cases that do not require it. The proposals that follow provide a detailed plan for ongoing management of these cases that fall into the Special Management track.[46]

A. Initial Pretrial Conference

As soon as practicable after a case is filed, the court should schedule an initial pretrial conference, to be held within 30 to 60 days thereafter. The purpose of the initial pretrial conference would be to resolve differences among the parties and to allow the court to make an independent assessment on the elements in a proposed case management plan that would be proposed in advance of the conference. While we have recommended that a pretrial conference be scheduled in every case, in many instances by telephone, the number of issues and the importance of establishing ongoing cooperation

---

46. These proposals overlap and at times conflict with the detailed requirements of Local Rule 21, and in considering this report the court may choose to reassess that rule.

in complex cases suggest that in these pretrial conferences the lawyers should appear in person.

At the same time the parties are notified of the pretrial conference, the court should require them to confer and prepare a proposed case management plan. The court should identify specific issues to be addressed in the plan. The idea of such a plan is to encourage the attorneys to meet early in the litigation to work out as many preliminary issues as they can. Based on discussions with attorneys experienced with these cases, this is consistent with their current practice. The types of issues to be addressed in the plan should be tailored to the nature of the case. In complex cases, there are recurring issues, such as the designation of lead and liaison counsel, deposition guidelines and decisions as to how and when to deal with issues of class certification.

We believe that these early discussions provide a useful opportunity to attempt to identify categories of information that can be exchanged summarily, without objection and by order of the court. For example, in certain environmental cases, the administrative record is the basis of the court's review and could be provided to the defendants immediately. In other cases, exchange of documents produced during a government investigation could be appropriate, or the plaintiffs could agree to provide information relevant to their contention that the action be allowed to proceed as a class action. Thus we recommend that the parties be required to include in their proposed case management order any such categories. This proposal is related to our recommendation in section IX that, for all cases, this court adopt a local rule to require early self-executing disclosure of certain central facts. But in accordance with the principle of differential case treatment, it is intended as an alternative for the more complex cases, which should lead to exchange of categories of documents tailored to the particular litigation.

Thus, a typical order requiring the parties to prepare a case management order might require the parties to address the following issues, where appropriate:

1. designation of lead and liaison counsel and the roles and responsibilities of each;
2. deposition guidelines;
3. protective orders;
4. if the case is a class action, a proposal for class discovery and a timetable for briefing and a hearing date;
5. identification of any summary discovery and its timing;
6. possible Rule 12 or summary judgment motions and a proposed timetable for briefing and hearing; and
7. the possibility of bifurcation.

The first conference should be an opportunity to work out significant issues that typically present themselves in complex cases besides resolving any issues that the parties were not able to work out in the initial pretrial order. If the case is a class action, the court should consider whether to stay merits discovery and allow discovery related only to class issues. The Advisory Group recommends that, generally, the court should not stay merits discovery, because this categorization often results in disputes over the nature of the discovery and is more likely to delay resolution of the case. In appropriate cases, however, a stay of merits discovery may result in reduced cost to the parties, especially if a class is not certified.

If the parties state their intention to file Rule 12 or summary judgment motions, the court, where possible, should express itself on the prospects for success. In this recommendation we distinguish between cases in the Special Management track and the Standard track cases. In these cases, we believe it appropriate for the judge to have the degree of involvement in the case to give effective guidance. As discussed above, we do not believe it is necessary or a wise use of judicial time to require the parties to confer with the judge before dispositive motions in every case. If the court and the parties determine that such a motion should proceed, the motion should be heard and resolved promptly—in any event, before the second conference.

During the initial conference, the court should set the context for discovery—for example, to direct the parties to resolve discovery disputes among themselves, suggesting that it may impose sanctions where a party has taken an unreasonable position. The court should also pursue aggressively whether categories or information other than those proposed in the case management order can be exchanged.

In addition to this summary exchange of discovery, we recommend that the court set a discovery schedule that requires, as a first wave of discovery, the "core" discovery, which is key knowledge essential to the case. The purpose of such core discovery would be to prepare the parties and the court for an early and meaningful settlement conference to be held three to four months after the initial conference (discussed below in section VIII(B)). The idea of the discovery is to put the parties in a position to prepare in advance of the second pretrial conference a short preconference memorandum setting forth the elements of their claims or defenses and its evidentiary support obtained through the core discovery. While the lawyers themselves are best able to identify the "core" discovery, the court's role during the first conference should be to describe the purpose and intended use of such discovery.

Finally, when cases are pending in several districts and a consolidation motion is pending before the Judicial Panel on Multidistrict Litigation, the Advisory Group recommends that the court should determine what discovery is pending elsewhere and require the parties to coordinate it. The Panel's rules specifically provide that none of the proceedings in any of the districts in which cases are pending is stayed during the proceedings before the Panel. As a result, litigants often face overlapping discovery demands in each of the many districts in which cases are pending.

At or shortly after the conclusion of the first pretrial conference, the court should issue a case management order, set the date for the second pretrial conference and set the due date for the next preconference statement. The date should be three to four months after the initial conference.

B. Second Pretrial Conference

The primary purpose of the second pretrial conference should be to determine whether the case will settle. To this end, before the second conference, the parties should submit brief preconference statements that identify their claims and

defenses with the evidentiary support obtained by the "core" discovery. The purpose of the statements would be to enable the judicial officer conducting the conference to make an informed contribution to the process.

The conference should be attended by the attorneys of record as well as a party with authority to settle the case. Our recommendation here is consistent with the recommendation, discussed below in section XVI, that the court adopt a rule that, for any case, the judge may require the presence of parties at a settlement conference. It would expand upon Local Rule 21(3), which requires the attorneys at a final settlement conference to have obtained or be able to obtain authority by telephone to settle the case. Sufficient time should be set aside for the conference to permit the judicial officer to speak at length with each side.

If the case does not settle during the conference, the court should, at or shortly after the conference, set firm trial and discovery cut-off dates and order the parties to submit a plan to prepare for trial of the case. The court should review the proposal and issue an order containing such a plan. The proposed plan should include deadlines for all the remaining events contemplated by the parties, for example:

1. identification of summary judgment or other dispositive motions or issue-limiting motions, and a proposed schedule for briefing and hearing;
2. a timetable for designation of experts and exchange of expert reports;
3. any proposed bifurcation of issues for discovery or trial;
4. any proposed use of alternative dispute resolution procedures; and
5. proposals for the use of special masters or magistrates for discrete discovery issues.

C. Subsequent Conferences

The court should continue to hold conferences on a frequent basis. The purpose of such conferences is to monitor discovery, allow continued opportunities to explore settlement and allow continued consideration of alternative dispute resolution mechanisms.

IX. USE OF VOLUNTARY DISCLOSURE OF INFORMATION AND COOPERATIVE DISCOVERY DEVICES

The point most strenuously debated, both within the Advisory Group and among the lawyers from whom we solicited comments, was the statute's mandate that the plan encourage cost-effective discovery through "voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices."[47] The group agreed early and quickly that if the principle is to meet the goals of the statute, it must be given content that goes beyond that which is merely voluntary. While we have pointed out in other parts of the report that both lawyers and their clients have a responsibility to ensure that discovery is conducted in a responsible and cost-effective manner, it is apparent from the pervasive criticism of current discovery practices that such exhortations fall short of addressing the entire problem.

The solution to which we addressed ourselves, therefore, is a concept already recommended by the Advisory Committee on Civil Rules in its proposed amendments to Fed.R.Civ.P. 26, i.e., required disclosure shortly after the defendant files an answer to the complaint, of witnesses and documents that "bear significantly" on the claims or defenses. The initial reaction among a large number of lawyers was negative. Would a party be required to disclose documents or witnesses that are harmful as well as helpful? Does the automatic nature of the disclosure preclude objections, such as objections to providing telephone numbers of former employees of a corporate party? What happens when a party, at the preliminary stage of the litigation, has not yet identified documents or witnesses that bear significantly on his claim? How, in this context, can the gamesmanship that arises in discovery be avoided?

Notwithstanding these bristling questions, the Advisory Group concluded that, in this pilot district, the concept should be tried. We reached this conclusion for several reasons. First, and most important, we believe that summary, initial disclosure offers significant promise to hasten the resolution of the dispute and to reduce costs. The process should reduce cost by eliminating the exchange of paper that currently precedes the disclosure of any information. Moreover, there will no longer be the costs and delays caused by unwarranted objections to basic requests.

---

47. 28 U.S.C. § 473(a)(4).

In the intensive colloquy of our debate over this seemingly revolutionary proposal there were genuine concerns expressed by experienced lawyers from both sides of the civil litigation bar about gamesmanship that would be involved in disclosing or withholding crucial information in this phase of initial disclosure and the difficulties in deciding what witnesses and documents "bear significantly" on the claims and defenses. We debated them exhaustively and concluded that in reality those decisions are no different from decisions on routine discovery disclosures that are already a part of a lawyer's responsibility in discovery. In the end they depend on the same professional responsibility that controls the response to any legitimate discovery demand. Such decisions are no more or less compelling whether demanded in an established summary disclosure procedure or in a later requirement of disclosure in existing obligations under discovery requests.

Besides, the concept of self-executing discovery is not new to this district. Some judges already require it for certain types of cases, for example, RICO or class action cases. Local Rule 26 requires that certain medical information be exchanged in personal injury cases. We are also told that a similar rule or practice was in use in the past; it was discontinued because of concern about the authority to enact this proposal as a local rule. Finally, certain lawyers, especially those who litigate complex cases, already agree among themselves to the exchange of categories of documents and information in informal conferences to organize the case.

Beyond this, the draftsmen of the proposed amendment to Rule 26 have considered many of these objections and resolved them. Summary disclosure is already a part of pretrial procedures in a number of other districts. The experience in those districts demonstrates the utility of summary disclosure in reducing ritualistic formalities of interrogatory practice, now an inevitable but needless burden on the litigants and the courts. The comments to the proposed amendment make clear that a party who discovers additional information after the initial disclosure will not be penalized or sanctioned. The party would, however, have a continuing obligation to supplement the initial disclosure. The comments also make clear that where a litigant does not comply, the sanctions in Rule 11 and Rule 37 are available.

The Advisory Group recommends that the court adopt a local rule that requires early summary disclosure of certain information for all cases. Consistent with the recommendation that the court treat cases differentially, we recommend differential

treatment for information to be exchanged and applicable procedures, depending upon the track in which the case falls. For example, for asbestos cases, there is already a procedure for summary exchange of certain information. For those cases, that procedure would apply. In civil RICO cases many judges in this district already require plaintiffs to respond to a standard set of interrogatories to particularize the elements of RICO application that sometimes eliminate the RICO counts. That procedure would be continued.

Complex cases often present many possibilities for categories of information that can be exchanged early and without the need to exchange requests, responses and objections. In section VIII, we have already set forth a recommended procedure for identifying such categories of documents through voluntary efforts by the parties and then incorporating their agreement into a pretrial order after an initial meeting with the judge.

For cases in all other tracks, the information to be exchanged should be the identification of witnesses and documents that "bear significantly" on the claims and defenses asserted and insurance agreement—essentially the same information as would be required in the proposed amendment to Rule 26. For these tracks, the local rule should adopt the language and the comments of the proposed amendment in most respects.[48] We would not, as the proposed amendment does, require the parties to exchange damages calculations because, at this early stage, they may not be meaningful because parties might attempt to obscure them to avoid prejudicing their positions later in the litigation. We are also concerned that the rule as drafted precludes all other discovery pending this disclosure, which could delay rather than hasten the progress of the case. While there is much to commend the foreclosure of additional discovery until summary disclosure has been accomplished, as the proposed amendment would do, a majority of the Advisory Group decided that this might impede rather than expedite the forward movement of the litigation. In our experimental role as a pilot court, we have chosen to move prudentially here.

---

48. The Act, especially as applied to pilot courts, provides authority for innovations that might appear to conflict with the national rules in the area specified. For this reason, we have no hesitation in recommending that the court seize the initiative for significant reform by issuing new local rules in accordance with established rule-making procedure.

X. REASONABLE AND GOOD FAITH EFFORT OF PARTIES TO RESOLVE DISCOVERY DISPUTES

The fifth principle to be incorporated into the court's plan is one that requires only passing reference here because it is already well established in this court's practice. The local rules already prohibit discovery motions or other applications with respect to discovery unless the motion "contains a certification of counsel that the parties, after reasonable effort, are unable to resolve the dispute."[49]

---

49. Local Rule of Civil Procedure 24(f).

XI. ALTERNATIVE DISPUTE RESOLUTION

The Eastern District of Pennsylvania has been a recognized leader in using alternative dispute resolution ("ADR") to reduce cost and delay in civil litigation. It was one of the very first federal courts to adopt a program of court-annexed arbitration.[50] The felicitous experience under this program, documented by carefully kept statistics since the program's inception, has proved to be influential in persuading Congress to expand the program to other district courts.

The Civil Justice Reform Act requires in section 473(a)(6) that each pilot court program include "authorization to refer appropriate cases to alternative dispute resolution programs that (A) have been designated for use in a district court; or (B) the court may make available...." The Report of the Senate Committee on the Judiciary that accompanied the legislation discusses a number of familiar forms of alternative dispute resolutions, but makes clear that identification of these particular techniques "is not intended to signal any disapproval of other excellent techniques also currently employed."

As this legislative history implies, it is appropriate for a court to make available a variety of ADR programs so that each case might be matched with an appropriate mechanism. In doing so, the court must balance the time and resources required by each program against the anticipated reduction in cost and delay for the litigants. It is, of course, critical that the court avoid too many attempts to resolve any particular case short of trial, while still maintaining flexibility for litigants to take advantage of any program likely to be beneficial, and to do so at various stages of the litigation. It is also important for the court to evaluate the cost to the judicial system of administering alternative dispute resolution programs.

Different types of ADR include the following kinds of programs: early neutral evaluation, settlement judges or magistrates, mediation, settlement weeks, valuation, arbitration, mini-trials and summary jury trials.

---

50. Senior Judge Raymond J. Broderick has been nationally recognized for his role in furthering this program since its beginning.

As set out in the Court-Based Dispute Resolution Programs materials published by the Federal Judicial Center, the general benefits and general concerns of ADR are these:

General Benefits

1. Parties get a neutral evaluation without risk of compromising the perceived neutrality of the trial judge.
2. Trial judges should experience a reduction in caseload burden because some cases are diverted from the normal processing track.
3. The setting of a firm date for the procedure should stimulate earlier settlements.
4. Both sides are put in the position of operating on the same information that may narrow the issues and spur more settlements or shorter, more focused trials.

General Concerns

1. Inaccurate neutral intervention may translate into unrealistic client expectations and a hardening of positions.
2. Some litigants and attorneys object to an early disclosure of their cases.
3. Such programs may simply add another costly layer to the litigation process unless they replace other procedures that would have been used.
4. There is a question in some circuits whether district courts may require the attendance of parties at alternative dispute resolution hearings or conferences.

All of these programs structure the pretrial process to encourage parties to resolve their disputes more quickly themselves and provide for timely court or other neutral intervention if they do not.

Before proceeding further, we must consider the ADR programs this court currently offers. The established mandatory, non-binding arbitration program of this court, described above, is a nationally recognized mode. It deals effectively with more than 20 percent of the civil litigation caseload.

Early this year, the court instituted a mediation program to supplement its successful arbitration program. Preliminary reports suggest that the mediation program is proving even more successful in inducing settlements than had been anticipated. Of the 955 cases eligible for mediation since January 1991, 145 have settled. Of the like number of cases not eligible for mediation, only 76 have settled. This two-fold increase is promising. The program will be thoroughly evaluated at the end of the one-year trial period. More significantly, because the court set up the program as a random experiment, we can expect more reliable information than is normally available in assessing the desirability of continuing, modifying or discontinuing this form of ADR in this court.

With both the arbitration program and the mediation program already in place, functioning well and working toward the twin goals of reducing cost and delay in civil litigation, it would not be useful to adopt additional ADR programs at this time. While other ADR options can and should be made available to appropriate litigants, such as early neutral evaluation, which will later be addressed, we believe our current ADR programs are particularly effective for diversity cases, which continue to be the largest group of cases on our docket. Cases that have a high settlement potential are already on an ADR track. Proliferating alternative dispute resolution programs can add to cost and delay. Thus, the mediation rule wisely excludes cases that are eligible for the arbitration program.

If the mediation program, now in its experimental stage, proves to be successful, a plan of modest compensation should be instituted for the mediators. This is especially so since the program has just been modified to provide three-case assignments to the mediators, just as the arbitration program does. The Bar is presently involved in numerous *pro bono* programs with the court. These programs shift the burden of increasing costs from the court to the Bar. To balance this burden, mediators should be compensated. To accomplish this payment, funds may be reprogrammed from the money available for payment of arbitrators' fees.

The Advisory Group has heard from the Center for Public Resources in substantial detail concerning its programs and its services to the judiciary. It has also heard from the American Arbitration Association. We note, for example, specialized publications concerning environmental dispute resolution, with pollution issues treated

separately from toxic-related matters under federal law, arbitration of construction cases, intellectual property disputes and insurance coverage disputes.

We recommend that there be a resource within the court, possibly a committee of judges serviced by the Clerk's Office and working in conjunction with a Bar committee, that would keep current on available programs of specialized ADR. Such a committee would be in a position to respond to requests for information made by any judicial officer.

We are under no illusion that any such program will have a major impact, and possibly not even a discernible impact, on the court's docket. However, if a handful of cases each year and the litigants involved in those cases benefit from heightened sensitivity to ADR, the program would be worthwhile.

PART THREE:
COST AND DELAY REDUCTION TECHNIQUES NOT MANDATED

The statute specifically enumerates a number of cost and delay reduction techniques that must be considered by each district court, but that need not be adopted.[51] *In addition, the statute specifically invites consideration of "other features" that may commend themselves to the court in consultation with the Advisory Group.*[52]

This part of the report responds to that requirement of the statute.

---

51. 28 U.S.C. § (b) (1)-(5).
52. 28 U.S.C. § (b) (6).

XII. JOINT DISCOVERY—CASE MANAGEMENT PLANS

The statute requires the Advisory Group to consider, but does not compel it to implement, a requirement "that counsel for each party to a case jointly present a discovery–case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so."[53]

The theme we have repeated throughout this report of different treatment for different cases applies here. We do not believe such a requirement, applied indiscriminately, would reduce costs. More likely, it would increase costs for litigants with simple cases and a short period from complaint to trial. For those cases an early, firm trial date and a discovery cutoff are sufficient.

For complex cases, however, we believe that a plan addressing discovery management is useful. We have already proposed, in the discussion of complex cases in section VIII, that the parties be required to prepare for the initial pretrial conference a case management plan. The plan should include, among other elements, identification of categories of documents or information that can be exchanged summarily, without objection and by order of the court; deposition procedures that could include limitations on the time for the deposition or establish agreed-upon locations; and any necessary confidentiality orders.

We recommend that the court adopt this requirement as an element of its plan as a procedure for cases that are assigned to the Special Management track.

---

53. 28 U.S.C. § 473 (b) (1).

XIII. REPRESENTATION BY ATTORNEY WITH POWER TO BIND

The Act requires each district court to consider adopting a provision in its plan that would require "each party to be represented at each pretrial conference by an attorney who has authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters."[54]

This provision, separate and distinct from a provision relating to the presence at settlement conferences of representatives authorized to bind their principal,[55] would make explicit the authority of the district judge to announce such a requirement, limited to matters previously identified by the court.

The Advisory Group recommends implementation of such a provision. We note that although the text of the statute is couched in terms of attendance of an attorney with such authority at "each pretrial conference," the requirement is not operative except as to matters previously identified by the court. This vests an appropriate discretion in the court and should be invoked only when required for the efficient management of the litigation.

54. 28 U.S.C. § 473 (b) (2).
55. 28 U.S.C. § 473 (b) (1).

XIV. PARTY SIGNATURE TO REQUESTS FOR EXTENSION OF DISCOVERY DEADLINE OR TRIAL DATE

The statute invites promulgation by the court as part of its plan "a requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request."[56]

We have considered the proposal and recommend strongly against it.

A rule stating that the attorney's signature alone is not sufficient to request an extension or continuance reflects a distrust of the attorney–client relationship. We find no basis for such distrust and object to the subliminal message such a provision would inevitably send to litigants and to the public.

---

56. 28 U.S.C. § 473 (b) (3)

XV. NEUTRAL EVALUATION PROGRAMS

The Civil Justice Reform Act mandates that the court shall consider, although it need not adopt, a program of early neutral evaluation (ENE).[57] Such a program provides for "the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a non-binding conference conducted early in the litigation."[58]

The theory behind such a program, pioneered in the Northern District of California but modeled after a more limited program in both state and federal courts in Michigan, is that a qualified neutral observer's assessment of the litigation, duly communicated to the parties, might result in early settlement, sharply reducing transaction costs and certainly expediting the ultimate disposition.

The primary administrative difference between our mediation program and early neutral evaluation is that the latter calls for an evaluator with expertise in the particular area of the litigation—for instance someone knowledgeable about securities fraud in a case of that type, about construction contracts in a case of that type. This expertise is necessary because the program calls for an impartial assessment by a knowledgeable neutral, one whose assessment is recognized by the parties as credible. Obviously, any such program must be administered with care.

The Northern District of California, after an experimental period, was sufficiently satisfied with ENE to make the program permanent. The results reported in that district approximate the preliminary figures we may expect from our mediation program: settlements in approximately one-fourth of the cases.[59]

We recommend that in assessing the experience with mediation the court consider whether any role exists for a supplemental program of early neutral evaluation. As a corollary, we recommend that no formal ENE program be implemented before the evaluation of the mediation program, now in its one-year experimental phase. The chair of the Philadelphia Bar Association Committee on mediation has testified that sufficient data for evaluation of the latter program should be available by the end of this year.

---

57. 28 U.S.C. § 473(b)(4).
58. 28 U.S.C. § 473(b)(4).
59. *See* Northern District of California adopts Early Neutral Evaluation to expedite Dispute Resolution, 72 Judicature 235 (1988–89).

One recommendation to be considered by the court is that ENE become yet another tool available to the judges in this district. Because local attorneys are already sitting as arbitrators and mediators, they and the magistrate judges could provide an early neutral evaluation in any areas in which they have established expertise. Far from being mandatory, a local rule could be adopted that would make ENE another option available, to be used only at the discretion of the court and only in cases where specialized issues could be matched with highly qualified neutral evaluators. This would be entirely consistent with our recommendation that the court make available to the litigants ADR programs potentially useful in the individual case.

XVI. REPRESENTATIVES WITH AUTHORITY TO SETTLE

The Act invites promulgation of a requirement that "upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference."[60] The legislative history emphasizes the value of client participation in settlement conferences:

"The committee believes that cases are more likely to be settled when the clients themselves are present, in person or by telephone, during any court-sponsored settlement conference. The presence of the client makes it difficult, if not impossible, for the attorneys to delay settlement discussions—often for weeks or months—by asserting that they must get back to their clients."[61]

The proposal embodied in the statute is similar to Local Rule 21(d) par. 3 of the local rules of the Eastern District of Pennsylvania. That rule, limited to the final pretrial conference, provides that it "shall be attended by trial counsel, who must be either authorized and empowered to make binding decisions concerning settlement, or able to obtain such authority by telephone in the course of the conference."[62]

The rule proposed in the statute is somewhat broader than the local rule presently in force in this district. To the extent that it differs, it would confer broader authority on the district judge, to be invoked as discretion dictates. We recommend that it be adopted by the court.

---

60. 28 U.S.C. § 473 (b) (5).
61. Civil Justice Reform Act of 1990, H.R. Report 101-732 at 16.
62. Local Rule 21(d) par. 3.

XVII. ADDITIONAL FEATURES THE ADVISORY GROUP MAY CHOOSE TO RECOMMEND

A. Expediting Service of Process

A number of judges have commented on the apparent anomaly of a statutory provision that contemplates a firm trial date no later than 18 months after the filing of the complaint in all but the most complex civil cases[63] and a provision in the Federal Rules of Civil Procedure that allows, without justification or penalty, up to four months of that period for completion of service of process.

Anomaly aside, we have been urged to recommend that this period from filing to service be shortened, absent a showing of good cause, because it is excessive and needlessly delays the disposition of the case. From the point of view of a litigant seeking relief, it matters little whether the cause of delay is a continuance granted at the request of an attorney, or an excessive period in accomplishing service on the defendant or defendants.

The 120-day period in question is of relatively recent origin. It came into the rule in 1983 when Fed.R.Civ.P.4 was substantially rewritten to relieve the United States Marshals Service and to substitute service by private citizens. In addition, a major change in the rule allowed service by ordinary mail. Before the 1983 amendment there was no specific period provided in Rule 4, and the standard was said to be one of "flexible due diligence." With service by federal marshals as the mandated procedure, this was not a major problem, although it might be noted that the 120-day limit has been viewed by some commentators as intended to ***reduce*** the time between the institution of litigation and service.

The Advisory Group is persuaded that the 120-day period allowed by Fed.R.Civ.P.4(j) is excessive and recommends that it be reduced substantially, retaining power in the court to extend the period for good cause shown.

We do not believe that this change should be made by local rule; rather, the national rule should be amended. It might be noted that the relevant portions of Federal Rule 4 were enacted as a statute after the Congress had rejected the version of

---

63. 28 U.S.C. § 473 (a) (2) (B).

the rule transmitted by the Supreme Court. This, of course, does not preclude amendment of the national rule, duly promulgated by the Supreme Court and laid before the Congress in accordance with the enabling act.

We recommend amendment of Fed.R.Civ.P.4(j) because the focus of such a change would be on concern for the litigants, on avoiding delay that is deleterious and on achieving dispatch in disposition consistent with preserving the highest possible quality of adjudication.

B. Use of Magistrate Judges and Special Discovery Masters

1. Civil Trials before Magistrate Judges

When magistrates were first authorized to conduct civil trials and order entry of judgment, that authority was conditioned on the consent of the parties, a condition that remains in effect.

The detailed provisions governing that consent reflect congressional concern lest the judges attempt to pressure the parties into consenting, even by reference to the state of the civil docket. Thus, the notice to the parties of their right to consent to trial before a magistrate was to come from the Clerk of Court; the decision of the parties was to be communicated to the Clerk; the notice was to be sent to the parties at the time the action was filed; and, remarkably enough, there was a further provision that "Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent..." As if all this were not enough, the section concludes by requiring that the relevant local rules "shall include procedures to protect the voluntariness of the parties' consent." [64]

Read in context, the prohibition against the district judge's attempting to induce any party to consent effectively proscribed any mention of the possibility beyond the original notice from the Clerk. The Judicial Improvements Act of 1990, of which the Civil Justice Reform Act is a part, amended section 636 and changed those provisions.

Section 636 now provides that the initial advice by the Clerk shall be "of the availability of a magistrate" to try civil cases.[65] Moreover, even after the parties

---

64. Former 28 U.S.C. § 636 (c) (2) (amended to current 28 U.S.C. § 636 (c) (2) by the Judicial Improvements Act of 1990).

65. 28 U.S.C. § 636 (c) (2).

have communicated their decision to the Clerk, "either the district court judge or the magistrate may again advise the parties of the availability of the magistrate," although there is the obligation to inform the parties that "they are free to withhold consent without adverse substantive consequences."

These changes were signed into law December 1, 1990. Judicial mores, including the habits and customs of lawyers and litigants, change slowly. It is too early for this change to have had much impact. Nor do we suggest that if a judge is available to try a particular civil case, there is any reason to substitute a magistrate judge. However, the evidence before us suggests that there is very substantial docket pressure on the judges, that as a result scheduling is not yet optimal and that increased use of magistrate judges in appropriate cases would be desirable, especially in trials de novo on appeal from arbitration awards.

This recommendation should not be read as minimizing the urgency of filling all authorized district judgeships, or as justifying the delay in authorizing additional district court judgeships.

Another advantage is to be gained from increasing the opportunity for magistrate judges to try cases: It adds diversity to their workload and prestige to the office. Not every magistrate judge is empowered to conduct civil trials, even if the parties consent. The statute requires that the district court shall "specially designate[]" each magistrate who is deemed qualified for the exercise of such jurisdiction, which includes jury as well as nonjury trials.

The Advisory Group recommends that the judges of the Eastern District of Pennsylvania use the new procedures for magistrate judges to try appropriate civil cases, and that lawyers and litigants consider the availability of magistrate judges as an alternative means of trial.

To facilitate appropriate consideration by the parties of this resource, the Advisory Group further recommends that the Clerk of Court distribute a suitable response form with the original notice of availability, and to the extent useful and appropriate, whenever thereafter similar advice is communicated to the parties.

2. Additional Magistrate Judges

Magistrate judges are so busy with criminal matters in the Eastern District of Pennsylvania that judges are reluctant to add to that burden by referring civil litigation to them. As detailed earlier in this report, at Section I(D)(3), the volume of criminal

matters has already resulted in a sharp decrease in magistrate judges' contribution to the handling of civil litigation.

In making these recommendations, the Advisory Group is not unmindful of this, nor does it intend to re-order priorities. Our recommendations rest on a fundamental premise: Any rational program of reducing cost and delay in civil litigation requires that the court be provided with adequate resources, including an appropriate number of magistrate judges.

To stint on the number of magistrate judges is false economy. Creating new magistrate judge positions provides greater flexibility than does authorizing new district judgeships; the total number may be raised or lowered more readily in response to changes in docket conditions. Beyond this, it is more economical to add magistrate judges than to add district judges, and it is far simpler and typically more expeditious.

There have been two major difficulties in assuring the availability of an adequate number of magistrate judges in the Eastern District of Pennsylvania: having new positions authorized and having them funded and filled.

Historically, new judicial positions are authorized only on the basis of demonstrated need, which means existing rather anticipated need. This has been generally true of magistrate judgeships. Thereafter comes a process of approval by a committee of the Judicial Conference of the United States and by the Conference itself. Funding follows in due course in accordance with established budgeting procedures and appropriation requests. From "first approval" to putting a magistrate judge in office typically takes 18 to 24 months.

Because of the efforts of Chief Judge Bechtle, the Director of the Administrative Office of the United States Courts has undertaken to develop and to seek approval for expansion of a program currently available to districts seriously affected by narcotics cases that would significantly reduce the current waiting period.

Whatever might be said in favor of caution in the creation of new district judgeships, which are both lifetime positions and concerning which political considerations are inevitably involved, the creation of new magistrate judgeships should be made more flexible and more responsive to docket demands.

The Advisory Group recommends that the court seek and obtain whatever number of magistrate judgeships is necessary for the expeditious handling of its caseload, civil and criminal, and that the process of authorizing and funding these positions be expedited.

3. Special Discovery Masters

Special situations often benefit from special procedures. Faced with a dispute over the applicability of attorney-client privilege or work product immunity to hundreds of documents, each requiring an individual ruling, a judge might well refer the matter to a magistrate judge. No magistrate judge may be available, and the optimal procedure may be appointment of a special discovery master to act in the first instance, the master's decisions subject to exceptions and review by the district judge. Such review is typically based on a clearly erroneous standard.

Resort to a special discovery master is relatively rare in this district, but it is in more general use in other circuits. Both lawyers and judges have reported such appointments to have been successful. Moreover, it is especially appropriate in complex litigation that already demands a great deal of the judge's time and in which further delay is particularly undesirable.

In *In re Sunrise Securities Litigation*, 124 F.R.D. 99 (M.D.L. No 655, E.D. Pa. 1989), Judge O'Neill appointed a special discovery master, noting the following circumstances: "Most of the motions raise complex issues of privilege, including the applicability of work-product, attorney-client, grand jury and joint defense privileges. Parties have withheld thousands of documents as privileged, many on the basis of more than one privilege."[66]

Authority for such appointments is to be found in Fed.R.Civ.P. 53. Judge O'Neill, in the opinion cited above, quotes Wright and Miller, *Federal Practice and Procedure: Civil § 2605*, supporting such appointment in "unusual cases" and the *Manual for Complex Litigation*, Second Edition, to the same effect. [67]

The Advisory Group recommends the use of special discovery masters in those cases where such appointments will serve the interests of the court and the litigants.

---

66. 124 F.R.D. 99.
67. Id. at 100.

C. *Pro Se* Complaint Form

The Advisory Group was urged to address the cost involved in litigating cases brought by prisoners alleging civil rights violations, most often brought *pro se*. Under the court's procedures, these cases are screened by two *Pro Se* law clerks who determine whether the court should appoint counsel. When counsel are appointed, which rarely occurs, they represent the plaintiff on a *pro bono* basis. When counsel are not appointed, there was some evidence that the proceedings may be prolonged as judges attempt to ensure that the litigant fully and fairly litigates the claim.

With the exception of one modest suggestion, the group concluded that the present procedure for this class of cases is satisfactory. They are not monolithic, but can be simple or complex, depending upon the subject matter. While some may be frivolous, others involve important constitutional rights, and the group was reluctant to suggest anything that would curtail the right to proceed with those cases. Beyond this, the cases do not represent a significant percentage of the docket; as of July 1, 1990, 5.0 percent of the pending civil cases were prisoners' civil rights or other cases.

One suggestion might assist in more efficient resolution of these cases. We learned that it is often difficult to understand what the complaint is really all about--even the persons involved or the location of significant events. To help in clarifying such issues at the beginning, we suggest that the court provide for clerical review of the form complaint to help determine whether modifications exist that would encourage a plaintiff to set forth a claim with greater specificity. Such a modification, together with the required early disclosure of significant witnesses and documents, could reduce the time-consuming discovery that such cases sometimes engender.

A CONCLUDING WORD

The first of the "cornerstone principles" of the Civil Justice Reform Act is that change must come from the "bottom up," that each of the 94 district courts is to survey its own situation and build its own program tailored to its own needs.[68]

---

68. Committee on the Judiciary, S. Rep. No. 101-416 (1990) at Senate 14.

As must be evident, the Eastern District of Pennsylvania is not a typical court. Given the demands placed upon it, its record has been exemplary. Yet it is clear that there is room for improvement, and we have been encouraged that this view is widely shared by both Bench and Bar, accompanied by a willingness to search for and experiment with potential improvements.

The design of the Act is important in another respect. Neither this report nor the resultant plan is to be a one-time effort. An annual assessment of the condition of the court's dockets is required. The judicial world, no less and perhaps even more than the world around it, is not static. Even if it were, many a reform has been more appealing in prospect than in retrospect. No less than once a year, there is to be a reassessment and a renewed effort to improve.

Reviewing what we have produced we, and surely others, are tempted to ask whether the product has been worth the effort, whether the inquiry is important enough to have warranted the concern mandated by the statute. Instead of the grand sweep of major issues of public policy with which courts and commissions are sometimes concerned, this report appears focused on technical minutiae. And indeed it is. We have been concerned with the prosaica of the litigation process: Is mediation preferable to "early neutral evaluation"? Shall there be "voluntary" disclosure of significant documents—under pain of sanctions—or shall we continue to insist on a formal request? And precisely because that is the case, it is important to be aware of the underlying concerns that animate the Civil Justice Reform Act.

The statute speaks of the need to facilitate "access to the courts."[69] It speaks of the need to "ensure just, speedy, and inexpensive resolutions of civil disputes."[70] The legislative history is at the same time more explicit and more dramatic. The Senate Report quotes Judge Jon Newman of the United States Court of Appeals for the Second Circuit, an American Bar Association task force, Justice Powell and Chairman Biden, who, taken together, warn that what is at stake is access to justice.[71]

---

69. 28 U.S.C. § 472 (c) (3).
70. 28 U.S.C. § 471.
71. Senate Committee on the Judiciary, S. Rep. No. 101-416 (1990) at 8.

Clearly, those who drafted the statute and we who have participated in its implementation are not concerned with access to justice in the formal sense of who may sue and who may defend. This report does not speak to standing to bring suit. It focuses on details that may smooth the path of civil litigation for the litigants. The major premise of the legislation and the animating principle behind this report is that to preserve access to the courts in a realistic sense, cost must not be prohibitive and delay must not effectively deny a remedy.

It is useful to be reminded of the words of an American Bar Association task force chaired by Honorable Griffin B. Bell, written some 15 years ago:

> It is important to keep firmly in mind that neither efficiency for the sake of efficiency, nor speed of adjudication for its own sake are the ends which underlie our concern with the administration of justice in this country. The ultimate goal is to make it possible for our system to provide justice for all. Constitutional guarantees of human rights ring hollow if there is no forum available in fact for their vindication. Statutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting it. Only if the courts are functioning smoothly can equal justice become a reality for all.[72]

Our hope is that we have contributed in some small measure to that goal —equal justice for all—and that we may have eased the path for our successors to do likewise.

---

72. American Bar Association, Report of Pound Conference Follow-Up Task Force (1976) reprinted in Levin and Wheeler (eds.), *The Pound Conference: Perspectives on Justice in the Future* (1979), 295, 300.

ATTACHMENTS

MEDIAN TIME INTERVALS IN MONTHS FROM FILING TO DISPOSITION OF CIVIL CASES TERMINATED SY90

	PA-EASTERN	NATION
TOTAL CASES	6	8
UNITED STATES CASES	5	6
CONTRACT ACTIONS		
Negotiable Instruments	-	5
Recovery of Overpayments and Enforcement of Judgments	2	3
Other Contracts	4	5
REAL PROPERTY	5	6
TORT ACTIONS		
Marine, Personal Injury	-	14
Motor Vehicle, Personal Injury	6	9
Other Personal Injury	7	13
Other Torts	-	8
ACTIONS UNDER STATUTES		
Antitrust	-	5
Civil Rights		
Employment	8	11
Other Civil Rights	7	6
Liquor Forfeitures	-	-
Other Forfeiture & Penalty Suits	5	6
Fair Labor Standards Act	6	8
Other Labor Litigation	4	5
Selective Service Act	-	-
Social Security Laws		
Health Insurance	-	10
Black Lung	-	2
Disability Insurance	9	10
Supplemental Security Income	8	10
Retirement & Survivor Benefits	-	10
Other	-	-
Tax Suits	6	9
ALL OTHER U.S. ACTIONS	5	6

* Time intervals are computed only where there are ten (10) or more cases.

Continued

MEDIAN TIME INTERVALS IN MONTHS FROM FILING TO DISPOSITION OF CIVIL CASES TERMINATED SY90

(Continued)

	PA-EASTERN	NATION
FEDERAL QUESTION	6	8
CONTRACT ACTIONS		
Marine	5	7
Miller Act	6	7
Other Contracts	4	8
REAL PROPERTY	-	7
TORT ACTIONS		
Employers' Liability Act	7	12
Marine, Personal Injury	7	12
Other Personal Injury	10	11
Other Torts	11	9
ACTIONS UNDER STATUTES		
Antitrust	18	14
Civil Rights		
Employment	8	12
Other Civil Rights	7	10
Fair Labor Standards Act	8	11
Labor Management Relations Act	5	7
Other Labor Litigation	4	6
Copyright	4	6
Patent	8	10
Trademark	3	6
CONSTITUTIONALITY OF STATE STATUTES	-	6
ALL OTHER FEDERAL QUESTION	5	7
DIVERSITY OF CITIZENSHIP	7	10
CONTRACT ACTIONS		
Insurance	7	10
Negotiable Instruments	6	8
Other Contracts	5	9
REAL PROPERTY	5	5
TORT ACTIONS		
Marine, Personal Injury	8	9
Motor Vehicle, Personal Injury	8	10
Other Personal Injury	8	13
Other Torts	8	11
ALL OTHER DIVERSITY	29	19

EASTERN DISTRICT OF PENNSYLVANIA
WEIGHTED CASELOAD
Statistical Years 1962 - 1997

YEAR ENDED JUNE 30th	JUDGESHIPS	WEIGHTED CASES PER JUDGESHIP	TOTAL WEIGHTED CASELOAD
1962	11	258	2,838
1963	11	258	2,848
1964	11	260	2,860
1965	11	279	3,069
1966	14	224	3,136
1967	13	241	3,133
1968	14	245	3,430
1969	13	276	3,588
1970	19	196	3,724
1971	19	255	4,845
1972	19	193	3,667
1973	19	203	3,857
1974	19	217	4,123
1975	19	242	4,598
1976	19	277	5,263
1977	19	281	5,339
1978	19	288	5,472
1979	19	346	6,574
1980	19	360	6,840
1981	19	349	6,631
1982	19	381	7,239
1983	19	427	8,113
1984	19	433	8,227
1985	19	501	9,519
1986	19	542	10,298
1987	19	551	10,469
1988	19	724	13,756
1989	19	688	13,072
1990	19	638	12,122
1991*	23	550	12,643
1992*	23	572	13,164
1993*	23	595	13,685
1994*	23	618	14,206
1995*	23	640	14,727
1996*	23	663	15,248
1997*	23	686	15,769

* Projected figures.

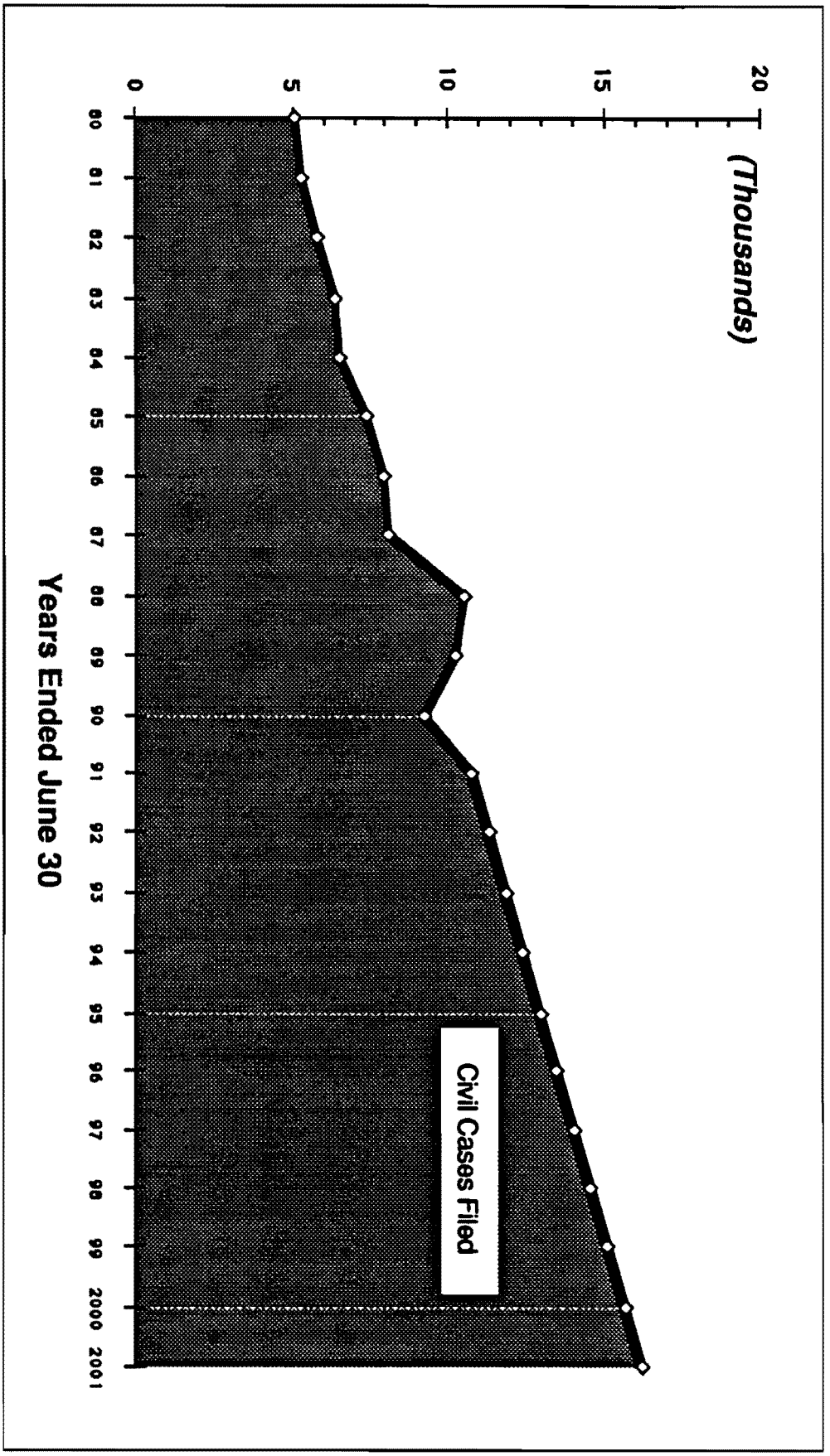
ATTACHMENT 4

CIVIL CASES PENDING AND LENGTH OF TIME PENDING AS OF JUNE 30, 1990

DISTRICT	TOTAL	LESS THAN 1 YEAR	1 TO 2 YEARS	2 to 3 YEARS	OVER 3 YEARS	% 3 YEARS + OVER OF TOTAL
S.D. N.Y.	12,269	5,643	3,270	1,789	1,567	12.8%
N.D. OH.	11,137	5,867	2,207	2,001	662	5.9%
E.D. PA.	**9,784**	**5,610**	**2,169**	**1,796**	**209**	**2.1%**
C.D. CAL.	8,586	5,071	1,719	1,054	742	8.6%
S.D. TX.	8,185	3,968	2,122	1,015	1,080	13.2%
N.D. ILL.	6,347	3,771	1,290	549	737	11.6%
D. N.J.	5,160	3,275	1,181	401	303	5.9%
N.D. TX.	5,121	3,139	1,260	426	296	5.8%
S.D. FLA.	4,100	2,752	847	340	161	3.9%
E.D. LA.	3,795	2,772	749	179	95	2.5%
NATIONAL	242,346	135,334	53,933	27,872	25,207	10.4%

PERCENTAGE BREAKDOWN OF THE NUMBER OF CIVIL CASES PENDING BY THEIR LENGTH OF TIME PENDING

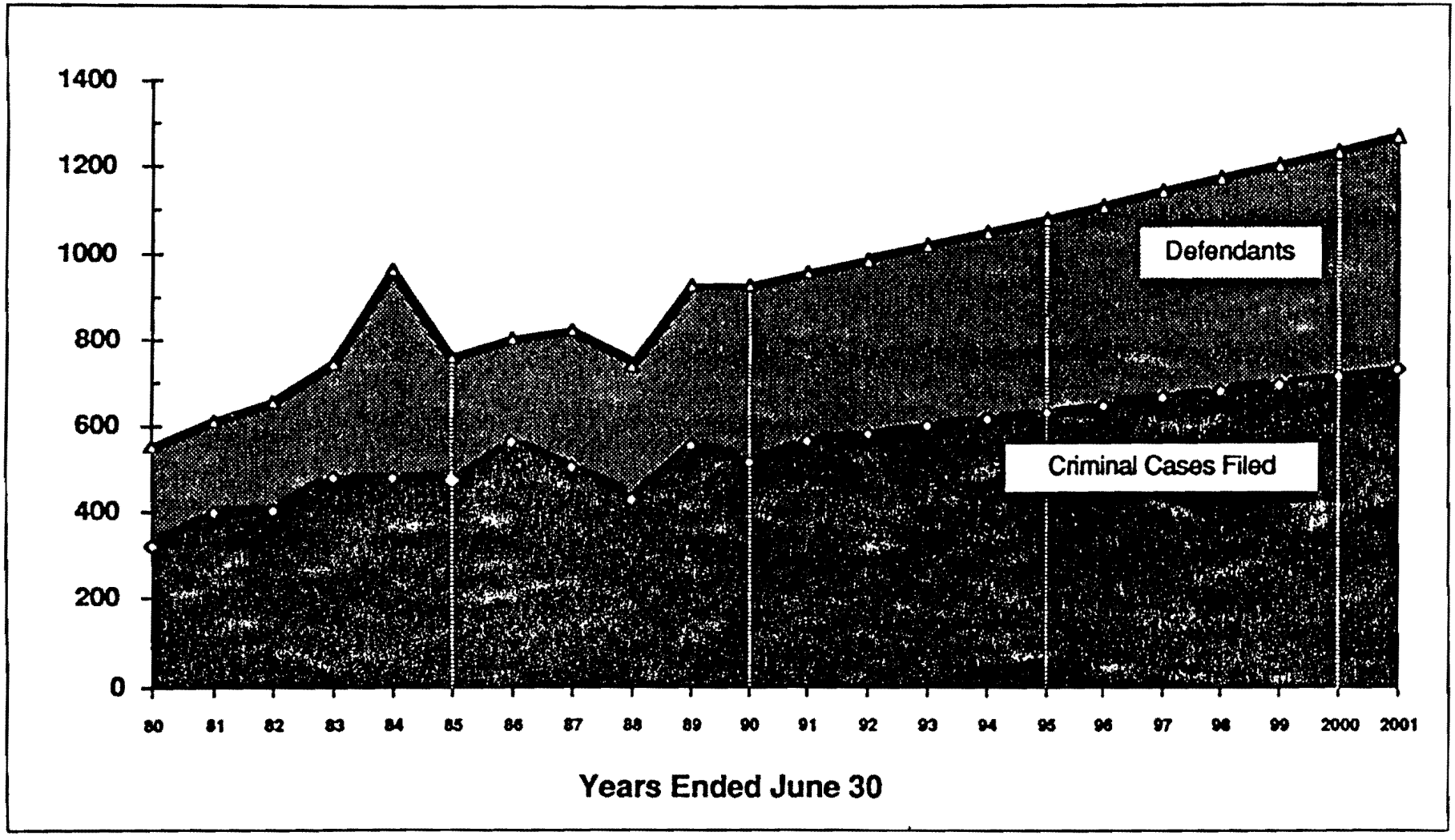
	LESS THAN 1 YEAR	1 to 2 YEARS	2 to 3 YEARS	OVER 3 YEARS
NATIONAL	55.8%	22.3%	11.5%	10.4%
TOP 10 METRO. COURTS	56.2%	23.1%	12.8%	7.9%
E.D. PA.	**57.3%**	**22.2%**	**18.4%**	**2.1%**


EASTERN DISTRICT OF PENNSYLVANIA
CIVIL CASES FILED
(Thousands)
0
5
10
15
20
Civil Cases Filed
Years Ended June 30
60 61 62 63 64 65 66 67 68 69 90 91 92 93 94 95 96 97 98 99 2000 2001

ATTACHMENT 6

EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL CASES FILED AND DEFENDANTS



E.D.PA CASES PENDING, FILED AND TERMINATED
Statistical Year 1990

	PENDING 7/1/89	FILED SY 90	TERMIN. SY 90	PENDING 6/30/90
TOTAL CIVIL CASES	8,902	9,271	8,389	9,784
U. S. CASES, TOTAL	601	846	899	548
RECOVERY	27	108	119	16
Medicare-Act	3	4	1	6
Student Loans	23	95	112	6
VA	0	5	5	0
Other Recovery	1	4	1	4
OTHER CONTRACT	22	58	50	30
LAND CONDEMNATION	1	3	2	2
OTHER REAL PROPERTY	15	16	22	9
TORT ACTIONS	82	121	114	89
ANTITRUST	1	2	1	2
CIVIL RIGHTS	66	60	72	54
PRISONER PETITIONS, TOTAL	26	60	55	31
Habeas Corpus	0	1	1	0
Civil Rights	0	1	0	1
Other	26	58	54	30
FORFEITURE AND PENALTY	37	68	69	36
LABOR LAWS	30	35	45	20
SOCIAL SECURITY	210	167	226	151
TAX SUITS	25	43	36	32
ALL OTHER U.S. CASES	59	105	88	76

Continued

E.D.PA CASES PENDING, FILED AND TERMINATED
Statistical Year 1990

(Continued)

	PENDING 7/1/89	FILED SY 90	TERMIN. SY 90	PENDING 6/30/90
PRIVATE CASES, TOTAL	8,301	8,425	7,490	9,236
CONTRACT	1,245	1,408	1,794	859
REAL PROPERTY	58	86	90	54
TORT ACTIONS, TOTAL	5,624	4,055	2,860	6,459
FELA	277	434	360	351
Air Personal Injury	18	22	29	11
Marine Personal Injury	77	83	101	59
Auto Personal Injury	588	534	704	418
Other Personal Injury	523	459	608	374
Asbestos Product Liability	3,381	2,141	613	4,909
Other PI Product Liability	292	298	321	269
Personal Property	108	84	124	68
ANTITRUST	34	26	25	35
CIVIL RIGHTS, TOTAL	463	543	538	468
Voting	1	1	0	2
Employment	152	169	164	157
Housing/Accommodations	7	7	7	7
Welfare	3	13	5	11
Other	300	353	362	291
COMMERCE	23	19	34	8
PRISONER PETITIONS, TOTAL	407	993	908	492
Habeas Corpus	148	280	266	162
Death Penalty	0	2	0	2
Civil Rights	258	711	642	327
Mandamus & Other	1	0	0	1
RICO	52	71	68	55
LABOR LAWS	279	578	520	337
COPYRIGHT, PATENT, TRADE.	77	161	153	85
ALL OTHER PRIVATE CASES	399	485	500	384

ATTACHMENT 8

EASTERN DISTRICT OF PENNSYLVANIA
FILINGS BY CASE TYPE
Statistical Years 1981 - 1990

	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990
Asbestos	20	47	133	212	216	326	448	1,838	1,489	2,114
Bankruptcy Matters	41	84	123	110	96	81	168	153	170	143
Banks and Banking	4	4	2	8	1	5	8	6	7	14
Civil Rights	398	428	429	471	505	625	636	630	622	603
Commerce: ICC Rates, etc.	44	59	53	92	86	74	65	41	35	22
Contract	1,262	1,324	1,348	1,366	1,609	1,818	1,885	2,073	2,318	1,445
Copyright, Patent, Trademark	98	118	118	135	107	103	132	125	124	162
ERISA	70	157	241	216	282	250	276	375	424	456
Forfeiture and Penalty (excl. drug)	20	11	32	18	33	33	37	50	63	53
Fraud, Truth in Lending	45	32	64	38	46	50	59	60	52	44
Labor	270	276	209	227	234	254	188	162	171	157
Land Condemnation, Foreclosure	49	35	38	25	43	57	42	35	78	64
Personal Injury	1,685	1,695	1,759	1,724	2,166	2,400	2,379	2,663	2,444	1,915
Prisoner	570	558	660	561	650	680	823	971	1,072	994
RICO	0	0	0	0	0	35	41	39	54	71
Securities, Commodities	63	73	96	88	145	127	108	130	135	98
Social Security	209	290	495	538	355	316	160	201	225	165
Student Loan and Veteran's	0	46	8	106	163	90	29	67	130	100
Tax	149	91	93	45	50	55	56	31	44	43
All Other	311	459	520	522	605	609	562	895	601	608
All Civil Cases	5,208	5,787	6,421	6,502	7,392	7,988	8,102	10,545	10,258	9,271

ATTACHMENT 9 (page 1 of 2)

EASTERN DISTRICT OF PENNSYLVANIA

ASBESTOS CASELOAD

FOR STATISTICAL YEARS 1977-1990

CASE STATISTICS				
YEAR	NO. CASES	NO. CASES TERMINATED	NO. PLACED IN SUSPENSE	NO. PENDING
1977-82	273	109	11	153
1983	133	34	38	214
1984	212	56	14	356
1985	216	51	80	441
1986	326	87	130	550
1987	448	124	139	735
1988	1,838	584	-269	2,254
1989	1,489	319	30	3,398
1990	2,114	511	83	4,919
TOTAL	7,049	1,875	256	4,919

ASBESTOS CASELOAD FOR STATISTICAL YEARS 1977-1990 (Continued)

ASBESTOS PARTIES					
YEAR	YEARLY TOTAL TERM/SUSP/NEW	NO. TERM.	NO. PLACED IN SUSP.	NO. OF PARTIES PENDING	
				NEW	RUNNING TOTAL
1977-84	11,082	4,017	1,608	5,997	5,997
1985	4,689	2,217	331	2,141	8,138
1986	6,292	3,652	641	1,999	10,137
1987	7,788	4,788	857	2,143	12,280
1988	30,493	7,050	-396	23,839	36,119
1989	30,752	6,640	883	23,229	59,348
1990	38,688	11,188	2,125	25,375	84,723
TOTAL	129,784	39,552	5,509	84,723	84,723

BREAKDOWN OF PARTIES IN 4919 CASES AS OF JUNE 30, 1991				
	NO. OF PLAINTIFFS	NO. OF DEFENDANTS	NO. OF THIRD-PARTY DEFENDANTS	TOTAL NO. OF PARTIES
PENDING	9,780	73,187	1,756	84,723
IN SUSPENSE	568	4,533	408	5,509
TERMINATED	4,368	30,451	4,733	39,552
TOTAL	14,716	108,171	6,897	129,784

ATTACHMENT 10

PENNSYLVANIA PRISON POPULATIONS

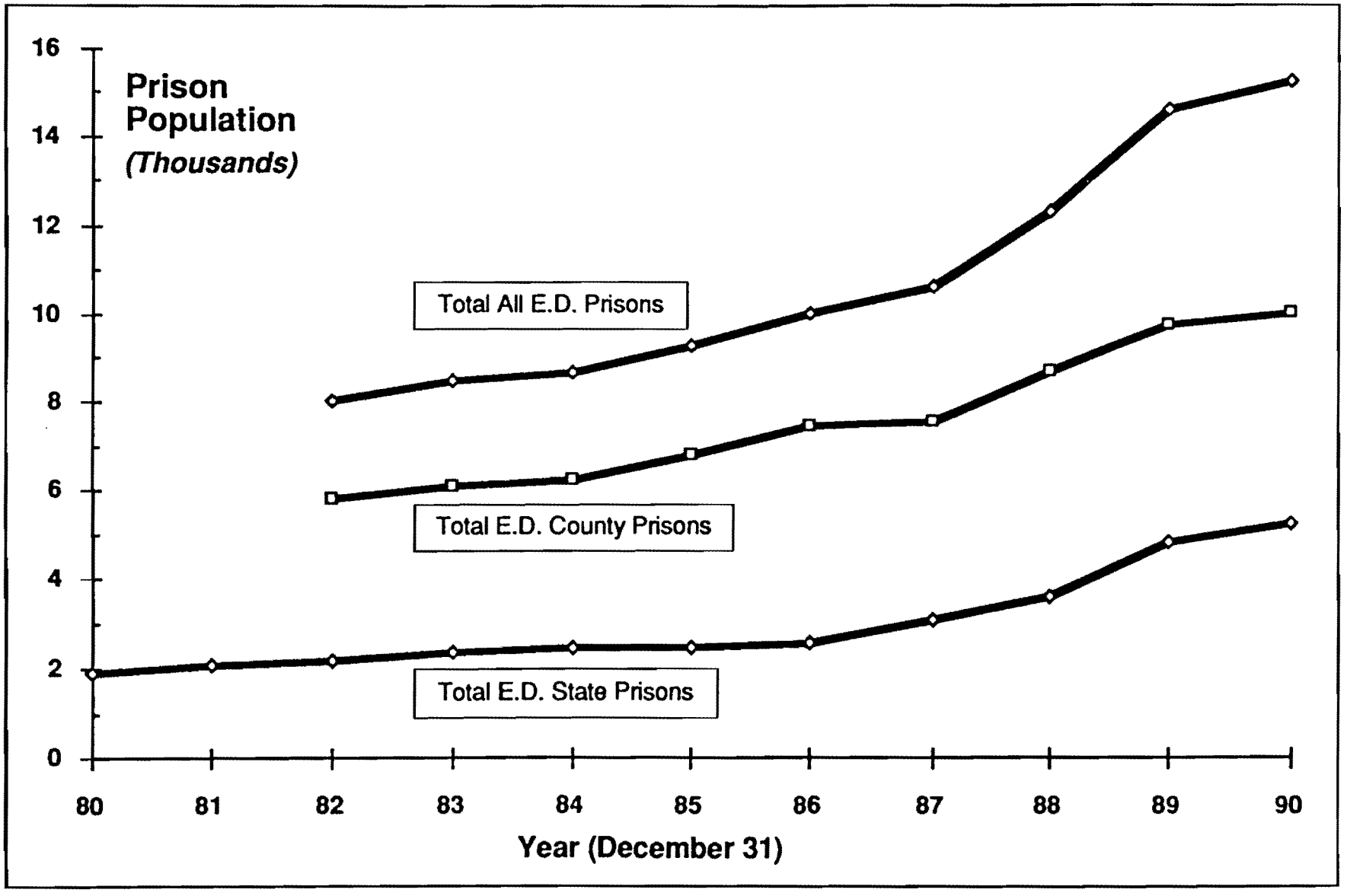
	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990
ALL STATE PRISONS	8,243	9,420	10,572	11,798	13,126	14,260	15,227	16,302	17,929	20,490	22,325
% Change		14.28%	12.23%	11.60%	11.26%	8.64%	6.78%	7.06%	9.98%	14.28%	8.96%
GRATERFORD	1,930	2,129	2,194	2,399	2,476	2,488	2,579	2,451	2,753	3,881	4,175
% Change		10.31%	3.05%	9.34%	3.21%	0.48%	3.66%	-4.96%	12.32%	40.97%	7.58%
FRACKVILLE								629	835	935	1,038
% Change									32.75%	11.98%	11.02%
TOTAL E.D. STATE PRISONS	1,930	2,129	2,194	2,399	2,476	2,488	2,579	3,080	3,588	4,816	5,213
% Change		10.31%	3.05%	9.34%	3.21%	0.48%	3.66%	19.43%	16.49%	34.23%	8.24%
COUNTY PRISONS											
Berks			265	298	295	300	311	382	516	536	510
Bucks			259	272	284	431	457	537	570	724	693
Chester			286	349	402	457	417	454	457	537	528
Delaware			445	418	505	532	568	548	762	789	835
Lancaster			275	267	291	301	341	380	424	512	526
Lehigh			232	271	254	279	315	367	435	467	580
Montgomery			351	369	384	384	494	578	730	799	840
Northampton			219	199	245	281	278	280	347	397	359
Philadelphia			3,426	3,576	3,496	3,760	4,188	3,896	4,349	4,863	4,999
Schuylkill			80	72	83	92	95	123	127	139	152
TOTAL E.D. COUNTY PRISONS			5,838	6,091	6,239	6,817	7,464	7,545	8,717	9,763	10,022
% Change				4.33%	2.43%	9.26%	9.49%	1.09%	15.53%	12.00%	2.65%
TOTAL ALL E.D. PRISONS			8,032	8,490	8,715	9,305	10,043	10,625	12,305	14,579	15,235
% Change				5.70%	2.65%	6.77%	7.93%	5.80%	15.81%	18.48%	4.50%

SOURCE: Pennsylvania Department of Corrections

ATTACHMENT 11

EASTERN DISTRICT

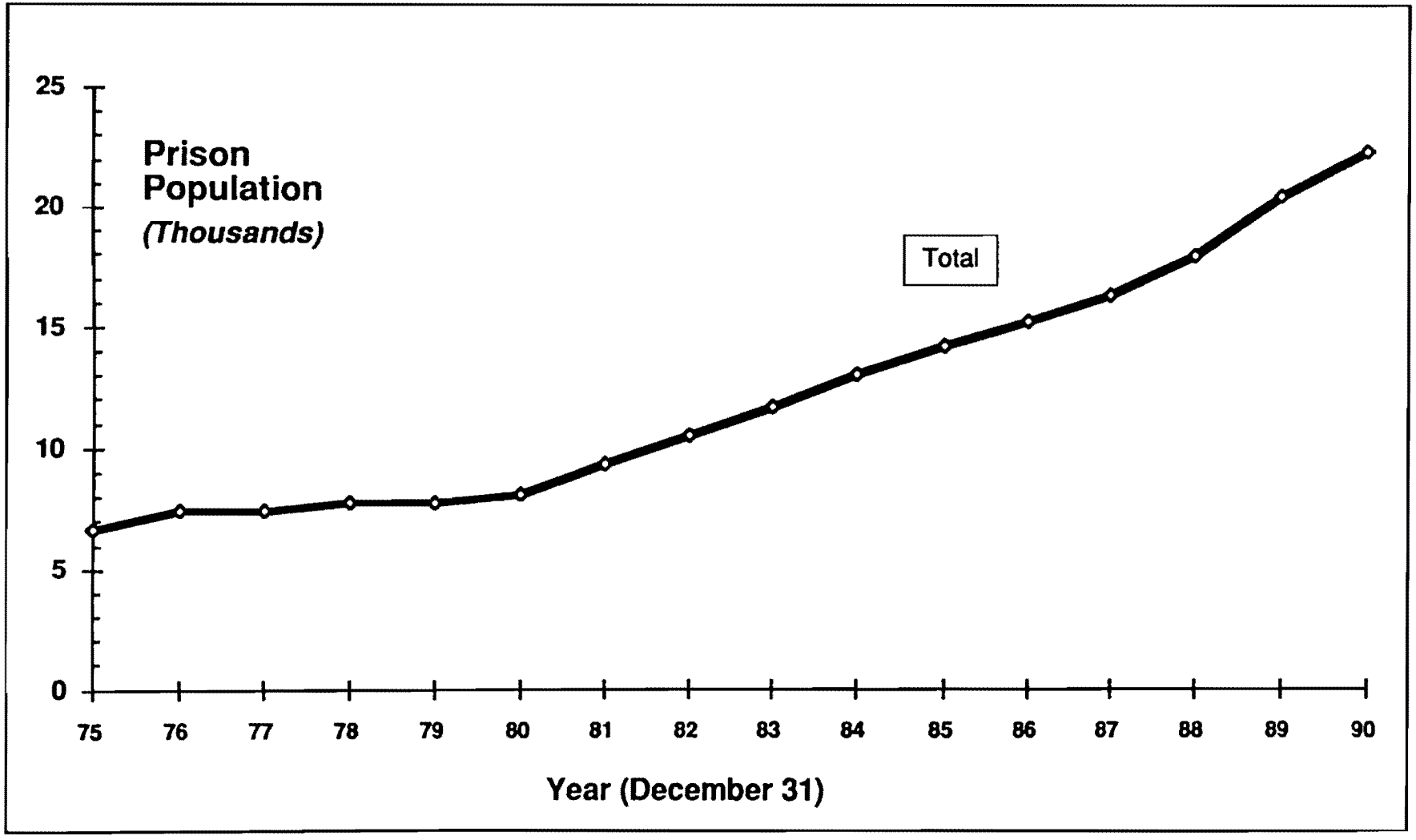
STATE AND COUNTY PRISONS



SOURCE: Pennsylvania Department of Corrections

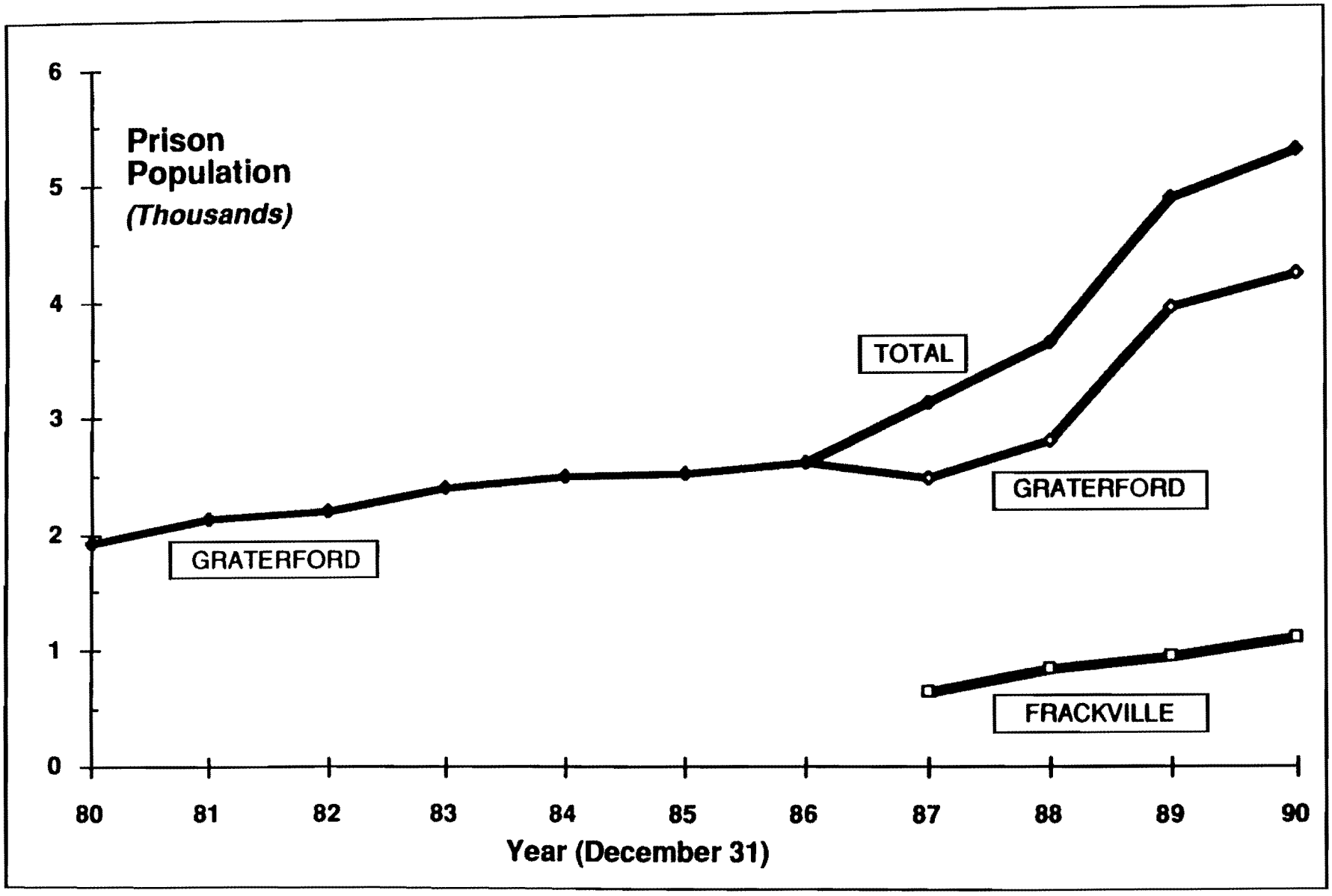
ATTACHMENT 12

ALL STATE PRISON POPULATIONS



SOURCE: Pennsylvania Department of Corrections

EASTERN DISTRICT
STATE PRISON POPULATION



SOURCE: Pennsylvania Department of Corrections

CASES TERMINATED BY TRIAL AND LENGTH OF TIME PENDING FROM FILING TO FIRST DAY OF TRIAL (IN MONTHS) BY NATURE OF SUIT SY 90

NATURE OF SUIT	0-6	7-12	13-18	19-24	25-30	31-36	37-42	43-48	49-54	55-60	OVER 60	TOTAL
CONTRACT												
Insurance	1	6	4	3	0	2	0	1	0	0	0	17
Negotiable Instru.	1	0	0	1	0	0	0	0	0	0	0	2
Recovery of Overpymt.	0	1	0	0	0	0	0	0	0	0	0	1
Stockholder's Suit	1	0	0	0	0	0	0	0	0	0	0	1
Other Contract	4	17	11	6	3	0	1	1	0	2	0	45
ALL OTHER REAL PROPERTY	1	1	0	0	0	0	0	0	0	0	0	2
PERSONAL INJURY												
Airplane	1	0	0	1	0	0	0	0	0	0	0	2
Airplane Product Liab.	0	0	0	0	1	0	0	0	0	0	0	1
Assault, Libel & Slander	0	2	3	0	0	0	0	0	0	0	0	5
Fed. Empl. Liability	0	4	4	2	0	1	0	0	0	0	0	11
Marine	0	2	3	1	0	0	0	0	0	0	0	6
Marine Product Liab.	0	0	1	0	0	0	0	0	0	0	0	1
Motor Vehicle	1	14	9	2	4	0	0	0	0	0	0	30
Motor Vehicle P.L.	1	1	0	0	0	1	1	0	0	0	0	4
Other Personal Injury	8	14	13	3	1	2	0	2	0	0	0	43
Med. Malpractice	0	4	2	2	0	0	0	0	0	0	0	8
Personal Inj. P.L.	7	12	19	6	6	4	2	2	0	0	0	58
Asbestos	2	0	0	0	2	8	2	0	0	0	0	14

ATTACHMENT 14 (page 2 of 3)

NATURE OF SUIT	0-6	7-12	13-18	19-24	25-30	31-36	37-42	43-48	49-54	55-60	OVER 60	TOTAL
PERSONAL PROPERTY												
Other Pers. Property Damage	0	1	1	0	1	0	0	0	0	0	0	3
Property Damage P.L.	0	2	0	0	0	0	0	0	0	0	0	2
Other Fraud	0	0	0	0	1	0	0	0	0	0	0	1
CIVIL RIGHTS												
Other Civil Rights	9	12	8	3	2	2	2	0	2	0	2	42
Employment	6	10	12	3	1	0	0	0	0	0	0	32
RICO	0	1	0	0	1	1	0	0	0	0	0	3
PRISONER CIVIL RIGHTS	2	4	4	2	3	1	1	1	1	0	2	21
OTHER FORFEITURE/ PENALTY	0	1	0	0	0	0	0	0	0	0	0	1
LABOR												
Fair Labor Standards Act	1	2	1	0	0	0	0	0	0	0	0	4
Labor/Mgmt. Relations	2	1	0	1	0	0	0	0	0	0	0	4
Empl. Ret. Income Security Act	0	2	0	0	0	0	0	0	0	0	0	2
Other Labor Litigation	0	0	1	0	0	0	0	0	0	0	0	1
PROPERTY RIGHTS												
Copyright	1	0	1	0	0	0	0	0	0	0	0	2
Patent	1	1	0	0	0	2	0	0	0	0	0	4
Trademark	1	0	2	0	0	0	0	0	0	0	0	3
OTHER STATUTES												
Commerce/ICC Rates	0	0	1	0	0	0	0	0	0	0	0	1

NATURE OF SUIT	0-6	7-12	13-18	19-24	25-30	31-36	37-42	43-48	49-54	55-60	OVER 60	TOTAL
Securities/Commodities Exchange	0	0	0	0	0	1	0	1	0	1	1	4
Environmental Matters	0	0	0	1	1	0	0	0	0	0	0	2
Other Statutory Actions	1	2	0	1	0	0	0	0	0	0	0	4
TOTAL	52	117	100	38	27	25	9	8	3	3	5	387
	TOTAL 0-18 MOS. 269 (70.0%)			TOTAL 19-60 MOS. 118 (30.0%)								

ATTACHMENT 15

EASTERN DISTRICT OF PENNSYLVANIA

JUDICIAL WORKLOAD PROFILE

	1986		1987		1988		1989		1990	
	PER ACTIVE AUTHORIZED JUDGESHIP (19)	PER ACTUAL ACTIVE JUDGE	PER ACTIVE AUTHORIZED JUDGESHIP (19)	PER ACTUAL ACTIVE JUDGE	PER ACTIVE AUTHORIZED JUDGESHIP (19)	PER ACTUAL ACTIVE JUDGE	PER ACTIVE AUTHORIZED JUDGESHIP (19)	PER ACTUAL ACTIVE JUDGE	PER ACTIVE AUTHORIZED JUDGESHIP (19)	PER ACTUAL ACTIVE JUDGE
FILINGS TOTAL	449	474	452	524	577	662	568	610	514	558
CIVIL	420	443	426	493	555	639	540	580	488	530
CRIMINAL FELONY	29	31	26	30	22	25	28	30	26	28
Defendants	44	46	43	50	39	45	49	52	49	53
PENDING	321	339	344	399	425	489	490	526	537	583
WEIGHTED FILINGS	542	572	551	638	724	834	688	739	638	693
TERMINATIONS	439	466	429	497	496	571	503	540	468	506
TRIALS COMPLETED	36	38	37	43	37	43	41	44	36	39

APPENDIX I
CIVIL JUSTICE REFORM ACT OF 1990

Public Law 101-650
101st Congress

An Act

To provide for the appointment of additional Federal circuit and district judges, and for other purposes.

Dec. 1, 1990
[H.R. 5316]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Judicial Improvements Act of 1990".

Judicial Improvements Act of 1990.
Courts.
28 USC 1 note.

TITLE I—CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

Civil Justice Reform Act of 1990.

SEC. 101. SHORT TITLE.

28 USC 1 note.

This title may be cited as the "Civil Justice Reform Act of 1990".

SEC. 102. FINDINGS.

28 USC 471 note.

The Congress makes the following findings:

(1) The problems of cost and delay in civil litigation in any United States district court must be addressed in the context of the full range of demands made on the district court's resources by both civil and criminal matters.

(2) The courts, the litigants, the litigants' attorneys, and the Congress and the executive branch, share responsibility for cost and delay in civil litigation and its impact on access to the courts, adjudication of cases on the merits, and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties.

(3) The solutions to problems of cost and delay must include significant contributions by the courts, the litigants, the litigants' attorneys, and by the Congress and the executive branch.

(4) In identifying, developing, and implementing solutions to problems of cost and delay in civil litigation, it is necessary to achieve a method of consultation so that individual judicial officers, litigants, and litigants' attorneys who have developed techniques for litigation management and cost and delay reduction can effectively and promptly communicate those techniques to all participants in the civil justice system.

(5) Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including—

(A) the differential treatment of cases that provides for individualized and specific management according to their needs, complexity, duration, and probable litigation careers;

(B) early involvement of a judicial officer in planning the progress of a case, controlling the discovery process, and scheduling hearings, trials, and other litigation events;

(C) regular communication between a judicial officer and attorneys during the pretrial process; and

49-139 O - 90 (650)

(D) utilization of alternative dispute resolution programs in appropriate cases.

(6) Because the increasing volume and complexity of civil and criminal cases imposes increasingly heavy workload burdens on judicial officers, clerks of court, and other court personnel, it is necessary to create an effective administrative structure to ensure ongoing consultation and communication regarding effective litigation management and cost and delay reduction principles and techniques.

SEC. 103. AMENDMENTS TO TITLE 28, UNITED STATES CODE.

(a) CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS.—Title 28, United States Code, is amended by inserting after chapter 21 the following new chapter:

"CHAPTER 23—CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

"Sec.

"§ 471. Requirement for a district court civil justice expense and delay reduction plan

"There shall be implemented by each United States district court, in accordance with this title, a civil justice expense and delay reduction plan. The plan may be a plan developed by such district court or a model plan developed by the Judicial Conference of the United States. The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.

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

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

Reports.

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

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

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

"(3) recommended measures, rules and programs; and

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

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

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

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

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

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

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

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

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

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

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

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

"§ 473. Content of civil justice expense and delay reduction plans

"(a) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction:

"(1) systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case;

"(2) early and ongoing control of the pretrial process through involvement of a judicial officer in—

"(A) assessing and planning the progress of a case;

"(B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint, unless a judicial officer certifies that—

"(i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or

"(ii) the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases;

"(C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; and

"(D) setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

"(3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer—

"(A) explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;

"(B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;

"(C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to—

"(i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and

"(ii) phase discovery into two or more stages; and

"(D) sets, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

"(4) encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices;

"(5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion; and

"(6) authorization to refer appropriate cases to alternative dispute resolution programs that—

"(A) have been designated for use in a district court; or

"(B) the court may make available, including mediation, minitrial, and summary jury trial.

"(b) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following litigation management and cost and delay reduction techniques:

"(1) a requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;

"(2) a requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters;

"(3) a requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request;

"(4) a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation;

"(5) a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference; and

"(6) such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title.

"(c) Nothing in a civil justice expense and delay reduction plan relating to the settlement authority provisions of this section shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, or any delegation of the Attorney General.

"§ 474. Review of district court action

"(a)(1) The chief judges of each district court in a circuit and the chief judge of the court of appeals for such circuit shall, as a committee—

"(A) review each plan and report submitted pursuant to section 472(d) of this title; and

"(B) make such suggestions for additional actions or modified actions of that district court as the committee considers appropriate for reducing cost and delay in civil litigation in the district court.

"(2) The chief judge of a court of appeals and the chief judge of a district court may designate another judge of such court to perform the chief judge's responsibilities under paragraph (1) of this subsection.

"(b) The Judicial Conference of the United States—

"(1) shall review each plan and report submitted by a district court pursuant to section 472(d) of this title; and

"(2) may request the district court to take additional action if the Judicial Conference determines that such court has not adequately responded to the conditions relevant to the civil and criminal dockets of the court or to the recommendations of the district court's advisory group.

"§ 475. Periodic district court assessment

"After developing or selecting a civil justice expense and delay reduction plan, each United States district court shall assess annually the condition of the court's civil and criminal dockets with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court. In performing such assessment, the court shall consult with an advisory group appointed in accordance with section 478 of this title.

"§ 476. Enhancement of judicial information dissemination

"(a) The Director of the Administrative Office of the United States Courts shall prepare a semiannual report, available to the public, that discloses for each judicial officer— Reports.

"(1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending;

"(2) the number of bench trials that have been submitted for more than six months and the name of each case in which such trials are under submission; and

"(3) the number and names of cases that have not been terminated within three years after filing.

"(b) To ensure uniformity of reporting, the standards for categorization or characterization of judicial actions to be prescribed in accordance with section 481 of this title shall apply to the semiannual report prepared under subsection (a).

"§ 477. Model civil justice expense and delay reduction plan

"(a)(1) Based on the plans developed and implemented by the United States district courts designated as Early Implementation District Courts pursuant to section 103(c) of the Civil Justice Reform Act of 1990, the Judicial Conference of the United States may develop one or more model civil justice expense and delay reduction plans. Any such model plan shall be accompanied by a report explaining the manner in which the plan complies with section 473 of this title.

Reports.

"(2) The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations to the Judicial Conference regarding the development of any model civil justice expense and delay reduction plan.

"(b) The Director of the Administrative Office of the United States Courts shall transmit to the United States district courts and to the Committees on the Judiciary of the Senate and the House of Representatives copies of any model plan and accompanying report.

"§ 478. Advisory groups

"(a) Within ninety days after the date of the enactment of this chapter, the advisory group required in each United States district court in accordance with section 472 of this title shall be appointed by the chief judge of each district court, after consultation with the other judges of such court.

"(b) The advisory group of a district court shall be balanced and include attorneys and other persons who are representative of major categories of litigants in such court, as determined by the chief judge of such court.

"(c) Subject to subsection (d), in no event shall any member of the advisory group serve longer than four years.

"(d) Notwithstanding subsection (c), the United States Attorney for a judicial district, or his or her designee, shall be a permanent member of the advisory group for that district court.

"(e) The chief judge of a United States district court may designate a reporter for each advisory group, who may be compensated in accordance with guidelines established by the Judicial Conference of the United States.

"(f) The members of an advisory group of a United States district court and any person designated as a reporter for such group shall be considered as independent contractors of such court when in the performance of official duties of the advisory group and may not, solely by reason of service on or for the advisory group, be prohibited from practicing law before such court.

"§ 479. Information on litigation management and cost and delay reduction

"(a) Within four years after the date of the enactment of this chapter, the Judicial Conference of the United States shall prepare a comprehensive report on all plans received pursuant to section 472(d) of this title. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding such report to the Judicial Conference during the preparation of the report. The Judicial Conference shall transmit copies of the report to the United States district courts and to the Committees on the Judiciary of the Senate and the House of Representatives. Reports.

"(b) The Judicial Conference of the United States shall, on a continuing basis—

"(1) study ways to improve litigation management and dispute resolution services in the district courts; and

"(2) make recommendations to the district courts on ways to improve such services.

"(c)(1) The Judicial Conference of the United States shall prepare, periodically revise, and transmit to the United States district courts a Manual for Litigation Management and Cost and Delay Reduction. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding the preparation of and any subsequent revisions to the Manual. Government publications.

"(2) The Manual shall be developed after careful evaluation of the plans implemented under section 472 of this title, the demonstration program conducted under section 104 of the Civil Justice Reform Act of 1990, and the pilot program conducted under section 105 of the Civil Justice Reform Act of 1990.

"(3) The Manual shall contain a description and analysis of the litigation management, cost and delay reduction principles and techniques, and alternative dispute resolution programs considered most effective by the Judicial Conference, the Director of the Federal Judicial Center, and the Director of the Administrative Office of the United States Courts.

"§ 480. Training programs

"The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts shall develop and conduct comprehensive education and training programs to ensure that all judicial officers, clerks of court, courtroom deputies, and other appropriate court personnel are thoroughly familiar with the most recent available information and analyses about litigation management and other techniques for reducing cost and expediting the resolution of civil litigation. The curriculum of such training programs shall be periodically revised to reflect such information and analyses.

"§ 481. Automated case information

"(a) The Director of the Administrative Office of the United States Courts shall ensure that each United States district court has the automated capability readily to retrieve information about the status of each case in such court.

"(b)(1) In carrying out subsection (a), the Director shall prescribe—

"(A) the information to be recorded in district court automated systems; and

"(B) standards for uniform categorization or characterization of judicial actions for the purpose of recording information on judicial actions in the district court automated systems.

"(2) The uniform standards prescribed under paragraph (1)(B) of this subsection shall include a definition of what constitutes a dismissal of a case and standards for measuring the period for which a motion has been pending.

Records. "(c) Each United States district court shall record information as prescribed pursuant to subsection (b) of this section.

"§ 482. Definitions

"As used in this chapter, the term 'judicial officer' means a United States district court judge or a United States magistrate.".

28 USC 471 note. (b) IMPLEMENTATION.—(1) Except as provided in section 105 of this Act, each United States district court shall, within three years after the date of the enactment of this title, implement a civil justice expense and delay reduction plan under section 471 of title 28, United States Code, as added by subsection (a).

(2) The requirements set forth in sections 471 through 478 of title 28, United States Code, as added by subsection (a), shall remain in effect for seven years after the date of the enactment of this title.

28 USC 471 note. (c) EARLY IMPLEMENTATION DISTRICT COURTS.—

(1) Any United States district court that, no earlier than June 30, 1991, and no later than December 31, 1991, develops and implements a civil justice expense and delay reduction plan under chapter 23 of title 28, United States Code, as added by subsection (a), shall be designated by the Judicial Conference of the United States as an Early Implementation District Court.

(2) The chief judge of a district so designated may apply to the Judicial Conference for additional resources, including technological and personnel support and information systems, necessary to implement its civil justice expense and delay reduction plan. The Judicial Conference may provide such resources out of funds appropriated pursuant to section 106(a).

Reports. (3) Within 18 months after the date of the enactment of this title, the Judicial Conference shall prepare a report on the plans developed and implemented by the Early Implementation District Courts.

(4) The Director of the Administrative Office of the United States Courts shall transmit to the United States district courts and to the Committees on the Judiciary of the Senate and House of Representatives—

(A) copies of the plans developed and implemented by the Early Implementation District Courts;

(B) the reports submitted by such district courts pursuant to section 472(d) of title 28, United States Code, as added by subsection (a); and

(C) the report prepared in accordance with paragraph (3) of this subsection.

(d) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part I of title 28, United States Code, is amended by adding at the end thereof the following:

"23. Civil justice expense and delay reduction plans ..... 471".

SEC. 104. DEMONSTRATION PROGRAM. 28 USC 471 note.

(a) IN GENERAL.—(1) During the 4-year period beginning on January 1, 1991, the Judicial Conference of the United States shall conduct a demonstration program in accordance with subsection (b).

(2) A district court participating in the demonstration program may also be an Early Implementation District Court under section 103(c).

(b) PROGRAM REQUIREMENT.—(1) The United States District Court for the Western District of Michigan and the United States District Court for the Northern District of Ohio shall experiment with systems of differentiated case management that provide specifically for the assignment of cases to appropriate processing tracks that operate under distinct and explicit rules, procedures, and timeframes for the completion of discovery and for trial.

(2) The United States District Court for the Northern District of California, the United States District Court for the Northern District of West Virginia, and the United States District Court for the Western District of Missouri shall experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution, that such district courts and the Judicial Conference of the United States shall select.

(c) STUDY OF RESULTS.—The Judicial Conference of the United States, in consultation with the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall study the experience of the district courts under the demonstration program.

(d) REPORT.—Not later than December 31, 1995, the Judicial Conference of the United States shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report of the results of the demonstration program.

SEC. 105. PILOT PROGRAM. 28 USC 471 note.

(a) IN GENERAL.—(1) During the 4-year period beginning on January 1, 1991, the Judicial Conference of the United States shall conduct a pilot program in accordance with subsection (b).

(2) A district court participating in the pilot program shall be designated as an Early Implementation District Court under section 103(c).

(b) PROGRAM REQUIREMENTS.—(1) Ten district courts (in this section referred to as "Pilot Districts") designated by the Judicial Conference of the United States shall implement expense and delay reduction plans under chapter 23 of title 28, United States Code (as added by section 103(a)), not later than December 31, 1991. In addition to complying with all other applicable provisions of chapter 23 of title 28, United States Code (as added by section 103(a)), the expense and delay reduction plans implemented by the Pilot Districts shall include the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a) of title 28, United States Code.

(2) At least 5 of the Pilot Districts designated by the Judicial Conference shall be judicial districts encompassing metropolitan areas.

(3) The expense and delay reduction plans implemented by the Pilot Districts shall remain in effect for a period of 3 years. At the end of that 3-year period, the Pilot Districts shall no longer be required to include, in their expense and delay reduction plans, the

6 principles and guidelines of litigation management and cost and delay reduction described in paragraph (1).

(c) PROGRAM STUDY REPORT.—(1) Not later than December 31, 1995, the Judicial Conference shall submit to the Committees on the Judiciary of the Senate and House of Representatives a report on the results of the pilot program under this section that includes an assessment of the extent to which costs and delays were reduced as a result of the program. The report shall compare those results to the impact on costs and delays in ten comparable judicial districts for which the application of section 473(a) of title 28, United States Code, had been discretionary. That comparison shall be based on a study conducted by an independent organization with expertise in the area of Federal court management.

(2)(A) The Judicial Conference shall include in its report a recommendation as to whether some or all district courts should be required to include, in their expense and delay reduction plans, the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a) of title 28, United States Code.

(B) If the Judicial Conference recommends in its report that some or all district courts be required to include such principles and guidelines in their expense and delay reduction plans, the Judicial Conference shall initiate proceedings for the prescription of rules implementing its recommendation, pursuant to chapter 131 of title 28, United States Code.

(C) If in its report the Judicial Conference does not recommend an expansion of the pilot program under subparagraph (A), the Judicial Conference shall identify alternative, more effective cost and delay reduction programs that should be implemented in light of the findings of the Judicial Conference in its report, and the Judicial Conference may initiate proceedings for the prescription of rules implementing its recommendation, pursuant to chapter 131 of title 28, United States Code.

SEC. 106. AUTHORIZATION.

(a) EARLY IMPLEMENTATION DISTRICT COURTS.—There is authorized to be appropriated not more than $15,000,000 for fiscal year 1991 to carry out the resource and planning needs necessary for the implementation of section 103(c).

(b) IMPLEMENTATION OF CHAPTER 23.—There is authorized to be appropriated not more than $5,000,000 for fiscal year 1991 to implement chapter 23 of title 28, United States Code.

(c) DEMONSTRATION PROGRAM.—There is authorized to be appropriated not more than $5,000,000 for fiscal year 1991 to carry out the provisions of section 104.

APPENDIX II

THE ADVISORY GROUP AND ITS ACTIVITIES: A SUMMARY

The makeup of the Advisory Group was a prototype of the practitioners in this court, reflecting the total range of interests affected by the litigation that comes before it. The Advisory Group was convened by Chief Judge Bechtle on March 11, 1991, at which time it held its first meeting. Thereafter, it met on a regular basis through July 23, 1991 for a total of 13 plenary sessions. Most were two hours long, but some sessions ran for three hours.

We analyzed the statistics on the state of the docket, on the trends that could be discerned over recent years and of those projected until the end of the century. We noted particularly recent policy changes affecting criminal caseloads and asbestos filings. We considered the local rules of the court and the practices currently in place in individual chambers.

We invited each of the judges of the court, active and senior, to share with us their perceptions of the present situation, the problems that they found and the solutions they would recommend. Some came to our sessions, engaging in a dialogue with the members of the group; some were interviewed in chambers with the transcripts of the sessions circulated to the full group; some provided us with written submissions. They were uniformly cooperative and exceedingly helpful.

We utilized background materials provided by the Federal Judicial Center and the Administrative Office of the United States Courts. These were both rich and voluminous. Some focused on the Eastern District of Pennsylvania and some provided background that was national in scope.

We solicited, through direct mailings, comments from such diverse groups as prisoners, labor unions, city and state agencies, universities and legal organizations representing specific interest groups. In addition, we invited written comments from the public at large, with the added provision that a hearing might also be requested for the purpose of elaborating on any submission.

We conducted a public hearing to which all members of the public were invited to appear and be heard, and we did hear from, among others, a lawyer active in

civil rights litigation, the general counsel of a major corporate litigant, a representative of the United States Attorney, the chancellor of the Philadelphia Bar Association, a representative of the American Arbitration Association and the chair of a Bar Association committee on the court's mediation program.

We undertook a limited survey of litigants by sending a questionnaire to general counsel for the 20 major corporations in the Delaware Valley as well as to the Philadelphia Chamber of Commerce. Each counsel was asked to provide information about specific cases that had been litigated in this district.

The group acted as a committee of the whole. This allowed it to draw heavily on the experience of its own members, who, collectively, brought to the process years of experience in a broad range of cases. This was done informally, through the exchange of information both at meetings and outside of the group's meetings, and also more formally through written presentations.

In addressing specific subjects that the Act required us to deal with, we called upon members of the group to develop proposals for presentation at a group meeting. In connection with such assignments, members of the group consulted with other lawyers who specialized in relevant areas of the practice, such as asbestos or complex cases.

Finally, we had the great advantage of having Michael Kunz, Clerk of Court, as an ex officio member of the group. He and his staff were of inestimable value in providing statistical data and analysis on a wide variety of topics, in providing logistical support for each of our meetings and our hearing, in giving us information on local rules and individual practices and, in addition to everything else, in offering critique and advice of superlative quality.

BIOGRAPHICAL SKETCHES OF THE ADVISORY GROUP

Robert M. Landis, Former Chairman, Dechert Price & Rhoads,

A.B. Franklin and Marshall College, 1941; LL.D. Franklin and Marshall College, 1991; J.D. University of Pennsylvania Law School, 1947; Editor-in-Chief, University of Pennsylvania Law Review. A Chancellor of the Philadelphia Bar Association, Mr. Landis has been President of the Pennsylvania Bar Association, President of the National Conference of Bar Presidents and President of the National Association of Railroad Trial Counsel. In his trial and appellate practice, he has largely represented corporate defendants in civil litigation. He is a former Chairman of the ABA Standing Committee on Federal Judicial Improvements and a former member of the ABA Board of Governors. A life member of the American Law Institute, he is a Fellow of the American College of Trial Lawyers and has been a member of its Board of Regents. He is former Chairman of the Federal Reserve Bank of Philadelphia.

Alice W. Ballard, Samuel and Ballard,

B.A. Harvard University, 1970; J.D. Harvard University, 1973. After three years as staff attorney at the Public Interest Law Center of Philadelphia, Ms. Ballard established the law firm of Samuel and Ballard. She has concentrated in civil litigation, focusing on federal employment rights (ERISA, Title VII, LMRA, ADEA) and related claims. She has taught trial practice at the University of Pennsylvania Law School and Employment Discrimination at Villanova Law School. She has served on Judge Gibbons' Rule 11 Task Force.

Michael M. Baylson, United States Attorney, Eastern District of Pennsylvania,

A.B. University of Pennsylvania Wharton School, 1961; J.D. University of Pennsylvania Law School, 1964. Mr. Baylson served four years as an Assistant District Attorney in Philadelphia before joining Duane, Morris & Heckscher, where he has been a partner. During his practice, primarily in the federal court, he has concentrated on complex antitrust, securities and contract cases. Editor, Antitrust Discovery Handbook. Appointed United States Attorney in 1988.

Michael Churchill, Chief Counsel, Public Interest Law Center of Philadelphia,

B.A. Harvard College, 1961; London School of Economics, 1961-62; J.D. Harvard Law School, 1965. Mr. Churchill has been a partner in the law firm of Ballard, Spahr, Andrews and Ingersoll, specializing in corporate and municipal finance matters and litigation. Since 1976 he has been Managing Partner or Chief Counsel of the Public Interest Law Center of Philadelphia, except for his service in 1984 as General Counsel for the School District of Philadelphia.

James C. Corcoran, Chairman of the Board, General Accident Insurance,

A.B. University of Notre Dame, 1950. Mr. Corcoran entered the property and casualty insurance business upon his graduation from Notre Dame and has served General Accident for the past 28 years. He has been Chief Executive Officer in the United States since 1976 and has served on the Board of Directors in the United Kingdom since 1979.

Andre L. Dennis, Stradley, Ronon, Stevens & Young,

B.A. Cheyney State University, 1966; J.D. Howard University School of Law, 1969. Mr. Dennis is a partner in his law firm and has had a diverse practice in civil litigation in the federal courts. He is Vice-Chancellor of the Philadelphia Bar Association, President of Philadelphia VIP former member Lawyers Advisory Committee for the Third Circuit Court of Appeals and Lawyers Advisory Committee for the Eastern District of Pennsylvania.

Eve Biskind Klothen, Director, Philadelphia Volunteers for the Indigent Program,

A.B. University of Michigan, 1972; J.D. Vanderbilt Law School, 1975. After serving as managing attorney for Georgia Legal Services, Ms. Klothen worked for the Department of Labor in Washington, D.C. doing ERISA fraud litigation and for the Commodity Futures Trading Commission doing similar litigation. After five years of private practice in Cincinnati, she became director of Philadelphia VIP, the Philadelphia Bar Association's *pro bono* program. Member, University of Pennsylvania Law School Public Service Program Advisory Committee and Women Against Abuse Advisory Committee; Board member, Philadelphia Volunteer Lawyers for the Arts, A Better Chance - Strathaven; Selection Committee Biskind Public Interest Fellowship, Case Western Reserve University Law School.

Seymour Kurland, Dechert Price & Rhoads,

B.S. Temple University, 1954; J.D. *cum laude*, University of Pennsylvania Law School, 1957; Senior Editor University of Pennsylvania Law Review. A Chancellor of the Philadelphia Bar Association, Mr. Kurland was appointed City Solicitor for the City of Philadelphia in 1988; upon completing his term in 1990 he became a partner in Dechert Price & Rhoads. Mr. Kurland is widely experienced in complex litigation. He is a Fellow of the American College of Trial Lawyers.

S. Gerald Litvin, Litvin, Blumberg, Matusow & Young,

A.B. Temple University, 1951; J.D. *cum laude* University of Pennsylvania, 1954; Gowen Fellow, University of Pennsylvania Law School, 1954-1955. Mr. Litvin has trial experience in the federal and state courts. In the Philadelphia Bar Association he has been Chair of the Board of Governors, Chair of the Judiciary Committee and has served in many other offices in the Pennsylvania Bar Association. During the past 20 years he has taught trial advocacy to practicing litigators and was appointed Professor of Law, Temple University Law School, effective July, 1991.

Edward W. Mullinix, Schnader, Harrison, Segal & Lewis,

A.B. St. John's College, Annapolis, 1943; J.D. *summa cum laude,* University of Pennsylvania Law School, 1949. Mr. Mullinix is a partner in the law firm of Schnader, Harrison, Segal & Lewis where he has been involved mainly in complex civil litigation in the federal courts and before federal and state agencies. He has been Co-Chairman of the ABA's Special Committee on Complex and Multidistrict Litigation, Member of the Council of the ABA Section of Litigation, and Member of the Special Committee for the Study of Discovery Abuse of the ABA Section of Litigation. He is a Fellow of the American College of Trial Lawyers.

Arthur G. Raynes, Raynes, McCarty, Binder, Ross & Mundy,

A.B. Duke University, 1956; J.D. Temple University School of Law, 1959. A former Chancellor of the Philadelphia Bar Association, Mr. Raynes has had an active civil practice in the federal and state courts and specializes in complex litigation, especially serious personal injuries. He is a Fellow of the American College of Trial Lawyers, International Academy of Trial Lawyers and an Advocate of the American Board of Trial Advocates.

Richard M. Rosenbleeth, Blank, Rome, Comisky & McCauley,

B.S. University of Pennsylvania Wharton School, 1954; J.D. University of Pennsylvania Law School, 1957. Mr. Rosenbleeth served as Assistant District Attorney of Philadelphia from 1957 to 1962 and has been engaged in private civil practice since that time. As Chair of the Litigation Department for his law firm, he has been engaged in the trial of corporate-commercial cases, with additional experience in white-collar criminal defense and mass tort cases. He is a Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers, and has been an active participant in the work of the Center for Public Resources.

Daniel J. Ryan, LaBrum & Doak,

United States Merchant Marine Academy, 1947; J.D. Temple University Law School, 1955. Mr. Ryan has specialized in all aspects of defense litigation since joining his law firm. He has been President and Chairman of the Board of the Defense Research Institute, Fellow of the American College of Trial Lawyers and the International Academy of Trial Lawyers and has served as a faculty member of the Defense Counsel Trial Academy and of the Academy of Advocacy. He has also served as President of the Philadelphia Association of Defense Counsel.

John O.J. Shellenberger, Chief Deputy Attorney General, Commonwealth of Pennsylvania,

A.B. Lafayette College, 1966; J.D. Harvard Law School, 1969; Masters in Public Administration, Harvard University Kennedy School of Government, 1988. After practicing eight years with Stradley, Ronon, Stevens and Young, Mr. Shellenberger became Chief of the Eastern Regional Office of the Pennsylvania Office of the Attorney General. His office supervises and manages the substantive work of the general litigation section of the Office of the Attorney General, with primary responsibility for defending state officials and employees in the federal courts and defending all civil rights actions brought by state prisoners.

J. Clayton Undercofler, III, Saul, Ewing, Remick & Saul,

B.S. Drexel University, 1962; J.D. Villanova University School of law, 1966. Mr. Undercofler served in the United States Attorney's Office of the Eastern District of Pennsylvania from 1969 through 1976 rising from the rank of Assistant United States Attorney to court-appointed United States Attorney for this district. He has been a visiting Associate Professor of Law at Villanova University School of Law and an adjunct faculty member there. After practicing with Dilworth, Paxson, Kalish & Kaufman, he became a partner in Saul, Ewing, Remick & Saul in 1986. His practice is focused in both civil and criminal litigation, primarily in federal court. He is a Fellow in the American College of Trial Lawyers and a member of the Judicial Conference of the Third Circuit. Mr. Undercofler is a Chairman of the Southeastern Pennsylvania Transportation Authority.

Louis C. Bechtle, Chief Judge,

B.S. Temple University, 1951; J.D. Temple University, 1954. Judge Bechtle was an Assistant United States Attorney in the Eastern District of Pennsylvania from 1956 to 1959. He returned to private practice in Norristown, Pennsylvania, where he served as Solicitor for Springfield Township. He was appointed United States Attorney for the Eastern District of Pennsylvania in 1969 until his appointment to the United States District Court in February 1972. He became Chief Judge in April 1990.

Edward N. Cahn, District Judge,

B.A. Lehigh University, 1955; J.D. Yale University, 1958. Judge Cahn was engaged in private practice in Allentown, Pennsylvania until his appointment to the United States District Court for the Eastern District of Pennsylvania in January 1975.

Robert F. Kelly, District Judge,

B.S., Villanova University, 1957; J.D. Temple University Law School, 1960. Judge Kelly was in private practice in Media and Chester, Pennsylvania from 1961 to 1976. In 1976 he was elected a judge of the Court of Common Pleas, 32nd Judicial District, where he served for 10 years. Judge Kelly was appointed to the United States District Court for the Eastern District of Pennsylvania in 1987.

James R. Melinson, Magistrate Judge,

B.A. LaSalle University, 1961; J.D. Temple University Law School, 1968; M.Ed. Admin. Temple University, 1973. Judge Melinson engaged in the general practice of law for 19 years before his appointment to the bench. Governor Robert P. Casey appointed him to the Superior Court of Pennsylvania in February, 1988. In January 1990 he was appointed Magistrate Judge in this district and has served in that capacity since March 1990.

Michael E. Kunz, Clerk of Court,

B.S. St. Joseph's University, 1970; M.B.A. St. Joseph's University, 1980. Before his appointment as Clerk of Court, Mr. Kunz served as Chief Deputy Clerk from 1976 to 1979 and as Deputy Clerk from 1962 to 1975. He is a Graduate and Fellow of the Institute for Court Management, Court Executive Development Program and is Chairman of the Clerks Council of the Federal Courts Clerks Association. He is a founding member, secretary and member of the Board of Directors of the Historical Society of the United States District Court for the Eastern District of Pennsylvania.

A. Leo Levin, Leon Meltzer Professor Emeritus, University of Pennsylvania Law School,

B.A. Yeshiva University, 1939, J.D. University of Pennsylvania, 1942; several honorary degrees; Managing Editor, University of Pennsylvania Law Review; University Fellow Columbia University; Assistant Professor of Law, University of Iowa; Professor of Law, University of Pennsylvania; Vice Provost, University of Pennsylvania; Vice President Academic Affairs, Yeshiva University; Director, Federal Judicial Center. Professor Levin is a member of the American Law Institute and has served as Chairman of the State Legislative Reappointment Commission in Pennsylvania, Executive Director of the Commission on Revision of Federal Court Appellate System and President of the American Judicature Society (1977-1987).

Jennifer R. Clarke, Dechert Price & Rhoads,

A.B. *magna cum laude,* Dartmouth College, 1977; J.D. Columbia University School of Law, 1982. Stone Scholar and Editor of the Columbia Law Review. Ms. Clarke was an associate in the Washington, D.C. and New York City offices of White & Case until 1987, when she joined Dechert Price & Rhoads, where she is now a partner in the Litigation Department. She is principally engaged in the defense of major corporate litigation. Ms. Clarke is a founder and officer of The Caring Center, a Pennsylvania not-for-profit corporation that owns and operates a day-care center in West Philadelphia.