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February 16, 1993

On behalf of the Maryland Civil Justice Reform Act Advisory Group it is my pleasure to provide you with a copy of its Draft Report and of the Public Notice which will appear in The Daily Record.

The Advisory Group welcomes any thoughts, suggestions, or criticisms from you and your colleagues. Because of statutory time deadlines, we must ask that all comments be submitted in writing by April 2, 1993.

Very truly yours,

George Beall
Chairman, CJRA Advisory Group

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cc: Members of the CJRA Advisory Group

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REPORT OF THE ADVISORY GROUP

OF THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990

(D A T E)

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REPORT OF THE MARYLAND CIVIL JUSTICE REFORM ACT ADVISORY GROUP

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I. INTRODUCTION AND OVERVIEW

The Civil Justice Reform Act, 28 U.S.C. §§ 471-482, enacted by Congress in 1990, requires that each federal district court appoint an Advisory Group for the purpose of analyzing local circumstances and making recommendations for a "civil justice expense and delay reduction plan" to be established by the Court. This "Judicial Improvements Act" (the "Act") directs that in developing its recommendations 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.

28 U.S.C. § 472(c)(1). The text of the Act is found at Appendix 1.

This Court's Expense and Delay Reduction Plan is to be completed by December 1, 1993.

The Advisory Group of the District of Maryland was appointed in January, 1991. The group has eighteen members, consisting primarily of lawyers representing a cross-section of the Court's bar and involved in different areas of practice. 1/ In going about its task, the group met in regular, monthly general sessions to examine particular statutory issues; to review statistics, charts and reports reflecting the status of and trends in the court's docket; and to analyze court files in selected individual cases. In addition, teams of members interviewed each of the district judges and magistrate judges privately. 2/ This Report, reflecting the Advisory Group's detailed analysis and discussions, is divided into four substantive sections. The first surveys the state of the court's current and anticipated docket. The second section identifies principal local causes of cost and delay in civil litigation, separating these causes into those which are external to the process and those which fall within it. The third section sets forth principles for remedying unnecessary cost and

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1/ The group also consists of one representative of the business community and (as ex officio members) one district judge, one magistrate judge and the clerk of the court.

2/ Questionnaires used in these interviews are appended as Appendix 2.

delay. It focuses separately upon efficient management of judicial resources, effective case management, methods of alternative dispute resolution and the responsibilities of those outside the district court, specifically the President, Congress, and the Bar. The fourth and concluding section proposes specific recommendations to the court for inclusion in its civil justice expense and delay reduction plan.

OVERVIEW

The Advisory Group has concluded that the docket of the District of Maryland is reasonably current. This, however, is not a cause for complacency. A number of factors, including (1) an anticipated increase in the number of criminal cases, (2) the state of the docket of the bankruptcy court, (3) the court's present reliance upon numerous senior judges, (4) the retirement of two active district judges, (5) the delayed appointment of persons nominated to fill three existing vacancies, (6) the opening of a new federal prison in Western Maryland and (7) the creation of a southern division, give rise to serious concern about the continued healthy state of the civil docket in the near future. Absent expansion of existing resources, the Court cannot be expected to meet the demand for judicial intervention unless caseload management is improved and civil litigation made less costly, less rancorous and more expeditious.

The principal cause of unnecessary litigation expense identified by the Advisory Group is "overlawyering", as in, for examples, the conduct of excessive discovery, often accompanied by unnecessary discovery disputes and use of multiple counsel for a party in judicial proceedings when one spokesperson would be adequate and cheaper for the client.

To some extent the problem with discovery is being addressed by proposed amendments to the Federal Rules of Civil Procedure which contemplate a "disclosure" (as opposed to a "discovery") approach to the exchange of basic information upon the commencement of a case.

The Advisory Group recommends, however, that the Court adopt as part of its plan additional measures designed to provide more efficient and effective judicial control over discovery, including limiting the total number of deposition hours in appropriate cases, adopting rules of conduct to govern lawyers' conduct during discovery and providing ready access to district judges or magistrate judges to resolve discovery disputes. In addition, the Advisory Group recommends that there needs to be a change in judicial attitude towards discovery disputes. Discovery disputes are almost universally disfavored and generally viewed as not worth the expenditure of judicial resources necessary to

resolve them. Frequently, however, discovery disputes are not minor disagreements which reasonable counsel should be able to resolve, but rather they are the product of core substantive issues as to which the parties have irreconcilable -- and legitimate -- differences. In addition, the failure to resolve promptly even so-called "routine" discovery disputes, tends to generate new disputes.

Another cause of unnecessary litigation expense and delay which the group has identified is the last-minute postponement of trials. Such postponements not only have the effect of causing duplicitous trial preparation but also hinder the settlement process which frequently bears fruit only when a certain trial date is imminent. Accordingly, the Group's recommendations include measures designed to assure that reasonable and realistic trial dates be set and that these dates be held firm.

The Advisory Group also believes that the Court can use its existing resources somewhat more efficiently. For example, the district is fortunate to have extremely able magistrate judges. Although they already contribute substantially to the work of the Court, the Advisory Group believes that their talents can be utilized more extensively in managing discovery and conducting trials (particularly

ones where the nub of the controversy is a factual dispute to be resolved by a jury).

The Advisory Group further believes that the individual judges should be careful to guard against the increasing bureaucratization of the court. They should personally monitor their cases to identify issues which can be resolved without unnecessary cost and delay, but recognize that the collegial tradition of this court and reality oblige the judges to view effective case management as a common objective. All members of the bench and court family should work to avoid insular practices or excessive isolationism. All judges should also assure that the time of their law clerks is spent efficiently and should foster a productive working relationship with the personnel of the clerk's office assigned to them.

The Advisory Group finds that, in general, the Court manages its docket well. To the extent that delay in adjudication existed, the Group found that problems were confined to isolated judge-specific instances and were not representative of a broader pattern. Moreover these situations have improved during the pendency of this study. Accordingly, the Group's recommendations call for a fine-tuning, rather than a major overhaul, of the management systems now in place.

II. THE STATE OF THE DOCKET

The Act's first requirement for each Advisory Group is to "promptly complete a thorough assessment of the state of the Court's civil and criminal dockets." As part of that assessment, the Advisory Group is to identify trends in case filings and describe the principal causes of cost and delay and, in addition, 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." In doing so, the Advisory Group is to consider the special needs of its District Court as it prepares its report and recommendations, as well as to consider the needs of the litigants and their attorneys.

As background for this assessment, the Advisory Group was mindful of a widespread perception that the national federal judicial system has become burdened by rapid increases in the volume of criminal and civil cases. It was aware that for example, in 1950 there were 32,000 new private case filings; that by 1970 that figure had climbed to 64,000; by 1986 there were 161,000 private civil cases filed; and that by 1990 the number of new lawsuits in the nation's federal courts was over 250,000. This overall growth of private civil litigation, coupled with critical changes in the criminal system and well-publicized expansion of federal

criminal jurisdiction, underlay this Group's analysis of the local Court.

In comparison with other judicial districts, Maryland is relatively compact from a geographical standpoint. From the situs of the court in Baltimore to the most western and most eastern political subdivisions in the state is less than 200 miles in each direction. Approximately 75% of the population, moreover, resides within a 40 mile radius of Baltimore.

As of this writing, the district operates as one unitary judicial agency. This will change after this Report has been completed because Congress has legislated a new, Southern Division to be based in Greenbelt, Maryland in facilities under construction currently and targeted for occupancy in 1994.

All of the district judges for this Court preside from their chambers and courtrooms in the United States Court Building in Baltimore. Most of the magistrate judges are also located in the same place.

As of March, 1991 when this Group began its docket analysis there were ten authorized district judgeships for

this District. For the entire period since then there have been unfilled vacancies for the authorized judgeships. As of this date, three of the ten authorized judgeships are vacant, nominees for two having been presented to the Senate who were not acted upon before the end of the last Congress.

Over the same period of time, the Court has been augmented by as many as eight senior judges. With the recent full retirement of one judge, the likely departure of another and possibly more, this number is expected to be reduced to six or less in 1993.

The District is also served by six full-time magistrate judges and three part-time magistrate judges. Of these magistrate judges, five are resident in Baltimore and one in Hyattsville, while the others (part-time) are located in Salisbury, Hagerstown and Upper Marlboro.

The Bankruptcy Court (which by Congressional mandate is not to be included in the District assessment) is served by three judges, two in Baltimore and one in Rockville. The Bankruptcy Court maintains clerical offices in both locations as well. A fourth judge has been authorized recently but, as yet, this vacancy is unfilled.

The Office of the Clerk of the District Court is found in Baltimore. The Clerk's Office presently employs about 75 persons. The central function of the Clerk is to provide support personnel for administration of the work of the district judges and magistrate judges as well as jury administration, attorney admissions, financial management, procurement, naturalization proceedings, supplying courtroom deputies and computer facilities. In addition, the Clerk's office, through a Central Violation Bureau, records all criminal violation notices issued by participating agencies, collects forfeiture of collateral, prepares notices to appear before the magistrate judges, calendars all hearings, prepares dockets, records judgments and collects fines and special assessments.

Empirical and anecdotal information about the volume and nature of civil and criminal case filings was reviewed by the Advisory Group at various times during the course of its tenure. Statistical data both for this District Court and for all district courts nationwide was provided by the Administrative Office of the United States Courts for the twelve month periods ending June 30, 1990, 1991, and 1992. In addition to these published tables, the Advisory Group also studied data provided by the Office of the Clerk and of the United States Attorney with respect to individual

caseloads of the district judges and magistrate judges. Supplementing this statistical data was considerable information obtained from interviews of each of the district judges and magistrate judges and from experiences shared by the members of the Advisory Group, who were drawn from diverse practice backgrounds. The judicial interviews were particularly helpful because the subject matter covered was suitably broad ranging. This can be better understood by examination of the questionnaires that framed the discussions, samples of which are appended as Appendix 2.

The District of Maryland, it must be noted with some emphasis, 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 initial filing and the case remains with that judge until final disposition. The case assignments are made on a random basis with the exception that certain related cases are from time to time assigned to a particular judge by the Clerk.

This individual calendar system is to be contrasted with the practice prevailing in the State Courts of Maryland known as a central docketing system. Without meaning to state a preference for one system or the other, the Advisory Group is of the unanimous and strong view that the individual

judge calendar system has served the District of Maryland effectively and has contributed materially to the efficiency of this Court as compared to others across the nation. The Advisory Group has concluded, based on careful analysis, that the present individual judge calendar system provides the judges the incentive and control necessary to manage their caseloads effectively and recommends that there be no departure from the existing system.

Generally speaking, the number of new case filings in the District of Maryland for the past ten years has remained relatively static, fluctuating between a high of 5,472 filings in 1985 and a low of 3,879 in 1990. This includes both civil and criminal cases, with the latter trending downward every year since 1985.

To put the local numbers in a national context the total filings for the period ended June 30, 1991, placed this District Court 69th out of 94 district courts as to annual change in overall workload.

For 1991, the median time from filing to disposition for all civil cases in this district was 6.9 months, ranking the Court 10th best out of the 94 districts that comprised the federal judicial system. During the same time period,

the median time from issue to trial for those civil cases requiring a trial was 12 months, which ranked the court 18th out of the 94 districts. By comparison, in 1988 the average time to trial here was 16 months. As a way of testing the 1991 data, the Advisory Group surveyed 122 civil cases and learned that 3 went to trial in less than 6 months from filing, 18 in 6 to 12 months, 46 in 12 to 18 months, 19 in 18 to 24 months, 9 in 24 to 30 months and 27 in over 30 months.

Looking at this Court's caseload as to relative complexity and adjusting or "weighting" the figures so that a simple personal injury case is not considered the equivalent of a class action, the record of this Court is also exemplary. For the statistical year ending June 30, 1991 "weighted" filings for each of the 649 available judgeships in the United States averaged 386. In this District, there were 411 "weighted" case filings for each of the 10 authorized judges, during a time when this Court was consistently operating with at least one and occasionally three less judges than authorized. This shows that a disproportionate share of difficult and complicated cases is handled in this court.

Despite the shortfall in judges, the Court has consistently remained current on its docket. As of June 30,

1991, the Court had 3,450 pending civil cases of which merely 358 had been pending for over three years. This represents about 10% of the total at a time when the national average was 10.4%. Of the 3-year-old cases, most were asbestos in nature. For a more complete statistical picture, the Advisory Group encourages examination of data appended to this Report. See Appendix 3.

As for filing trends, most categories of civil filings over the last ten years have either remained relatively constant or decreased. During this decade, areas of major increase were civil rights, ERISA, prisoners' filings, and civil RICO cases. The latter, which were nonexistent in the early 1980's are now significant. Meanwhile, the number of filings for student loan and veterans' social security, land condemnation, labor and asbestos cases have trended downward. Of concern, yet not presently resolved, is the status of some 3,000 Dalkon Shield cases which have been in an inactive status pending appeals, but which may end up in Maryland. A federal prison, something never before experienced in this jurisdiction, will surely increase civil prisoner filings when it becomes operational.

In addition to the statistics appended to this Report, the Advisory Group has reviewed on a judge-by-judge basis the volume and composition of individual caseloads. Initially, this review disclosed a considerable imbalance as between the judges; i.e., some judges carried significantly more cases than other judges, thereby tending to prolong the time for disposition of their cases. With the advent of new judges and concurrent internal reassignment of existing cases, a redistribution of caseloads was effected which virtually eliminated caseload disparity as between judges.

Thus, to the extent that there was anecdotal support for an impression that eventual conclusion of cases was protracted in some instances, the Advisory Group has concluded this to be the result of judge-specific overload, not a systemic problem. For example, one judge as of May 1991 had 461 pending cases, far more than the average. This aberration was eliminated by the Court on its own by evaluating and reassigning certain pending cases. A year later the two most burdened judges had 305 and 304 cases, respectively. As this report is written, however, disparities once again appear to be developing.

The Advisory Group is of the view that, while individual judges are to manage their own docket, an

institutional procedure for periodic redistribution of caseloads should be implemented. The caseload after all is that of the entire Court and some central oversight is only sensible and practical. From time to time, for instance, depending upon an individual judge's involvement in protracted trials, the need arises for reassignment of cases. This is already being done by the judges on a weekly basis and is something that the Advisory Group encourages the Court to continue.

In sum, the statistical fluctuation in the pending civil and criminal caseload in this district and the understaffing that has come from vacant judgeships have not prevented this court from meeting, and indeed, exceeding the performance of other comparable judicial districts and the performance standards found in the Act. As an example of the latter, the Act sets an 18-month target for disposition of civil cases from the date of filing of the complaint to trial. The median time of disposition in this District for cases that went to trial in 1991 was 12 months. In 1988, by comparison, the average was 16 months. Thus, without any Advisory Group or Civil Justice Reform Act Plan, this District has managed its docket in a way that the per judge caseload, case aging, time to termination and other statistical benchmarks have been met or exceeded.

Notwithstanding this favorable assessment and the absence of any data showing a significant delay problem, the Advisory Group has reviewed litigation practices and procedures of the Court in an effort to determine how they might be modified to reduce cost and to prevent undue delay.

III. THE PRINCIPAL CAUSES OF COST AND DELAY

A. Causes External to the Civil Litigation Process

1. The Criminal Docket

While the Act does not impose the same obligation on the Advisory Group to analyze the state of the criminal docket, there is recognition that the criminal caseload can limit the resources available for the Court's civil activity. Generally speaking, the trend of criminal defendant filings for this district for the last ten years has been declining from a high of 1,400 criminal defendants in 1985 to 800 in 1991. 1992 saw a slight increase in the number of criminal filings.

The trend in the trial of criminal cases, however, has been on the rise. As a percentage of total trials in this District, criminal trials have increased from

approximately 30% in 1989 to over 40% in 1992. The number of drug prosecutions in this District, unlike a number of other courts, has not changed dramatically in the last decade. The number of drug defendants has fluctuated between 20 and 30% of all criminal defendant filings. In narcotics cases, however, the number of criminal defendants per case has been increasing, along with the number of gun-related felonies. The latter is a reflection of Department of Justice policies directing United States Attorneys to bring state cases into federal courts by using federal laws prohibiting the use of firearms to commit violent crimes. This has also increased the number of multi-defendant conspiracy charges and trials. However, there has been cooperation between the federal prosecutors and the Court about specific ways to streamline conspiracy cases and to divert others for State prosecution.

To a certain extent the statistical data on criminal cases may not be fully reflective of reality. The district judges when interviewed, all asserted that the increasing criminal workload was an ominous development with potentially adverse effects on disposing of their civil cases.

New federal legislation and aggressive federal prosecutorial initiatives are likely to continue to impact the Court's ability to dispose efficiently of its civil

litigation caseload. It is true as well that there has been an expansion in the staff of the United States Attorneys' Office. As of September 30, 1992, there were 60 Assistant United States Attorneys in this District. This is an increase from 30 Assistant United States Attorneys in 1982.

2. Legislation

Already mentioned are some federal legislative initiatives which have challenged the capacity of this Court to reduce cost and delay in the disposition of its civil litigation.

There are, however, several other legislative changes which have created significant impediments to expeditious case management.

The Sentencing Reform Act of 1984 and the United States Sentencing Guidelines issued under it have markedly increased the time the judges must dedicate to the conduct of sentencing hearings. Naturally, the increased time consumed in discharging the judicial function in criminal sentencing thereby reduces the time that is available for other purposes, including civil matters.

The guidelines apply to all federal criminal offenses committed after November 1, 1987 and oblige judicial officers to impose sentences within narrow ranges. In addition, the Court is called upon to measure or quantify for sentencing purposes the amount of harm or loss attributable to the conduct of a defendant. In the context of drug conspiracy cases this presents particular problems separating from the total quantity of drugs attributable to a conspiracy that which may have been attributable to the conduct of one member. In many instances full evidentiary hearings are requested and required for this purpose and in other instances to determine a defendant's aggravating or mitigating role in an offense. In short, the length and complexity of the presentence process and the sentencing hearing have been expanded.

The Sentencing Reform Act also affords a right to appeal to both the Government and the defendant. Either party can challenge the sentencing Court's interpretation or application of the sentencing guidelines. Before this legislation there were few grounds for appeal available.

As of this time, there is no known statistical data available which would quantify the time the Court must spend in passing sentences under the Guidelines, but it is the view

of the judges, the United States Attorneys Office and attorneys familiar with sentencing procedures that the sentencing process is more complicated and time-consuming than before.

The Speedy Trial Act is another obstacle to efficient case management. All criminal cases are on a fast track from the day of indictment, regardless of how simple or complicated. Although there are a number of exclusions, the Act can still cause scheduling problems where the Defendant is incarcerated, not released on bail and seeks immediate trial. In these jail cases, the judges are obliged to adjust their trial calendars to accommodate the priority afforded criminal cases which, necessarily, causes delay with the civil docket.

3. Unfilled Vacancies

As discussed earlier, a persistent problem for this Court and many others across the country is the inordinate delay encountered in filling newly-created judicial positions or vacancies caused by resignation or retirement. Beginning in about 1986 the time for filling vacant judgeships here increased from significantly less than one year to one year eight months and now is likely to approximate over two years.

The reasons for this are not easy to determine and, indeed, are beyond the focus of the Advisory Group. Suffice to say, however, that the preappointment process for federal judicial nominees has become infested with redundancy. Applicants are cleared before being recommended for appointment to the Department of Justice, then are subjected to an elaborate screening process by that federal agency and the Federal Bureau of Investigation. Simultaneously, outside organizations such as the American Bar Association conduct their own background inquiries. Once a name is submitted to the President for consideration another investigation is conducted under the auspices of the White House before the nominee is sent to the United States Senate. At that point, the staff of the Senate conducts another, independent background check. Then and only then does the name of the nominee work through the Senate Judiciary Committee and its members, a process that bears no time deadlines. In fact, in instances where the President and the Congress are of different political parties there is little incentive for the latter to approve federal judicial appointees on an expedited basis.

B. Causes Within The Civil Litigation Process

1. Excessive and Abusive Discovery

Many studies reflect what is known to any federal judicial official and trial lawyer--the discovery process in too many cases takes on a life of its own. Whether directed by clients or orchestrated by their counsel, extensive resort to written interrogatories, oral depositions, document production and the like consumes time and costs money. This truism has been confirmed by the Advisory Group through interviews with the district judges and magistrate judges, as well as from their own personal litigation experiences.

The Act requires the Advisory Group to consider "controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion." 28 U.S.C. § 473(a)(2)(C). It further suggests "phased discovery" as a means for managing complex cases in a more cost-effective and efficient manner. This concept reflects the view that discovery, in some cases, should occur in a prescribed sequence to promote a more expeditious proceeding.

Already in place long before adoption of the Act and the work of this Advisory Group as a part of the Local Rules of this Court are a number of specific measures which have limit the number of interrogatories, requests for production and requests for admission, mandate suspension of discovery

during the pendency of any motion under Federal Rule of Civil Procedure 12(b)(1) or (2) raising lack of personal or subject matter jurisdiction; specify the format for responses to interrogatories and requests for production; and establish a procedure for dispute resolution which obliges counsel to attempt resolution prior to initiating a specific procedure for invoking judicial resolution. Furthermore, it has been a practice of each judge of this Court to set time limits for completing discovery in scheduling orders entered in every civil case. This practice is in keeping with existing Rule 16 of the Federal Rules of Civil Procedure.

Before adoption of the Act in 1990, judges, lawyers and litigants appreciated the expansive and expensive discovery mechanism that was spawned a half-century ago by the Federal Rules of Civil Procedure. Countless agencies within the judicial system, as well as outsiders, have studied the discovery process and these efforts are ongoing. Two Judicial Conference Committees--the Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure--are considering proposed amendments which include mandatory prediscovery disclosure of certain information, placing numeric limits on depositions, interrogatories and restricting the use of expert witnesses. President Bush issued an Executive Order in October, 1991 which seeks to

streamline and simplify discovery in cases brought by the federal government. Simultaneously, the Rules Committee of our Maryland Court of Appeals is considering a set of similar recommendations. At this time, the ultimate formulation in each instance is pure conjecture and any courts that tinker with Local Rules risk conflict with the Federal Rules.

Given the existence of this Court's rules that place limits on the time and scope of discovery and, further, recognizing the uncertainty attendant to the ongoing work of national committees, the Advisory Group concludes that rather than establish additional restrictions by local rule, the better course would be to await the report of the Advisory Committee on Civil Rules of the Judicial Conference to see what modifications, if any, it recommends. We are mindful that federal rules changes proposed by the Judicial Conference, and by the Rules Committee of the Maryland Court of Appeals, could alter many discovery practices and requirements. Because we wish to avoid inconsistencies and contradictions with this Court's local rules, the Advisory Group will defer specific recommendations for local rules revision.

In the meantime, however, there were other issues or practices which the Advisory Group addressed. These relate

to (1) the accessibility of district judges and magistrate judges to resolve discovery disputes and (2) the absence of standards or guidelines which would govern counsel in their conduct of discovery.

On access to judges, the Advisory Group concluded that the existing procedure in the Local Rules for discovery dispute resolution had a certain built-in impediment which favors the dilatory litigant or counsel and adds cost for the opposition. The current procedure for conferring with counsel, filing briefs, and so forth can be so cumbersome that an unfair time delay is injected into the process which effectively obstructs legitimate discovery.

The Advisory Group concludes that availability of a judicial officer to entertain discovery issues on an expedited basis would, of itself, tend to be a deterrent to frivolous discovery disputes. Having a district judge or magistrate judge available to review spontaneously issues (such as those that arise at depositions) would likely discourage counsel from being obstructionist.

While the Court already uses magistrate judges effectively in the discovery process, they, too, are bound by the local procedure and even in instances where magistrate

judges handle discovery disputes expeditiously, appeals can be taken to the district judges, thereby injecting further delay.

The Advisory Group suggests that the Court establish a chambers magistrate judge to deal with discovery questions. This could be on a rotating basis, but one judicial officer would be available according to an established schedule to respond to emergency discovery issues, thereby affording an alternative dispute resolution mechanism to that found currently in the Local Rules.

Another suggestion included further use of Federal Rule 26(f) as a procedure for counsel to obtain judicial consideration of discovery issues. The Rule already provides a means for managing complex or other appropriate cases in a more cost-effective and efficient manner by involving the judicial officer at any time after commencement of a civil action to confer with the attorneys to discuss discovery and to develop a proposed plan and schedule for discovery which is reduced to an order. Rather than propose some new mechanism, the Advisory Group concluded that encouraging expanded use of the existing mechanism was advisable. A suggestion is that Rule 26(f) be specifically referred to in all scheduling orders issued by the judges. These orders, required by Rule 16 to be issued within 120 days after filing

of the complaint, are routinely entered in all civil actions. This is an appropriate means to control the time for discovery so long as the Court allows the parties to collaborate with it in appropriate cases to formulate a discovery protocol suitable for a particular case. Rule 26(f) provides the necessary flexibility already.

The Advisory Group, further, received from the judicial interviews confirmation of an impression that many counsel who have come to litigation practice in the recent era of "hard-ball" tactics are unaware of fundamental standards of professional courtesy which are implicit in the Federal Rules of Civil Procedure, although unstated. Civility, or rather the lack thereof, impacts the judicial process significantly. To the extent that attorneys do not communicate with opposing counsel, unnecessary discovery disputes result. Even in those instances where counsel communicate, on occasion there are fundamental misapprehensions about the accepted way to conduct discovery.

For that reason the Maryland Rules since 1990 have contained explicit discovery guidelines. This is in the nature of a code of conduct which spells out certain assumptions or "givens" that govern attorneys in the discovery phase of litigation. These discovery guidelines,

appended as Appendix 4, afford a starting point in the view of the Advisory Group and should either by made a part of the existing Local Rules of the Court or incorporated into scheduling orders. There should also be a "Code of Conduct" or specific reminders that counsel are always obliged to conduct discovery, and other communications with counsel with civility and respect.

2. Last-Minute Postponements

One perception of many members of the Advisory Group prior to judicial interviews was that civil cases scheduled for trial were too often postponed at the last minute. Naturally, such postponements after trial preparation has taken place can be a cause of extra litigation costs and delay. While it was determined that there are occasions when civil trials are postponed on the eve of the commencement of the proceedings, these postponements appeared to relate more to convenience of the parties and their counsel than to any court-specific problem. Health, travel schedules, unavailability of important witnesses and factors of this sort appeared to be the reason for last-minute postponements rather than any system by which cases are assigned for trial.

One of the reasons for this is the Court's existing practice of the judges collaborating each week on their trial schedules. In instances where a particular judge is involved in a matter which will impact on another matter set for trial, the judge, typically, brings this to the attention of the Court. Every effort is then made to reassign the case to another judge who will adhere to the existing schedule.

The importance of establishing firm trial dates early in the litigation process was accentuated repeatedly during the work of the Advisory Group. Establishing early, firm trial dates is critical to prompt, efficient disposition of cases simply because lawyers and their clients tend to work better against a deadline. It also in many cases tends to produce a more focused pretrial discovery regimen and to afford an inducement to resolve the dispute alternatively by settlement.

The Act recognizes the critical significance of this by requiring that the Court consider and include in its civil justice expense and delay reduction plan the early 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 . . . " 28 U.S.C. § 473(2)(B).

This Group recommends that the Court have a uniform practice among the judges to establish firm trial dates very early in the process. All judges should be cognizant of the need both to establish a trial date that does not protract the litigation and the need, once a date is set, to adhere to that date. The Advisory Group is aware that the overwhelming majority of civil cases in this District are already disposed of within eighteen months of filing. For that reason there appears to be no need to impose a formal, inflexible rule. The Court, in most cases, should be able to establish a trial date in the initial scheduling order issued under Rule 16. In complicated cases there is the likelihood that there will be early judicial involvement either through a discovery or scheduling conference at which time a realistic trial date can be established with the input of counsel. In either event, once a trial date has been scheduled, postponements should be ordered only in rare instances.

3. Inefficient Use Of Courtroom Time

The experience of the members of the Advisory Group, as well as their interviews of the district judges and magistrate judges, confirmed that the length of in-court proceedings is increasing for both civil and criminal cases. There was discussion earlier about the additional time that

is required in the criminal sentencing process. The same holds as well for conducting arraignments and for multi-defendant conspiracy cases.

A similar trend toward longer trials also is apparent in civil cases, many times because counsel and their clients do not adequately focus on and tailor the proof. Too often testimony and documentary evidence is cumulative.

The Local Rules already provide certain mechanisms for expediting trials and other court proceedings. For example, Local Rule 107.5 requires that exhibits be made available for review by opposing counsel prior to trial and that at trial counsel need not hand to counsel for the other side any exhibits which have been made available for review prior to trial. Similarly, Local Rule 108.a limits the length of jury arguments. These rules should be enforced. Furthermore, the goal of judges and lawyers alike should be to assure that testimony is presented virtually every minute that the jury is present. In that connection judges should make every effort to resolve evidentiary issues by way of pretrial motions in limine or at hearings in the morning before the jury has arrived or in the afternoon after the jury has left.

Some have suggested that greater attention be given to imposing limits in advance of trial on the number of witnesses a party may call, increasing the authority of judges to limit the time of case presentation or insisting upon presentation of direct testimony in narrative or affidavit form.

The difficulty with many of the suggestions that purport to shorten the trial and reduce costs is the likelihood that they could substantially impair the right of litigants to a fair trial. Tension exists, obviously, between efficiency and due process of law.

In the end, the Advisory Group suggests that the Court and counsel not lose sight of the responsibility to conduct trials in the shortest, most cost-efficient manner that is consistent with the parties' right to their "day in court".

4. Motions

Just as excessive discovery contributes significantly to unnecessary litigation costs, counsel on occasion present to the Court unnecessary motions. Defensive lawyering--like defensive medicine--too often produces

motions that are unfounded, presented for reasons of delay or to intentionally harass the opposition. Determining how many motions are too many is not possible. The members of the Advisory Group and the judges uniformly believe that the volume of motions could be reduced, but how to achieve this end is uncertain. Short of increasing the use of sanctions as a means of discouraging unnecessary motions--something that is not recommended and would contravene the policy of Local Rule 105.8(a)--few concrete proposals come to mind.

To the extent that the national perception is that motions contribute to delay in the judicial process, the Advisory Group confirmed that this conclusion is not accurate for this District. Many of the judges decide routine motions promptly without involving their law clerks. Most, if not all, judges hold hearings on motions only in more complicated matters or at the request of counsel. Other judges have imposed deadlines for completing their work on motions, thereby attaining an increase in the motion turnaround time. Still other judges have found that hiring their law clerks for two-year terms helps reduce the time expended on motions because the experience of the older law clerks tends to expedite disposition of routine matters.

On the whole, it appeared that while the Court was the recipient of unnecessary motions, for the most part it has been able to resolve them in a timely manner. The fact that the court typically sets deadlines in the initial scheduling order for filing dispositive motions (and that this deadline is well before the trial date) is a salutary practice. As a rule judges should resolve substantive motions to dismiss or for summary judgment within 60 days of the last responsive memorandum. Since it appears true that, if motions are resolved quickly, there are fewer filed, the Court's interest is best served by deciding them quickly.

Some judges in this district have followed the practice of stating their views at the outset of a motions hearing as to the questions presented and asking counsel to address the issues as thus framed. The Advisory Group understands that a similar practice has been recommended in the Northern District of Ohio. The practice has the beneficial effects of preventing counsel from having to waste time persuading the judge to make a ruling which he or she is already inclined to make and of giving counsel a fair opportunity to change the judge's mind on an issue as to which the judge is inclined to rule against them. We recommend that all judges adopt the practice.

5. Sanctions and Attorney Fees

The generally recommended antidote for discovery abuse or excessive motions is to impose sanctions. There already exists in the Federal Rules considerable latitude for the Court's authority.

For example, Rule 16(f) entitles the Court to sanction a party or a party's attorney for failure to obey scheduling or pretrial orders, to appear at scheduling or pretrial conferences, for not participating in good faith or to be "substantially unprepared to participate in the conference". Similarly, Rule 37 contains a number of sanctions for failure to make or cooperate in discovery.

For the Advisory Group to advocate more sanctions or greater use of existing sanctions would be very difficult, particularly in the face of a substantial body of opinion within the judges of this Court that sanctions are not to be encouraged. Some judges were outspoken in saying that they would not impose sanctions either because of a fear that the litigation process would be unfairly chilled or because the likely additional proceedings generated by imposition of sanctions would be counterproductive, adding more cost and delay, rather than reducing them.

To the extent then that the objective is to shorten and make less expensive the civil litigation process, the consensus locally is that consistent judicious use of sanctions in accordance with Local Rule 105.8 and occasional award of reasonable expenses, including attorneys' fees, in extreme cases is to be encouraged.

IV. PRINCIPLES FOR REMEDYING UNNECESSARY COST AND DELAY

A. Efficient Management of Judicial Resources

1. The Individual Assignment System and Beyond

Section 473(a)(1) of the Act proposes that the Court, in consultation with the Advisory Group, consider certain "principles and guidelines of litigation management and cost and delay reduction". Among the guiding principles recited in the statute is "individualized and case specific management".

The individual assignment system which governs distribution of civil cases among the judges and the prevailing practice of the judges issuing scheduling orders in every case operate effectively to assure "individualized and case specific management". To the extent that there are special circumstances suggesting that a case may be unusually complex or that the amount of time reasonably needed to prepare the case for trial is exceptionally long, the judges

make themselves available to counsel and the parties to set a schedule for that particular case which suitably recognizes that a particular matter may require a level of judicial intervention that may be unusual.

The Advisory Group considered the pros and cons of a more formal differential case management system such as, for example, implementation of a "tracking" or categorizing procedure. To a certain extent the judges of this Court already recognize that all civil cases are not the same and that differential treatment, tailored to the individual case, is expected. Likewise, counsel are generally aware that, while in the usual case the assigned judge has little or no contact with litigation until discovery is complete, latitude exists presently to request a conference in the interim to discuss either discovery, as provided in Rule 26(f), or scheduling and planning, as contemplated by Rule 16(b). To the extent that emphasis must be placed by the judges on more intensive, individual management of civil cases, as the Act directs, the Advisory Group believes that this principle can be addressed and implemented within the individual calendar system and without the need for a tracking procedure. To assure that this is a uniform standard, the Advisory Group believes that the judges should be mindful of the expectation that they will review cases at the outset and treat

differently cases that appear to be extraordinary or complex. Furthermore, reference in scheduling orders to the opportunity for counsel and the parties to establish a special management system for an individual case should be implemented. Specific recommendations for the content of scheduling orders are set forth in Part V.

2. The Use of Magistrate Judges

Utilization of the Maryland magistrate judges in civil cases should be expanded, in the view of the Advisory Group. Of the five U.S. magistrate judges resident in Baltimore one dedicates full time to criminal matters and the other four magistrate judges spend every fourth month on a rotating schedule assisting with the criminal docket as needed. These four magistrate judges also receive referrals from the district judges of pretrial motions, including primarily the resolution of discovery disputes, but also some dispositive motions in accordance with 28 U.S.C. § 636 and Local Rule 301. The district judges also refer habeas corpus petitions, social security disability appeals and civil rights cases under 42 U.S.C. § 1983 in which prisoners challenge conditions of confinement. Further, these four magistrate judges handle settlement conferences and try civil cases, whether jury or nonjury, with consent of the parties.

Interviews of the district judges and magistrate judges disclosed that there is no uniform practice with respect to referrals. Some district judges tended to make no referrals whatever; others tended to refer only discovery questions; still others made referrals within the full authorization of Local Rule 301. Some district judges expressed a reluctance to refer dispositive motions because of the realization that all rulings were subject to de noso review by the district judge, thereby effectively adding another layer of review and creating the potential for duplicative effort between magistrate judge and district judge on the same case. To avoid this a suggestion was made that the parties be urged to consent to accept the ruling of the magistrate judge as final, thereby eliminating an appeal to the district judge, but preserving the right of appeal to the United States Court of Appeals.

Magistrate judges, it was learned, have proven very effective in facilitating settlement discussions between the parties and their counsel. It is routine in this District for litigants to ask that a judicial officer be designated to conduct settlement discussions and, typically, this results in designation of a magistrate judge for this purpose. This is a practice which the Advisory Group encourages.

Use of magistrate judges to try civil cases is less frequent but appears to be increasing. Prior to 1990, 28 U.S.C. 636(c) provided only for initial advice by the Clerk of the Court when a case was first filed "of the availability of a magistrate". By virtue of a recent amendment to Section 636 found in the Judicial Improvements Act of 1990, of which the Civil Justice Reform Act is a part, the statute permits either the district judge or the magistrate judge to again advise the parties of the availability of a magistrate judge, so long as the parties are informed that "they are free to withhold consent without adverse substantive consequences." This permits both the district judge and the magistrate judge to bring up the issue of consent at later points in the proceeding, such as a status or pretrial conference, when the parties are more likely to focus on the advantages of such an election. Frequently, a magistrate judge is able to provide counsel and the litigants a certain date for a trial, because the magistrate judge's calendar is not subject to interruption for the trial of felony criminal cases.

The Advisory Group recommends the use of magistrate judges for trial of appropriate civil cases be encouraged as a means of reducing both the cost and delay in civil litigation. Magistrate judges can offer an inexpensive yet traditional dispute resolution alternative for cases that can be prepared for trial expeditiously.

Finally, as discussed above, there is strong support for the establishment of a chambers magistrate judge to deal with discovery questions. Having one judicial officer available, perhaps on a rotating basis, to review discovery disputes immediately and spontaneously would be a significant alternative to the dispute resolution mechanism incorporated in the Federal and Local Rules.

3. The Centrality of the Judge's Role

The Advisory Group has already endorsed retention of the individual assignment system because, among other things, it permits judicial officers, whether district judge or magistrate judge, to take control of a civil case from the outset and, through the management techniques authorized by Rule 16, to move a particular case toward trial.

In this respect, there is already recognition of some of the "principles and guidelines of litigation management and cost and delay reduction" that are found in the Act. The individual assignment system, for instance, affords "differential treatment of civil cases". It "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...." § 473(a)(1)

Furthermore, the individual assignment of district judges and magistrate judges affords "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...; (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 practical time, deadlines for filing motions and a time frame for further disposition..." § 473(a)(2).

But the Advisory Group urges that the judges recognize and continue to appreciate the need for "hands on" management of their dockets. As the Act requires, the Advisory Group will continue to monitor the status of the docket to assure that there has been no deterioration and perhaps even improvement in the present system. Collaboration among the district judges and magistrate judges is also indispensable to proper functioning of the system. The collegial nature of this Court has promoted efficiency

and it is desirable to encourage this as a way of balancing the workload, permitting the trial of cases on schedule and promoting uniformity in case management. Necessarily the Chief Judge bears a greater burden to monitor the docket and take corrective steps whenever another judge or judges falls behind.

4. The Responsibilities of the Clerk

The Office of the Clerk of the Court is well organized, reasonably well staffed and very supportive of the judicial function. Without meaning to slight the many duties of the personnel related to jury administration, procurement, attorney admissions, naturalization, criminal cases, and so forth, this Group considers indispensable the ongoing involvement of the Clerk in the management of the civil docket. Each district judge and full-time magistrate judge is provided a courtroom deputy to assist in case management to the extent that they assist with docket matters, scheduling hearings, trials and other proceedings, and assisting in operation of the courtroom. They also have the important task of maintaining case inventory reports and other computer data which is meant to provide current information about the status, aging and disposition of cases. It is essential that the Clerk make sure that the

data being used by the Administrative Office is accurate and current since this court's performance is evaluated on the basis of that data. The Advisory Group is under the impression that plans are in progress to upgrade this District's electronic docketing systems and to enhance the office automation capability of the Clerk. The level of automation seems comparable to that of the most advanced district courts in the country, thanks to the personal effort of the Clerk, Mr. Haas, but improvement is not to be overlooked. As more sophisticated resources become available, this District should be sure to take advantage of improved technology. However, it is also imperative that members of the Clerk's staff remembers that computers and other equipment are only as good as the people who operate them.

The Clerk's office receives a number of inquiries from lawyers and members of the general public during the course of each working day. Sometimes callers are placed on hold for long periods of time or switched from one extension to another. Inevitably, this causes callers to become frustrated and contributes to a public perception of an uncaring and inefficient government bureaucracy. Furthermore, fielding telephone calls frequently interferes with the performance of other work. Therefore, the Clerk

should consider creating one or two positions dedicated primarily to responding to public inquiries.

Further, the interpersonal relationships between the district judges, magistrate judges and the Clerk, through regular group and individual meetings has been very effective in dealing with docket management issues. The Court is to be applauded for reducing the caseload disparity among judges and reducing the number of three-year old cases through cooperative effort between the judges and the Clerk. No plan for reducing civil justice expense and delay can be a substitute for interactive effort on the part of the personnel involved in the judicial process. The Clerk should be encouraged to work with the district judges and magistrate judges to further reduce the time for disposition of civil cases.

B. Effective Case Management

1. General Considerations

The Act, as stated earlier, proposes that "an effective litigation management and cost and delay reduction program should incorporate several interrelated principles" and mandates that "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." 28 U.S.C. § 472(c)(2).

The "interrelated principles" are, in essence, that (1) each civil case should be treated according to its own complexity and likely duration; (2) judicial officers are to become involved early in planning the progress of each case; (3) early, firm trial dates are to be set; (4) the extent and timing of discovery is to be controlled; (5) time deadlines should be established for filing and ruling on motions; (6) alternatives to trial should be used, including settlement conferences and other alternative dispute resolution mechanisms as appropriate; and (7) trials should be structured to efficiently utilize judicial resources.

2. Scheduling

Rather than advocate the implementation of so called "tracks" for categorizing civil cases, the Advisory Group recognizes and approves of this Court's long-standing practice of identifying certain types of cases which, because of the Court's experience, are likely to have different pretrial requirements. In practice, civil cases are sorted into three categories by the judicial officer assigned to the

case in question. Typically, that individual considers a number of factors including the subject-matter of the case, the number of parties, the factual and legal issues, the anticipated volume of discovery and the expectation as to length of court time to be consumed pretrial and at trial.

Generally, civil cases, applying these considerations, fall into categories of being relatively noncomplex, routine and complex.

a. Prisoner litigation and other pro se cases.

This court treats specially cases which require little discovery and only a few days of trial time. These cases can and are managed on an expedited time schedule, calling for trial within six months or so of the filing of the initial complaint.

Prisoner litigation and pro se petitions are examples of this category of noncomplex cases. Other specific examples include social security appeals, collection of student loans, enforcement of judgments, and bankruptcy matters.

b. Routine cases

The bulk of the civil litigation in this district, as apparently is the case in virtually all courts, are the "standard" suits pertaining to contracts, civil rights, discrimination, admiralty, labor, selective service, simple tort, statutory actions and others.

These cases are usually set for trial within one year of the filing of the initial complaint and are expected to consume more than three, but less than ten, days to try.

c. Complex cases

Cases that are neither noncomplex nor routine are those which will require special management by the court because of the large number of parties, the large number of claims or defenses, complicated factual issues, the volume of evidence, amount of discovery, foreign or third-party discovery, the likelihood of a protracted time required to prepare the case for resolution, the need to resolve preliminary issues before final disposition, and others.

These cases, recognized as "complex", are usually set for trial eighteen months after the initial filing of the complaint.

The Court, counsel and litigants know from the beginning the anticipated timetable for case management. The prospect of a trial on a date certain, furthermore, forces consideration of settlement in the context of anticipated trial preparation expense and litigation hazard.

But the benefits of early, firm trial dates are dissipated if these dates are not strictly adhered to. A firm date will foster serious settlement discussions. It also means that counsel and their witnesses prepare only once for trial. Furthermore, the costs of producing the third-party and expert witnesses are minimized if cases are processed on time.

Not all judges in this District establish trial dates at the beginning of a case. Still other judges tend to let the trial dates slip. This Group urges that in most cases the trial date be established early in the litigation and that, once a date is set, it be maintained. We recognize that there are competing demands on judicial time, particularly from the criminal docket, but the Court is working effectively to deal with this circumstance by encouraging adherence to the original trial date through proceeding before a different district judge or magistrate judge. No formal program for doing this seems necessary;

continuing the informal approach is encouraged. Nonetheless, the Group believes that the specific recommendations stated in Part V will assist in establishing and maintaining early and firm trial dates.

4. Judicial Control

The Act imposes on the Advisory Group and the Court an obligation to involve judicial officers not just in planning the progress of the case, but also controlling discovery, scheduling motions and hearings and conducting trials.

a. Over Discovery

Considerable discussion of the discovery phase of litigation appears earlier in this Report. Existing Federal and Local Rules now provide many effective mechanisms for controlling discovery. Already in place are limitations on the number of discovery requests and requests for admission. To the extent that the existing dispute resolution protocol does not work, this Group suggests that the Court make available a judicial officer to deal on an emergency basis with discovery disputes. Furthermore, we recognize that the lawyers themselves have a professional responsibility to conduct discovery sensibly and

economically. To that end, the adoption of guidelines should benefit litigants and lawyers about discovery management practices and their responsibilities.

b. Over Motions

To deal with excessive motions practice is a nettlesome problem. Like beauty, what is "excessive" is in the eyes of the beholder. Furthermore, most of the judicial officers in this District did not think that motions practice impacted significantly on the cost of litigation or the extent to which there is delay in the process.

Having said that, however, there have been isolated examples of instances where dispositive motions were not ruled on promptly or with due consideration. As noted, the Committee believes that judges should make a practice of resolving substantive motions to dismiss or for summary judgment within 60 days of the filing of the last responsive memorandum. Beyond that recommendation, the Advisory Group has no concise suggestion other than to encourage district judges who know that they will be involved in a protracted trial--and thereby not able to deal with motions in their cases--to call on magistrate judges for handling this responsibility. Recognizing that most district judges prefer to resolve dispositive motions in cases assigned to

them, there are still instances where referral to a magistrate judge would permit quicker resolution. Such a referral, however, should only be made as soon as the motion is ripe and the parties have consented to the ruling's being final.

c. Over Courtroom

Time is the most important judicial resource, and efficient expenditure of time is an objective of the Act. Little attention has been given, however, to consumption of judicial time in the courtroom. Perhaps this is a recognition of the inherent limitations on judicial control over the presentation of evidence, but it also may be a reflection of sensitivity to considerations of due process and fairness.

Nonetheless, there are practical, effective ways for trial time to be managed. Some of these include regulating and limiting expert trial testimony, requiring that in nonjury trials expert testimony be submitted in writing with only cross-examination done before the fact finder and limiting presentation of potentially redundant testimony through motions in limine and proffers. The Advisory Group does not propose any rules or guidelines in these respects, but recognizes the inherent right of the

Court, in its discretion, to limit evidence presented at trial. Both the judges and the lawyers should be particularly sensitive to the use of court time in jury trials. While jury service is a civic duty, it is a substantial personal sacrifice as it disrupts the jurors' personal and professional lives. Therefore, it is extremely important that trials begin and proceed on time; that to the maximum extent possible, legal issues are resolved prior to the time that jurors are required to be present; and that everything possible is done to make jury trials move efficiently and expeditiously.

5. Attorney Fee Guidelines

Implicit as an assumption -- more accurately, a "given" -- in the Civil Justice Reform Act is that the primary costs of civil litigation come from attorney-client billings, particularly when the charge for legal services is on an hourly basis. Setting hourly rates is surely beyond the scope and authority of this Advisory Group. Market forces, competition, overhead and client preferences are only a few of the determining factors in the pricing of attorneys' services.

Nonetheless, there is no more apt summary of the element of cost in civil litigation than the old adage that "time is money". It goes without saying that to the extent that litigation management results in, for example, reduction of attorney time dedicated to discovery, there will be an equivalent cost reduction for the consumers of legal services. Furthermore, as noted earlier, in this District the central explanation for unnecessary litigation expense is "overlawyering". While this is not the same thing as "overcharging" for legal services, as in the rate of compensation, the resulting cost to litigants is affected. The Advisory Group has no information that litigants in this District are being overcharged in the sense of having to pay excessive hourly fees. However, on occasion there are instances where the fee charged in a contingency case is disproportionate to the amount of work expended by the attorneys. Furthermore, to the extent that improved judicial management results in a reduction of delay, there will be an equivalent reduction of fees charged on an hourly basis. An equivalent reduction should be recognized for those civil matters which are handled on a contingency fee.

C. Methods of Alternative Dispute Resolution

One of the "principles and guidelines of litigation management and cost and delay reduction" which the Act mandates for consideration is utilization of alternative dispute resolution programs in appropriate cases. Consideration is to be given to "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, mini-trial and summary jury trial." 28 U.S.C. § 473 (a)(6).

The Advisory Group learned that the most widely accepted ADR process employed in this District is the settlement conference. Federal Rule 16(c) provides that participants in a pretrial conference "may consider and take action with respect to . . . (7) the possibility of settlement . . . .". There appeared to be no unanimity among judicial officers with respect to settlement practices. Not all judges interviewed approved of judicial involvement in settlement discussions as an agenda item for pretrial conferences. Most attorneys, however, and indeed virtually all committee members were of the view that judicial involvement in the settlement process makes a difference. It provides counsel an incentive to engage in such discussions and induces clients to also participate meaningfully.

While the Advisory Group unanimously endorsed continued and expanded use of settlement conferences, there was a division among committee members as to whether pretrial settlements conferences should be compulsory or discretionary. It was noted that very few judges in this district press attorneys to settle civil cases. This, apparently, was because of the view prevailing among the judges that settlement conferences tend more to affect the timing of settlements rather than contributing to effectuation of settlements.

For a time the Court designated one judge to serve as a "settlement court" on an experimental basis. This experiment was not particularly successful because the judicial intervention was deemed to be too early in the litigation process. Conferences with counsel were being scheduled as soon as a case was at issue, rather than after the case was ripe for trial. The result was a low percentage of cases being settled.

The majority view of the committee members is that some type of mandatory settlement conference, supervised by a judicial official, should be required in this district. Such a settlement conference could be mandated by Local Rule, or directed by the Court (generally at the pretrial conference

stage). Simply making settlement conferences available upon request of the parties, as is the prevailing practice now, is perceived as inadequate.

As to conduct of the settlement conference, it is the recommendation of the Advisory Group that the conference take place before a district judge or magistrate judge and that in either event the parties would be obliged to submit beforehand a written evaluation of their client's position with respect to settlement and an estimate of the cost of taking the case to trial. It was also thought that for settlement conferences to be effective, there should be a requirement that the parties or their authorized representatives and their trial counsel be present.

Because of a concern that to adopt a court rule which mandated settlement conferences could place substantial additional burdens on the district judges and magistrate judges, it is suggested as an alternative that the Court adopt a pilot program, perhaps involving a senior judge or others, to evaluate the effectiveness of mandatory settlement conferences in routine and complex cases.

In short, reinforcing the objectives of Rule 16 by requiring formal, supervised settlement conferences in

contrast to private settlement discussions between the parties is recommended. This recommendation does not preclude use of other alternative dispute resolution programs such as mediation, arbitration, mini trial and summary jury trial.

In fact, mediation is implicit in the process of settlement conferences. To the extent that settlement conferences have been used in this District typically there has been involvement of a district judge or magistrate judge who, in effect, serves as a mediator.

Mediation other than by judicial officers is a process that should be available upon request of the parties; that is, mediation through an impartial third party appointed by the Court to offer advice concerning all or a part of the controversy should be offered as an alternative. The Advisory Group declines to endorse the establishment of court-annexed mediation, but approves of the selection of mediators upon the agreement of all parties. The mediator would be compensated as agreed by them, subject to the approval of the judicial officer. Mediation proceedings would be regarded as settlement discussions and communication related to the subject matter of the dispute will be confidential communications.

The Court should also offer mini-trials on request of the parties. A mini-trial is a proceeding in which representatives for each party or an impartial third party are presented with abbreviated versions of the parties' positions. After the presentations, the merits of the dispute are discussed and a nonbinding advisory opinion is issued. Like the summary jury trial, a mini-trial is a means of providing the litigants with an early evaluation of their respective cases and to foster realistic settlement negotiations. There is no reason for this Court not to permit use of mini-trials, but there is also no particular reason to require it.

The same is true with arbitration. Arbitration provides an advisory adjudication of a particular case. In arbitration, the arbitrators (usually an outside neutral or panel of neutrals) conduct a hearing under a relaxed rules of evidence. They then issue an opinion on the merits of the case. Arbitration is often viewed as an attractive alternative to litigation because it limits the involvement of the judicial officers, diverts cases from the pretrial process and allows parties to submit their disputes to a neutral individual.

The Advisory Group, however, is not persuaded that arbitration either reduces the cost or quickens the pace of litigation. Furthermore, to implement a court-annexed arbitration system would run counter to the general objective of the Civil Justice Reform Act proposals of involving judicial officials early in the litigation process and then maintaining that involvement to assure efficient management of litigation. To divert cases to arbitration does not advance this objective. If nonbinding, arbitration also tends to be of questionable effectiveness because of the likelihood that a party would thereafter seek to obtain a trial de novo in the District Court, as is the practice now in Maryland in the arbitration of medical malpractice claims.

In sum, the need for a formal arbitration program, either dictated as an alternative dispute resolution technique or as a mandatory court-annexed program, has not been demonstrated in this District.

Finally, utilization of summary jury trials as a nonbinding procedure has been used sparingly in this District. The demand for this alternative seems sparse. Nonetheless, there is no reason why a summary jury trial cannot be used in particular circumstances. For example, a summary jury trial in which the parties briefly present their

cases to the jury, the jury deliberates and then renders a decision, could be encouraged in cases where the actual trial would be unusually expensive, either because of its length or because of the stakes involved. We are aware that other Courts have discouraged the use of the summary jury trial altogether (for example, the Eastern District of New York), but given the lack of significant experience or a "track record" with this particular device, the Advisory Group is of the view that it can be used as an alternative dispute resolution mechanism upon agreement of all parties.

D. The Responsibilities of Others

1. The President and Congress

One of the requirements of the Act is 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." 28 U.S.C. § 472(c)(1).

Unquestionably, as discussed earlier, expansion of the jurisdiction of federal courts by creation of new causes of action and legislative enhancement of existing federal rights have an adverse impact upon the Court's ability to dispose of civil cases in a timely fashion. As an example,

there is no longer a statute of limitations for student loan collection cases. This, surely, will increase the burden on the Court. For another example, the recently enacted Civil Rights Law provides for jury trials and expands the scope of damages that can be awarded. Already discussed and of similar consequence are the Speedy Trial Act, the Sentencing Reform Act and Firearms prosecutions. The same must be said about the Americans With Disabilities Act. This is another example of an expansion of individual rights of federal action which will impact the docket.

The Advisory Group is hard-pressed to make any specific recommendations which the President and Congress could or should adopt other than to note that any serious effort to control the problems of cost and delay in federal civil litigation must include both the Executive and Legislative branches. This Court -- indeed all 94 federal districts -- cannot answer the problem fully and finally. Management techniques can be implemented; rules of court directed at efficient and expeditious treatment of cases can be adopted; and serious efforts can be undertaken to cap legal fees. However, until Congress incorporates into new legislation and amendments to existing law some evaluation of the judicial effects of proposals, the reform process is handicapped. There should be at the national level some

requirement that the impact of legislation on federal courts be assessed in every instance. Like an "environmental impact statement" each new law should carry with it something in the nature of a "judicial impact analysis".

2. The Members of the Bar

One judge in this District responded when asked "what steps . . . (other than those already discussed) do you believe that the members of the Bar should take in order to reduce the cost of and delay in litigation?":

> The profession must be elevated above the marketplace. Lawyers should serve the interest of their clients rather than themselves.

This Report, representing as it does the voluntary effort of the lawyer members of the Advisory Group over a period of almost two years, represents at least one contribution, however modest, by the Bar to the cause of civil justice reform. Unquestionably much more can be done by attorneys. They obviously should undertake to insure that they do not overwork, overpaper or protract civil litigation. Lawyers should and can be more attentive to litigation schedules, seeing to it that delay is not caused by their own lack of preparation. Exercising control over the use of discovery, while much discussed, is probably not

attainable unless there are explicit rules limiting the number of depositions and the length of depositions, eliminating speaking objections and promulgating guidelines to civil conduct.

One problem identified by the judges of this Court is the seeming lack of experienced trial lawyers. The judges in this District commented repeatedly that trial counsel through inexperience or lack of confidence tended to "overtry" and not bring focus to the presentation of evidence. At one time this Court adopted a certification procedure as a way of attempting to upgrade the performance level of trial counsel. This proved ineffective. At the same time, there is today much greater emphasis beginning in law school on trial practice and clinical programs. After admission to the Bar there is likewise a plethora of "hands-on" post-graduate courses in litigation. One of the best is the MICPEL one-week program. Many others also exist. What more can be done is a subject beyond the scope of the Advisory Group.

Perhaps in the end, projects such as this are helpful in enabling members of the Bar to better understand how the Court functions and to afford opportunities to participate in its improvement. This is true because of the

inherent inconsistency between trial economy and trial experience. To gain trial experience, typically, younger lawyers work with more senior lawyers in the preparation and presentation of evidence at trial. The consequence of this, assuming all lawyers are compensated for their time, is additional cost to the client. How to keep costs down and to also provide young lawyers the mentorship of more senior lawyers is a real challenge.

V. RECOMMENDATIONS

The primary recommendations of the Advisory Group are:

(1) The individual assignment system under which the court presently operates should be retained. However, there should be greater centralized management, under the auspices of the Chief Judge, to assure that the dockets of all judges remain current. To that end, when the docket of a particular district judge becomes overly crowded, the Chief Judge should use senior judges and magistrate judges to assist in bringing the level of that judge's docket down.

(2) In most cases a judge should (without holding a conference) enter a scheduling order as soon as all defendants have answered, setting deadlines for (a) filing

counterclaims, cross-claims and third-party claims, (b) the completion of discovery and the submission of a status report, (c) the filing of summary judgment motions, and (d) for designating experts. If the case is of a type which is unlikely to be resolved by summary judgment (e.g., simple common law torts, FELA or Jones Act cases and actions instituted under 42 U.S.C. § 1983 involving the alleged use of excessive force), the initial scheduling order should also set a trial date. In all cases, if the status report submitted by counsel at the conclusion of discovery indicates that summary judgment motions are not to be filed (or immediately upon the denial of any such motions which are filed), a short scheduling conference should be held to set a trial date (if one has not already been set), a pretrial conference date and deadlines for the submission of motions in limine, proposed voir dire questions, proposed jury instructions and proposed special verdict forms. In routine cases the possibility of a trial by consent before a magistrate judge should be discussed at that conference.

(3) In a case identified as a complex one by the judge to whom it is assigned, a scheduling conference should be held as soon as all defendants have answered to set a complete schedule (including trial date). If the district judge intends to assign the case to a magistrate judge for

resolving discovery disputes, he/she should have the magistrate judge present at the conference.

(4) The existing rules and practice requiring counsel to certify that they have made good faith efforts to resolve a discovery dispute before bringing it before the court should be continued. However, alternative procedures should be established to provide quick and easy access to a district judge or magistrate judge for the purpose of resolving an emergency discovery dispute such as, for example, one that arises during depositions. In some instances, counsel should be able to bring a discovery dispute directly to the attention of a judicial officer where both counsel agree that written argument is not essential or not practical under the circumstances.

(5) The most critical key to effective case management is the certainty of an impending trial. It is the crucible by which settlements are more frequently forged. Moreover, postponements of trials are an understandable source of frustration to litigants and cast the judicial system in a bad light. Therefore, the Court should take all measures reasonably possible to prevent the last-minute postponement of cases. These include continuation of the judges' existing practice of volunteering to trade cases when

a calendar conflict develops and encouraging counsel in appropriate cases to consent to a trial by a magistrate judge to avoid a postponement. While the Group does not recommend the imposition of a formal, inflexible rule, the Court should set as a goal that routine cases be tried within one year of the filing of all defendants' answers and that, unless exceptional circumstances exist, all cases be tried within two years of the filing of all defendants' answers.

(6) Counsel should be required to certify at certain stages of the litigation process that they and their clients have made good faith efforts to settle the case. The Court should make district judges or magistrate judges available to preside over settlement conferences upon request at any stage of the proceedings and should routinely schedule settlement conferences in every civil case two to four weeks prior to trial. Because of the burdens that this practice would impose on district judges and magistrate judges, the Group recommends that these mandatory settlement conferences be implemented initially as a pilot program.

(7) Discovery guidelines, similar to those found in the Maryland Rules, should be incorporated into the Local Rules of the Court and/or regularly transmitted to counsel in scheduling orders. A "Code of Conduct" should also be

included, reminding counsel of their obligation to conduct discovery and all communications with opposing counsel in a civil and respectful manner.

(8) The Group views prompt disposition of motions as one means of avoiding delay in management of the civil docket. Accordingly, the group recommends that judges adopt a practice of resolving substantive motions to dismiss or for summary judgment within 60 days of the last responsive memorandum. Moreover, the group believes that motions hearings could be conducted more expeditiously if the Court states at the outset its tentative conclusions on the issues raised, and invites counsel to address the issues as framed by the Court.

(9) The Group views continued and intensified supervision by the Clerk of the Court of the civil docket as an efficient use of the Court's resources. Towards this end, the district should continue to take full advantage of improvements in computer technologies. Furthermore, inefficiencies in handling telephone calls from attorneys and members of the public suggests the need for the creation of one or two positions for individuals who respond to public inquiries.

(10) In addition to scheduling required settlement conferences shortly before trial, the court should make available to parties, upon request, mediation by other than judicial officers, though not as part of a court-annexed mediation program. The mediators would be compensated as agreed by the parties, subject to court approval. The court should also offer mini-trials on request of the parties.

VI. CONCLUSION

The Advisory Group recognizes that, although the responsibility for managing the court's docket rests primarily upon the district judges, there are other persons whose decisions impact directly upon the court. All of these persons must responsibly consider the effects of their actions upon the court's ability to function. The President and Congress should both act promptly in filling judicial vacancies and should analyze the impact upon judicial resources when proposing and enacting legislation. Appellate courts likewise should thoughtfully consider the practical impact of their decisions upon the litigation process. Finally, lawyers must meet their ethical duty to conduct litigation in the best interest of their clients, not themselves, and seek a just resolution of disputes in the most expeditious and least costly manner possible.

The stated recommendations, indeed this entire Report is presented to the Court, as mandated by the Act, to assist in formulation of a Civil Justice Expense and Delay Reduction Plan for this District. Litigants, the Bar and interested citizens have been invited through public notice of the project to review and comment on the Report in draft form. To the extent additional views were received by the Advisory Group and found by it to be constructive, they have been included in this Report.

While it is the hope of the Advisory Group that the Court will view favorably and adopt these suggestions, there is no intention to interfere with the work of our district judges and magistrate judges, all of whom deserve great credit for presiding over a District Court that is among the best in the nation by every measure. Our intent is to improve the judicial mechanism, not to dismantle or remake it, in the face of external forces which will increase the demands on its operation while, simultaneously, there are shrinking resources available for the task.

With this Report the Advisory Group completes the initial phase of its statutory responsibility. We thank the judges for their complete support of this project, their patient submission to the interview process, and their candor

in addressing issues of common concern. As provided in the Act, we remain available, at the Court's call, to assist in annual docket assessments or otherwise to help effect meaningful reductions in the expense and time consumed in civil litigation.

APPENDIX I
CIVIL JUSTICE REFORM ACT OF 1990

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

"(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;

"(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.

"(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:

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

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.

QUESTIONS TO ASK MAGISTRATE JUDGES DURING INTERVIEWS

Case Referrals

Civil

What categories of case referrals do you receive most often? (If possible, provide an approximate breakdown by percentage)*

How consistent (or variable) are the referral patterns of the district judges?

What changes in the referral patterns have you seen over the past few years?

What are the advantages/disadvantages for each category of referral from the point of view of (a) the magistrate judge, (b) the district judge, and (c) the litigants?

Criminal

What criminal work do you handle?

How does the criminal case load affect your civil docket?

Do you believe your criminal case load is increasing or will in the future?

Do you believe there are categories or types of cases by group or size that should not be handled by the U.S. Attorney's Office in federal district court because of the impact such cases have on the court's docket?

Management of Judicial Resources

What is the average number of open cases on your docket?

What is the average number of new referrals per month?

Should there be a limit on the number of referrals from each district judge per month?

How are the referrals assigned by the Chief Magistrate Judge? Is there any specialization?

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* In general, the categories would include: discovery, settlement conferences, trial, habeas corpus, social security, dispositive motions, prisoners' § 1983 suits.

Is the workload monitored to see whether cases are balanced among the magistrate judges and/or whether the magistrate judges' dockets are current?

Do district judges and/or litigants make requests for a particular magistrate judges to handle a case? If so, are these requests honored?

Do you believe that the current system for referring cases to the Magistrate Judges should be retained? What, if any, modifications to the system would you suggest?

Motions Practice

Do you have a targeted turnaround time in which to decide dispositive motions? Discovery motions?

Do you routinely hold hearings on dispositive motions? On discovery motions? Why or why not?

Do you believe that the Supreme Court trilogy regarding summary judgment has helped or hindered the efficient management of cases?

How current is your docket?

Trials

In the past year, approximately how many civil trials were referred to you by consent? How many went to trial?

In the past year, how many of your civil trials required last minute postponements? What were the principal causes of the postponements?

Do you believe that lawyers frequently squander courtroom time? If so, what can be done about it?

Do you routinely request that motions in limine be filed prior to trial and do you rule upon them prior to trial?

Do you hold counsel to the requirements of Local Rule 106.7 and 107.5 requiring them to exchange and review exhibits prior to trial?

Do you routinely limit the time of arguments in accordance with Local Rule 107.8(a)?

Have you ever limited trial testimony in accordance with Local Rule 107.8(b)?

In multi-party cases where several parties have at least some unity of interest, what controls, if any, do you exercise to prevent duplicative questioning?

Management of Chambers

How do you handle your daily mail? (Who reads it? Who responds to it?)

Do you personally review all motions which are referred to identify issues which should be resolved immediately or which you can resolve effectively without unnecessary cost and delay?

What categories of cases, if any, do you routinely refer to your law clerk? In general, how do you decide which case to assign to your clerk and which to handle yourself?

Do you keep an index of your opinions to assist your law clerk and yourself in handling recurring issues?

How do you keep track of all pending matters and monitor the workload of your clerk?

For what kinds of proceedings do you request or require your law clerks to be with you in the courtroom?

Do you permit counsel to participate over the telephone during scheduling conferences? During pretrial conferences? During settlement conferences? During hearings on discovery matters or other non-dispositive motions?

Sanctions and Attorneys' Fees

How do you handle requests for sanctions in connection with discovery matters? Do you routinely hold a hearing? If sanctions are awarded, how do you determine an appropriate amount?

Do you believe it would be helpful to compile a database and prepare guidelines to assist in deciding the amount of attorney's fees to award when such an award is required?

(a) In connection with discovery sanctions?
(b) In connection with Rule 11 sanctions?
(c) For prevailing party fees?

Methods of Alternative Dispute Resolution

Do you believe the court should establish a system of mandatory mediation?

Have you ever used a summary jury trial or mini trial? Do you think they are advisable on a routine basis?

Do you believe it is fruitful to routinely hold settlement conferences soon after a case is at issue?

Do you believe it is fruitful to routinely hold settlement conferences shortly before trial?

Do you believe that holding settlement conferences several weeks before trial might have the beneficial effect of having cases settled a week rather than a day before (or the morning of) trial?

Responsibility of Other Persons

Do you believe that Congress is responsible in any way for the backlog in the federal courts? If so, how?

Do you agree with the Federal Courts Study Commission that in enacting legislation, Congress should make it clear what the statute of limitations is, whether private causes of action are intended to be created, etc.?

What, if any, statutes do you believe are in need of amendment?

What decisions of the Fourth Circuit or the Supreme Court in recent years do you believe have had an unnecessarily negative impact upon your docket?

Unnecessary Cost and Delay

What do you believe are the principal causes of unnecessary litigation costs?

What do you believe are the principal causes of unnecessary delay?

What steps (other than those already discussed) do you believe that the members of the bar should take in order to reduce the cost of and delay in litigation?

What steps (other than those already discussed) do you believe that the judges in this court should take in order to reduce the cost of and delay in litigation?

What other recommendations or suggestions do you have for addressing the cost or delay of civil cases?

QUESTIONS TO ASK DISTRICT JUDGES DURING INTERVIEWS

State of the Docket

Do you believe your docket is presently current?

What impact does the criminal calendar have on your civil docket?

Do you believe that your criminal caseload will become heavier?

Do you believe that there are categories or types of cases by group or size that should not be handled by the U.S. Attorney's office in federal district court because of the impact such cases have on the court's docket?

What impact, if any, do the Sentencing Guidelines have upon your criminal workload? Mandatory statutory minimums?

Have you seen a substantial increase in bankruptcy appeals?

Unnecessary Cost and Delay

What do you believe are the principal causes of unnecessary litigation costs?

What do you believe are the principal causes of unnecessary delay?

Discovery

Do you believe that the proposed amendment to Fed. R. Civ. P. 26 requiring the initial disclosure (without discovery demand) of certain basic information about the litigation, including the description of all documents "that are likely to bear significantly on any claim or defense," is advisable?

Do you believe that the proposed amendment to Fed. R. Civ. P. 30 limiting the number and length of depositions (no more than ten depositions and no deposition longer than six hours, unless otherwise ordered) is advisable?

Do you routinely refer discovery disputes to magistrate judges?

If not, how do you handle such disputes?

Last-minute Postponements of Trial

In the past year approximately how many civil trials required last-minute postponements?

What were the principal causes of the postponements?

QUESTIONS TO ASK MAGISTRATE JUDGES DURING INTERVIEWS

Case Referrals

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What categories of case referrals do you receive most often? (If possible, provide an approximate breakdown by percentage)*

How consistent (or variable) are the referral patterns of the district judges?

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Do you believe that the current system for referring cases to the Magistrate Judges should be retained? What, if any, modifications to the system would you suggest?

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(a) In connection with discovery sanctions?
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Have you ever used a summary jury trial or mini trial? Do you think they are advisable on a routine basis?

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Do you believe it is fruitful to routinely hold settlement conferences shortly before trial?

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Do you agree with the Federal Courts Study Commission that in enacting legislation, Congress should make it clear what the statute of limitations is, whether private causes of action are intended to be created, etc.?

What, if any, statutes do you believe are in need of amendment?

What decisions of the Fourth Circuit or the Supreme Court in recent years do you believe have had an unnecessarily negative impact upon your docket?

Unnecessary Cost and Delay

What do you believe are the principal causes of unnecessary litigation costs?

What do you believe are the principal causes of unnecessary delay?

What steps (other than those already discussed) do you believe that the members of the bar should take in order to reduce the cost of and delay in litigation?

What steps (other than those already discussed) do you believe that the judges in this court should take in order to reduce the cost of and delay in litigation?

What other recommendations or suggestions do you have for addressing the cost or delay of civil cases?

United States District Courts — National Judicial Workload Profile

			ALL DISTRICT COURTS					
			1991	1990	1989	1988	1987	1986
OVERALL WORKLOAD STATISTICS	Filings[1]		241,420	251,113	263,896	269,174	268,023	282,074
	Terminations		240,952	243,512	262,806	265,916	265,727	292,092
	Pending		274,010	273,542*	265,035	268,070	264,953	262,637
	Percent Change in Total Filings — Current Year	Over Last Year ▶		-3.9				
		Over Earlier Years ▶			-8.5	-10.3	-9.9	-14.4
	Number of Judgeships		649	575	575	575	575	575
	Vacant Judgeship Months		988.7	540.1	374.1	485.2	483.4	657.9
ACTIONS PER JUDGESHIP	FILINGS	Total	372	437	459	467	466	491
		Civil	320	379	406	417	416	444
		Criminal Felony	52	58	53	51	50	47
	Pending Cases		422	476*	461	466	461	457
	Weighted Filings		386	448	466	467	461	461
	Terminations		371	423	457	462	462	508
	Trials Completed		31	36	35	35	35	35
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	5.7	5.3	5.0	4.3	4.1	3.9
		Civil	9	9	9	9	9	9
	From Issue to Trial (Civil Only)		15	14	14	14	14	14
OTHER	Number (and %) of Civil Cases Over 3 Years Old		28,421 11.8	25,207 10.4	22,391 9.2	21,487 8.8	19,782 8.1	19,252 7.9
	Average Number of Felony Defendants Filed per Case		1.6	1.4	1.4	1.4	1.4	1.4
	Jurors	Present for Jury Selection	36.79	35.84	35.89	32.7	31.1	32.0
		% Not Selected, Serving, or Challenged	34.0	34.2	35.8	33.7	32.1	34.3

1990 CIVIL AND FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

TOTAL CIVIL	207,742	TOTAL CRIMINAL FELONY[1]	32,928
A-Social Security	7,692	A-Immigration	2,020
B-Recovery of Overpayments and Enforcement of Judgments	7,933	B-Embezzlement	1,605
C-Prisoner Petitions	42,462	C-Weapons and Firearms	2,872
D-Forfeitures and Penalties and Tax Suits	8,227	D-Escape	732
E-Real Property	9,794	E-Burglary and Larceny	1,769
F-Labor Suits	14,686	F-Marihuana and Controlled Substances	3,769
G-Contracts	34,485	G-Narcotics	7,575
H-Torts	37,309	H-Forgery and Counterfeiting	998
I-Copyright, Patent, and Trademark	5,235	I-Fraud	6,218
J-Civil Rights	19,340	J-Homicide and Assault	599
K-Antitrust	681	K-Robbery	1,577
L-All Other Civil	19,898	L-All Other Criminal Felony Cases	3,194

[1] *Filings in the "Overall Workload Statistics" section include criminal felony transfers, while filings "by nature of offense" do not.*

*Revised

U.S. DISTRICT COURT -- JUDICIAL WORKLOAD PROFILE

	MARYLAND	TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN U.S. CIRCUIT	
		1991	1990	1989	1988	1987	1986		
OVERALL WORKLOAD STATISTICS	Filings*	3,821	3,879	4,484	4,139	4,043	4,871		
	Terminations	3,631	4,339	4,257	4,370	4,379	5,188		
	Pending	3,918	3,776	4,273	4,047	4,278	4,620		
	Percent Change In Total Filings Current Year: Over Last Year		-1.5					41	5
	Percent Change In Total Filings Current Year: Over Earlier Years			-14.8	-7.7	-5.5	-21.6	69	6
	Number of Judgeships	10	10	10	10	10	10		
	Vacant Judgeship Months	14.7	16.6	17.9	19.9	12.0	1.1		
ACTIONS PER JUDGESHIP	FILINGS: Total	382	388	448	414	404	487	40	6
	FILINGS: Civil	345	350	411	375	355	439	30	4
	FILINGS: Criminal Felony	37	38	37	39	49	48	66	9
	Pending Cases	392	378	427	405	428	462	43	3
	Weighted Filings**	411	400	451	399	423	447	24	3
	Terminations	363	434	426	437	438	519	46	6
	Trials Completed	28	27	27	30	32	30	54	6
MEDIAN TIMES (MONTHS)	From Filing to Disposition: Criminal Felony	6.9	6.2	6.4	5.4	5.1	5.1	73	6
	From Filing to Disposition: Civil**	7	9	8	9	10	9	10	2
	From Issue to Trial (Civil Only)	12	11	13	16	15	13	18	4
OTHER	Number (and %) of Civil Cases Over 3 Years Old	358 10.0	351 10.2	587 14.8	478 12.7	415 10.5	332 7.8	65	7
	Average Number of Felony Defendants Filed per Case	1.5	1.7	1.7	1.6	1.6	1.6		
	Jurors: Avg. Present for Jury Selection	42.58	42.50	44.30	43.17	37.75	40.81	77	9
	Jurors: Percent Not Selected or Challenged	33.5	30.9	37.8	37.2	31.2	30.4	60	8

FOR NATIONAL PROFILE AND NATURE OF SUIT AND OFFENSE CLASSIFICATIONS SHOWN BELOW -- OPEN FOLDOUT AT BACK COVER

1991 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	3450	86	160	752	100	67	246	653	617	72	325	56	316
Criminal*	364	12	19	47	5	19	7	72	14	100	4	34	31

* Filings in the "Overall Workload Statistics" section include criminal transfers, while filings "by nature of offense" do not.
**See Page 167.

Discovery Guidelines of the State Bar. — The Discovery Guidelines of the Maryland State Bar Association were approved in 1986 by the Board of Governors of the Maryland Bar Association and by the conference of Circuit Court Judges. These discovery guidelines were revised by a special committee on the Maryland Discovery Guidelines and approved by the Litigation Section of the Maryland State Bar Association in February, 1990. Although they are not officially part of the Maryland Rules and have not been adopted or approved by the Court of Appeals, the following Guidelines, as revised, may be of significant value in interpreting and applying Title 2, Chapter 400 of the Maryland Rules and are designed to eliminate unnecessary discovery disputes:

Guideline 1: Discovery Conference

Attorneys are encouraged to communicate with opposing counsel early in the case to discuss a plan and schedule for discovery.

Guideline 2: Stipulations Setting Discovery Deadlines

In appropriate cases, attorneys are encouraged to enter into written discovery stipulations to supplement the Court's scheduling order, or if there is no scheduling order. The stipulation should address, among other things, the following:

(a) Date by which plaintiff will designate expert witnesses.

(b) Date by which defendant will designate expert witnesses.

(c) Date by which discovery depositions of experts shall be completed.

(d) Date by which party must apply to the Court to show good cause why the designation of additional experts shall be permitted.

(e) A requirement that any expert consulted after the date of the stipulation may not be used as an expert at trial unless the witness is designated within a specified number of days following the initial contact with the witness.

(f) Date by which all written discovery shall be served.

(g) Date by which all discovery must be concluded.

Guideline 3: Stipulations Limiting Discovery Devices

Attorneys are encouraged in routine cases to enter into written stipulations or a Consent Order limiting discovery in the following areas:

(a) The number and length of depositions.

(b) The number of papers requesting the production of documents and the number of requests within each paper.

(c) The number of papers requesting the admission of facts or genuineness of documents and the number of requests within each paper.

Guideline 4: Delay in Responding to Discovery Requests

Attorneys should make good faith efforts to respond to discovery requests within the time prescribed by the Court rules. Attorneys wishing additional time to respond to discovery requests should contact opposing counsel as soon as practical after receipt of the request, but no later than three days before the response is due. A request for additional time should not be unreasonably refused. A stipulation and consent order for an extension of time containing the agreement of the parties should be filed by [with] the Court by counsel requesting the additional time. The consent order should contain a statement by the party requesting the additional time that the discovery can be provided within the time stated in the stipulation.

Guideline 5: Guidelines in Refusing Interrogatory Answers

(a) No part of an interrogatory should be left unanswered merely because an objection is interposed to another part of an interrogatory.

(b) The practice of objecting to an interrogatory or a part thereof while simultaneously providing a partial or incomplete answer to the objectionable part is presumptively improper.

(c) Where a claim of privilege is asserted in objecting to any interrogatory or part thereof and information is not provided on the basis of such assertion:

(1) The party asserting the privilege shall in the objection to the interrogatory

or part thereof identify with specificity the nature of the privilege (including work product) which is being claimed;

(2) The following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(i) For oral communications:

(a) the name of the person making the communication and the names of persons present while the communication was made, and where not apparent, the relationship of the persons present to the person making the communication;

(b) the date and place of the communication; and

(c) the general subject matter of the communication.

(ii) For documents:

(a) the type of document;

(b) general subject matter of the document;

(c) the date of the document; and

(d) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author, addressee, and any other recipient of the document, and where not apparent, the relationship of the author, addressee, and any other recipient to each other.

(3) The party seeking disclosure of the information withheld may, for the purpose of determining whether to move to compel disclosure, notice the depositions of appropriate witnesses for the limited purpose of establishing other relevant information concerning the assertion of privilege, including (i) the applicability of the privilege asserted, (ii) circumstances which may constitute an exception to assertion of the privilege, (iii) circumstances which may result in the privilege having been waived, and (iv) circumstances which may overcome a claim of qualified privilege. The party seeking disclosure may apply to the court for leave to file special interrogatories or redepose a particular witness if necessary.

Guideline 6: Assertions of Privilege at Depositions

Where a claim of privilege is asserted during a deposition and information is not provided on the basis of such assertion:

(a) The attorney asserting the privilege shall identify during the deposition the nature of the privilege (including work product) which is being claimed; and

(b) The following information shall be provided during the deposition at the time the privilege is asserted, if sought, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(1) For oral communications:

(i) the name of the person making the communication and the names of the persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication;

(ii) the date and place of the communication; and

(iii) the general subject matter of the communication.

(2) For documents, to the extent the information is readily obtainable from the witness being deposed or otherwise:

(i) the type of document, e.g., letter or memorandum;

(ii) the general subject matter of the document;

(iii) the date of the document; and

(iv) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author, addressee, and any other recipient of the document, and where not apparent, the relationship of the author, addressee, and any other recipient to each other;

(3) Objection on the ground of privilege asserted during a deposition may be amplified by the objector subsequent to the deposition.

(c) After a claim of privilege has been asserted, the attorney seeking disclosure should have reasonable latitude during the deposition to question the witness to establish other relevant information concerning the assertion of privilege, including (i) the applicability of the particular privilege being asserted, (ii) circumstances which may constitute an exception to the assertion of the privilege, (iii) circumstances which may result in the privilege having been waived, and (iv) circumstances which may overcome a claim of qualified privilege.

Guideline 7: Guidelines in Scheduling Depositions

(a) Attorneys are encouraged to make a good faith attempt to clear deposition dates with all opposing counsel or parties before noting a deposition.

(b) Before agreeing to a deposition date, an attorney should attempt to clear the date with his client if the client is a deponent or wishes to attend the deposition, and with any witness the attorney agrees to attempt to produce at the deposition without the need to have that witness served with a subpoena.

(c) An agreed-upon date is presumptively

binding. An attorney seeking to change an agreed-upon date should coordinate a new date before changing the agreed date.

Guideline 8: Deposition Questioning and Objections

(a) An attorney should not intentionally ask a witness a question that misstates or mischaracterizes the witness' previous answer.

(b) An attorney should not intentionally ask a witness more than one question at a time. To insist upon an answer to a multiple-part question after objection is presumptively improper.

(c) Objections in the presence of the witness which are used to suggest an answer to the witness are presumptively improper.

(d) An attorney should not question a deponent in such a manner as he knows or should know would serve merely to harass or annoy the deponent.

(e) An attorney for a deponent should not initiate a private conference with a deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted. To do so, otherwise, is presumptively improper.

(f) It is presumptively improper for an attorney to instruct a client not to answer a question at deposition unless:

(1) There is a specific assertion of privilege in accordance with these guidelines,

(2) There is abusive conduct in the questioning of which this question is a part with a specific identification of why the instructing attorney believes this to be so, or

(3) The question is completely irrelevant or intended to embarrass the witness.

(g) If the attorney lodging an objection or instructing a witness not to answer believes that his objection or his instruction requires the assertion of facts or an explanation of the formal defect, which would in any way be instructive to the witness, then the witness should be excused while the objection or instruction is made.

Guideline 9: Objections at Depositions

Attorneys objecting to the form of the question at deposition are encouraged, if requested, to state the reason for the objection.

Guideline 10: Discovery Disputes

Attorneys are encouraged to communicate with each other to make every good faith effort to resolve discovery disputes without Court involvement. Disputes that cannot be resolved should be submitted to the Court promptly in order to avoid continuing the trial date.

Rule 2-401. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. — Parties may obtain discovery by one or more of the following methods: (1) depositions upon oral examination or written questions, (2) written interrogatories, (3) production or inspection of documents or other tangible things or permission to enter upon land or other property, (4) mental or physical examinations, and (5) requests for admission of facts and genuineness of documents.

(b) Sequence and Timing of Discovery. — Unless the court orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery. The court may at any time order that discovery be completed by a specified date or time, which shall be a reasonable time after the action is at issue.

(c) Discovery Material. —

(1) *Defined.* — For purposes of this section, the term "discovery material" means a notice of deposition, an objection to the form of a notice of deposition, the questions for a deposition upon written questions, an objection to the form of the questions for a deposition upon written questions, a deposition transcript, interrogatories, a response to interrogatories, a request for discovery of documents and property, a response to a request for discovery of documents and property, a request for admission of facts and genuineness of documents, and a response to a request for admission of facts and genuineness of documents.