Report of the Advisory Group of the United States District Court for the Middle District of North Carolina Appointed Under the Civil Justice Reform Act of 1990, and Recommended Plan

December 10, 1992

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EXECUTIVE SUMMARY

The Advisory Group appointed pursuant to the Civil Justice Reform Act of 1990 (CJRA) for the United States District Court for the Middle District of North Carolina finds that there is a serious delay in obtaining trial dates for civil cases. The Group finds that the primary cause of the delay is the growing number and complexity of criminal cases in the District, most of which involve drugs or drug-related activity. Although a new United States District Judge's position has been authorized by the Congress and was filled in September, 1991, another Judge has recently taken senior status. When that vacancy is filled, the impact of the criminal docket on the civil case backlog should be reduced.

The Group finds that, in general, the District has a satisfactory civil case management system, with comprehensive rules and management plans and procedures in place. However, the rules and procedures are not sufficient to move civil cases to conclusion when trial dates are not available and opportunities to explore settlement or other resolution are few.

The Group analyzed the problems of cost and delay to the extent that it exists in civil litigation in the District, relying upon its members' experience, the deliberation of its committees, and the results of a survey sent to 1300 lawyers who have appeared in civil cases in the District. Aside from reducing the heavy

criminal docket, which is largely a function of the "War on Drugs" and legislation that has lengthened and prioritized criminal cases, the Group has recommended these procedures, among others, to further reduce cost and delay in civil litigation:

Initiation of a civil case tracking system for all contested litigation;

Adoption of additional alternative dispute resolution (ADR) techniques, including court-annexed mediation;

Amendment of the local rules for the initial and final pretrial conferences to incorporate ADR techniques, so that parties have the opportunity to use these techniques for evaluation and resolution of their cases early or late in the litigation;

Amend the initial pretrial rule to require automatic disclosure of certain information, and amend the final pretrial rule to require automatic disclosure of information on experts;

Provision for additional personnel to assist in handling of civil litigation matters.

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APPENDICES

I. Description of the Court.

The Federal Judgeship Act of 1990 added a new district judgeship to the Middle District of North Carolina, bringing the total of authorized judgeships to four. The court operated as a three-judge court in the decade before 1990, and as a smaller court before that. William L. Osteen, Sr. was appointed by the President to hold the new judgeship; he was confirmed by the U.S. Senate and was sworn in on September 27, 1991. In addition to Judge Osteen, the district judges for the court are Chief Judge Frank W. Bullock, Jr., and Judge N. Carlton Tilley, Jr. Two law clerks assist each judge. Chief Judge Richard C. Erwin took senior status in September 1992, and there is now a vacancy on the court.

The district has benefitted from having two senior district judges for the past several years. Senior District Judge Eugene A. Gordon took senior status in 1982 and carried a major caseload for years thereafter; he no longer maintains a support staff of law clerks or a secretary and does not take regular case assignments from the Clerk's Office. Senior District Judge Hiram H. Ward took senior status in 1988. He continued for a number of years to conduct regular criminal terms. Judge Ward accepts assignment of some criminal cases in emergencies and handles civil motions for other judges intermittently. Chief Judge Erwin assumed senior status on September 22, 1992. He intends to maintain a somewhat reduced civil and criminal workload.

Two magistrate judges are authorized for the Middle District. Magistrate Judge Russell A. Eliason is now in his third 8-year term, and Magistrate Judge P. Trevor Sharp is in his second 8-year term of appointment. The district has two bankruptcy judges, Chief Bankruptcy Judge James B. Wolfe, Jr., and Bankruptcy Judge Jerry G. Tart. A temporary third bankruptcy judge has been authorized and will be appointed by the United States Court of Appeals for the Fourth Circuit. The magistrate and bankruptcy judges are each authorized one law clerk.

The judges of the district are chambered in Greensboro and Winston-Salem. District Judges Erwin and Ward, and Magistrate Judge Eliason, are located in Winston-Salem. District Judges Bullock, Tilley, Osteen, and Gordon, Magistrate Judge Sharp, and Bankruptcy Judges Wolfe and Tart have their offices in Greensboro. Each district judge and magistrate judge holds court in all three of the statutory court locations, Winston-Salem, Greensboro, and Durham. (See 28 U.S.C. § 113[b]). The Middle District has five divisions, and Greensboro serves as the headquarters of the court. Local Rule 104(a).

The Middle District is located geographically in the center of the State of North Carolina. It includes 24 counties in the Piedmont area of the State. The district includes Durham, Greensboro and Winston-Salem, and many smaller urban areas,

including Burlington, Chapel Hill, High Point, Lexington, and Salisbury. The population of the Piedmont is divided evenly between urban and rural areas and is employed in a great number of businesses, including furniture, cigarette, and textile manufacturing; transportation, education, agriculture, banking, and other manufacturing and service industries. The variety of the commercial enterprises in the district accounts for the diverse mixture of the cases and controversies brought to the court.

There are no major federal military installations within the district, except for a part of Fort Bragg, and no federal penal institutions. Veterans Administration hospitals and offices, a small national park area, courthouses, and a few other federal properties are situated within the district. Because of this limited federal presence, only a few cases each year arise from the court's federal territorial jurisdiction.

The federal district court exists alongside the state court system, the North Carolina General Court of Justice. The state court operates under rules of civil and appellate procedure that are modeled on the federal rules. The state and federal courts carry on a tradition of cooperation. For example, the State-Federal Judicial Council of North Carolina promulgated Guidelines for Resolving Scheduling Conflicts, 316 N.C. 741 (1986), a compact among the United States Court of Appeals for the Fourth Circuit, the three district courts in the State, and the Supreme Court of

North Carolina for the General Court of Justice, to establish priorities and policies for resolving scheduling conflicts among the state and federal courts.

The procedures of the district court have been codified in the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina. (Herein cited as "Local Rules.") Copies of the local rules are available to attorneys and members of the public at the Clerk's Office and are published in an annual Annotated Rules pamphlet that is part of the North Carolina General Statutes. The Local Rules provide for general, civil, and criminal rules, and also for rules of disciplinary enforcement and for court-annexed arbitration of certain cases. The court has also published several internal management plans, including a Criminal Justice Act Plan, a Jury Selection Plan, a Court Reporter Management Plan, a Speedy Trial Plan, and a Case Assignment Plan, which are available in the Clerk's Office. From time to time, the court enters standing orders to further direct the operations of the court.

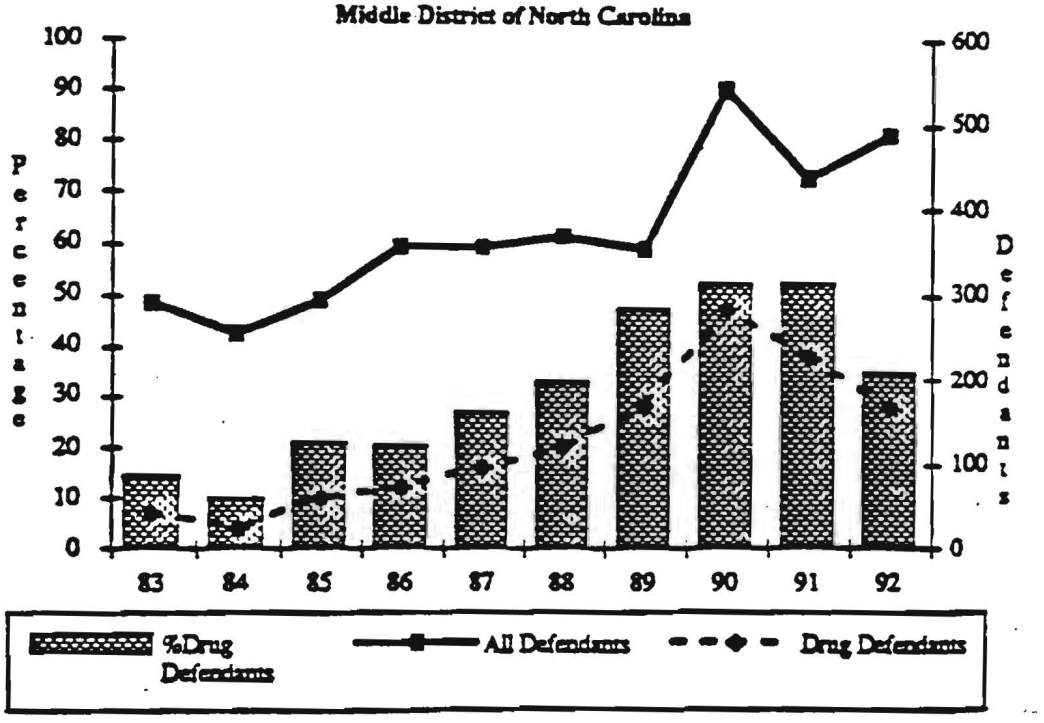
II. Assessment of Conditions in the District.

A. Condition of the Docket.

1. Trends in Filings and Demands on Court Resources.

The federal War on Drugs, which began in earnest in 1989, has resulted in a sharply increased number of criminal defendants being prosecuted by the U.S. Attorney in this district. Chart 1 shows this dramatic increase. The number of criminal defendants climbed back up to 506 in SY 92, an increase of 15 percent over SY 91. (See Appendix E, 10-1.)

Chart 1. Criminal Defendant Filings With Number and Percentage Accounted for by Drug Defendants, SY83-92

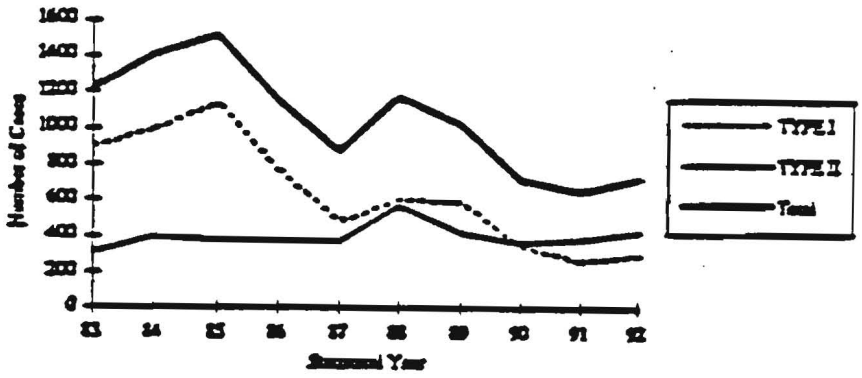


The rapid growth of the criminal docket since 1989 has dramatically curtailed trial of civil cases in the district since that time. So substantial has the impact on the civil docket been that only 13 civil trials were conducted in calendar year (CY) 1991, and only 10 were conducted in CY 1992.

In ~~early~~ LATE 1992 the Court adopted a criminal term limitation plan to attempt to restore some balance to the civil docket. Under this plan, each judge's criminal term will end no later than 6 weeks after it begins. Cases not tried during that term will be transferred to the overlapping term of another judge. The court believes that this procedure will require the United States Attorney to tailor the number of indictments brought forward to the time available for each term.

Type II civil cases[1] are the category of civil cases that generally require the greatest amount of judge-time in their management and disposition. The filing of Type II civil cases over the past decade has remained almost constant in the district. Type I civil cases, less demanding of judge time and characterized by many "paper cases," such as student loan claims that require almost no work by judges, dropped sharply in 1985-1987 and more gradually after that. Chart 2 shows these trends in Type I and Type II civil cases.

Chart 2. Filings By Broad Category, SYE3-92
Middle District of North Carolina

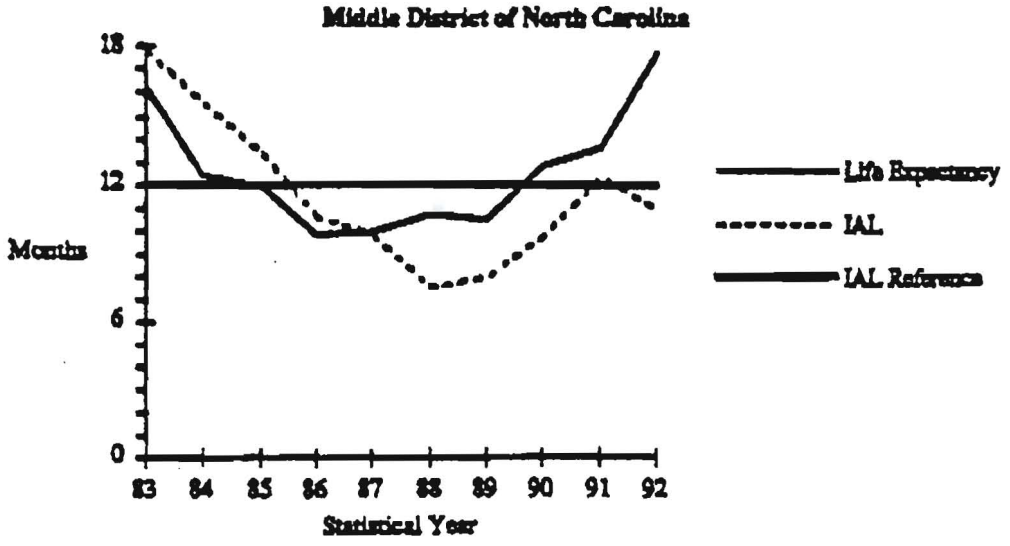


[1]Type II civil cases, which collectively account for about 60 percent of national civil filings over the past 10 years, include:

* contract actions other than student loan, veterans' benefits, and collection of judgment cases;
* personal injury cases other than asbestos;
* non-prisoner civil rights cases;
* patent and copyright cases;
* ERISA cases;
* labor law cases;
* tax cases;
* securities cases; and
* other actions under federal statutes

"Indexed Average Lifespan" compares the characteristic lifespan of civil cases. The "Life Expectancy"[2] of Type II civil cases, which dropped from 16 months in 1983 to a low of about 10 months in 1988, rose by 1992 to over 18 months. (See Chart 3, below). This rise resulted from the fact that relatively fewer civil cases terminated in 1989-92 primarily because of the diversion of judges' time to the criminal docket. Chart 3 shows these changes in indexed average lifespan and life expectancy.

Chart 3: Life Expectancy and Indexed Average Lifespan, Type II Civil Cases SY83-92



[2]Life Expectancy is a familiar way of answering the question: "How long will this case take before it is closed?"

Detailed statistics underlying the description of the docket trends set out in this section are included in Appendix E to this report. Those statistics include a Judicial Workload Profile for the Middle District (E, 1-1), a National Judicial Workload Profile (E, 1-2), and 10 tables, each with a related chart.[3] The total number of trials completed in the Middle District in recent years has been quite large, placing the district among the courts at the high end of the national rankings. For example, in 1990 each judge completed an average of 47 trials, ranking the court 17th among the 94 districts. In 1991, a fourth judgeship was authorized. Even though the court absorbed 7 months without the fourth judge, each of the four judges was "deemed" to have completed 31 trials, ranking the court 44th among all districts.

The median time from filing to disposition of a criminal felony case increased from 2.6 months in 1986 to 5.3 months in 1991, still below the national median of 5.7 months. (See Appendix E, Attachment 1.) The increase in median time from 2.6 to 5.3 months resulted from the Court's Standing Order 20, which implemented the Sentencing Reform Act of 1984, which took effect November 1, 1987. The Act mandates a more lengthy sentencing procedure than that followed under the Court's prior practice. The median time from filing to disposition of all civil cases (Types I and II), which had fallen below the national average of 9 months in 1988 and 1989, returned to the national median in 1991. The median

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[3]See Appendix E. "SY" stands for statistical year, from July 1 through the following June 30. "CY" stands for statistical calendar year.

time from joinder of issue to trial in civil cases, which started the decade at more than 40 months and was reduced steadily to the national average of 14 months in 1989, increased to 19 months in 1990, an uncalculated number in 1991, and 35 months in 1992. (See Appendix E, 1-1.)

While most categories of civil cases have experienced a steady number of filings in 1986-91, the weighted case load of each judge underwent a gradual decrease during this period. The overall weighted average was affected by significant decreases in two categories: student and veteran loan filings dropped from 466 in 1986 to 64 in 1991, and prisoner filings dropped from 308 in 1989 to 176 in 1991, with a further drop to 135 in 1992. (See Appendix E, 8-1.) The drop in student and veteran loan cases resulted from the playout of those cases involving overpayment of G.I. Bill education benefits to Vietnam veterans, and the decrease in prisoner litigation apparently resulted at least in part from a new requirement that a prisoner exhaust available administrative remedies before instituting a lawsuit.

Table 1

Filings by Case Types, SY 86-92
Middle District of North Carolina

	86	87	88	89	90	91	92
Asbestos	6	15	11	14	20	15	18
Bankruptcy Matters	19	16	30	21	12	23	23
Banks and Banking	1	0	1	1	0	2	2
Civil Rights	69	66	75	81	56	65	83
Commerce: ICC Rates, etc.	1	4	128	15	1	4	6
Contract	132	120	175	151	116	80	179
Copyright, Patent, Trademark	31	37	29	7	26	21	29
ERISA	2	6	10	10	15	13	25
Forfeiture and Penalty (excl.drug)	20	18	36	32	8	4	12
Fraud, Truth in Lending	7	1	4	8	1	5	0
Labor	16	16	18	11	13	13	13
Land Condemnation, Foreclosure	1	0	1	0	2	1	0
Personal Injury	37	35	31	44	34	42	14
Prisoner	261	243	259	312	178	163	135
RICO	0	1	1	3	2	1	1
Securities, Commodities	2	12	6	4	6	11	15
Social Security	18	44	51	21	20	6	64
Student Loan and Veteran's	466	168	252	221	111	64	75
Tax	6	4	5	5	7	11	5
All Other	51	58	47	49	82	110	28
All Civil Cases	1146	864	1170	1010	710	654	727

The twelve year trend of civil cases depicted in Appendix E, 2-1 and E, 2-2 indicates that the civil workload of this court for the remainder of this decade is unpredictable, although the filing rate of Type II civil cases has been relatively steady for several years. Recent events, most notably the War on Drugs, have proved that the number of criminal cases and their effect upon the overall workload of the court is largely dependent upon the decisions of the Justice Department and the Congress.

2. Status of the Civil and Criminal Docket.

a. The Civil Docket.

The percentage of civil cases 3 years old or older in the Middle District increased from 1986 to 1990 from 1.8 percent of the pending civil cases to 1.9 percent. In 1991 this increased to 3.2 percent of all pending civil cases, reflecting a jump of 81 percent in one year of cases 3 years old or older (from 11 in 1990 to 20 in 1991). Nevertheless, from 1987 through 1992, the life expectancy of all civil cases in the district has remained constant, around the national average of 9 months. (See Table 2, below.)

Table 2

True Average Duration (Life Expectancy)
All Civil Cases SY 1987-92
Middle District of North Carolina

YEAR	DURATION (in months)
1987	9
1988	7
1989	7
1990	10
1991	9
1992	8

The Middle District has experienced a substantial decrease in the number of Type I[4] filings for 1982-91, dropping from

[4]Type I cases generally are handled by standardized procedures, while Type II cases are more complex. Consequently, Type II cases take more judicial time and court resources. Type I, which over the past ten years account for about 40% of civil filings in all districts, includes the following types of cases:
*student loan collections
*recovery of overpayment of veterans' benefits
*appeals of Social Security Administration benefit denials
*condition of confinement actions brought by state prisoners
*habeas corpus petitions
*appeals from bankruptcy court decisions

approximately 950 to 212. Type II filings, however, have remained stable. Type II filings are more complicated and use more judge time. Thus, they have a higher weighted case average than Type I cases. In the Middle District, the weighted filings have fluctuated somewhat during the 1986-90 period. Since weighted filings are figured on a per judgeship basis, addition of a judge will change the results. In 1991 the district added a fourth judge, but experienced a 7-month vacancy. Consequently, in 1991 the number of weighted filings per judge dropped due to addition of the new judgeship, not because of reduction in Type II case filings. (See Appendix E, 1-1.) If the vacancy occasioned by Chief Judge Erwin's assuming senior status is not filled for some time, the same result may occur in CY 1992 and later years.

Table 3

Weighted Filings in the Middle District of North Carolina

SY Year	No. weighted filings per judgeship	No. judges	Total weighted filings
1987	301	3	903
1988	360	3	1,080
1989	320	3	960
1990	296	3	888
1991	218	4	872
1992	241	4	964

A breakdown of civil cases by specific types provides further detail and more precise analysis of the court docket. The mixture of civil cases filed in the Middle District has changed over the

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*land condemnations
*asbestos product liability.

last decade, mostly with a decrease in the number of rapidly-terminating Type I cases. This decrease is best exemplified in the student and veteran loan cases category, which went from 817 filings in SY 1985 to 75 in SY 1992. The more complicated, lengthier Type II case filings remained relatively constant. (See Table 1, above.)

The number of pending civil cases has been fairly steady during the past few years.

Table 4

Table of Pending Cases,
Middle District of North Carolina

SY YEAR	NUMBER OF PENDING CASES
1992	717
1991	617
1990	591
1989	701
1988	797

The steady numbers of pending civil cases and the statistics regarding life expectancy of civil cases reflect the overall impression of the Advisory Group that there has been no consistent pattern of "excessive delay" in Middle District civil cases. It is clear, however, that the civil docket has recently slowed down substantially due to the changed magnitude of the criminal docket and its mandated preferential status. The increased criminal docket has consumed much of the district's judicial manpower and thus has reduced the number of civil trials held, causing the number of cases pending more than 3 years to increase and the life

expectancy of all civil cases to be extended.

b. Criminal Docket.

Felony criminal filings per judge increased from 69 in 1985 to 104 in 1990. Although this number appears to have been reduced in 1992 to 75 criminal felony filings per judge, the figure reported by the Administrative Office of the U.S. Courts (AO) in 1992 is based upon 4 judges' being assigned to the court, not 3 as in 1990. (See Judicial Profile for Middle District for 1992, Appendix E, 1-1.) The reported figure of 75 is well above the national average of 53.

Criminal felony trials in the district increased from 40 percent of all trials in 1986 to 89 percent of all trials in 1991. The number of criminal defendants rose from approximately 250 in 1982 to 558 in 1990 and 440 in 1991 and back up to 506 in 1992.[5] (See Appendix E, 10-1.)

Another factor is the percentage of not guilty pleas in criminal cases. During CY 1991, 24 percent of the defendants in the Middle District pleaded not guilty; comparable figures for the Eastern and Western Districts of North Carolina were 12 and 6 percent respectively.

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[5]The decrease in criminal prosecutions in 1991, from 558 defendants in 1990 to 440 in 1991, probably occurred because the U.S. Attorney's Office was unable to sustain the high rate of criminal prosecutions commenced in 1990. However, since the War on Drugs commenced the U.S. Attorney has added three Assistant U.S. Attorneys and ten support personnel to his staff. Two of the Assistant U.S. Attorneys have been added in the past 18 months.

The burden on the judge in a criminal case is proportional to the number of defendants. Drug prosecutions, especially those involving multiple defendants, have dramatically increased demands on court resources. The district has had an increase in the percentage of drug defendants to all criminal defendants from 20 percent in SY 1986 to over 50 percent in SY 1991. (See Chart 1, above.)

The increased number of criminal trials, defendants, and particularly drug defendants, has occurred at the same time that the median time from filing to disposition for criminal felony trials has increased. The increase went gradually from 2.6 months in SY 1986 to 5.3 months in SY 1991, which reflects both the increased number of criminal felony filings, the relatively high percentage of not guilty pleas, and the impact of the new sentencing guidelines and mandatory minimum sentences.

3. Court Resources.

a. Judges

The court recently increased from three to four authorized judgeships, based upon the increased workload of the court. The addition of the fourth judgeship should have a positive impact, over time, on the slowdown of the civil docket that is described in this section. Such an impact, however, is contingent upon some decrease in the rate of criminal filings, a rate currently inflated by the federal War on Drugs.

b. Clerk's Office

The clerk's office is presently authorized 19.7 permanent positions (including the clerk of court) at 100 percent of the current staffing formula. As a result of a recent (April 30, 1992) nationwide staffing survey, the Administrative Office of United States Courts (AO) has recommended that the staff of the clerk's office be increased by 37.06 percent, from 19.7 to 27 employees. This increase is essential if progress is to be made in instituting effective case management techniques and procedures to assist the judges in controlling their increasing caseloads.

B. Cost and Delay.

1. The Extent of Excessive Cost and Delay.

The U.S. Senate Report for the Civil Justice Reform Act of 1990 defined litigation transaction costs as "the total costs incurred by all parties to civil litigation, excluding any ultimate liability or settlement." S. Rep. No. 101-416, 101st Cong., 2d Sess. 6. (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6808-09. The Report also cites costs in the context of costs to litigants and taxpayers, i.e. the cost to operate the judicial system. Id. at 8, 1990 U.S.C.C.A.N. at 6810-11, citing Newman, Rethinking Fairness, 93 Yale L.J. 1643 (1984) and Justice Powell's dissent to the 1980 amendments to the Federal Rules of Civil Procedure, 446 U.S. 997, 998, 1000-01 (1980). The Advisory Group, following the legislative history of the Act, decided that costs include not only the costs of expenses to the parties to prosecute or defend civil cases (i.e.

litigation transaction costs) but also indirect costs (e.g. judicial time, clerk time and administrative costs such as building use, incident to litigation.)

Delay, or excessive delay, was not defined in the Report. However, the Report cites testimony that equates delay with excessive time to get a just solution in civil litigation. S. Rep. No. 101-416, supra at 6, 1990 U.S.C.C.A.N. at 6809. Thus despite the Act's use of the phrases "expense and delay" or "cost and delay," e.g. 28 U.S.C. §§ 471, 472, delay emerges as a factor of costs or expenses. Most plaintiffs want to have their claims adjudicated promptly; the longer they must wait to get monetary or other relief, the longer they must make economic adjustments pending final adjudication. Similarly, most defendants want to have their cases adjudicated promptly; the longer they must wait for a decision, the longer they must make economic adjustments to cover against a possible adverse result. In either case, the parties lose through delay. Plaintiffs cannot get the resources that victory would give them to apply in the marketplace or their personal lives. Defendants or their insurers must tie up capital that might be put to other and better uses. To borrow a phrase, "Time is money."

Beyond these tangible aspects of cost or expense and delay, there are the intangible factors of seemingly endless waiting for a result, seemingly endless time spent in the process, and the fear of disproportionate costs for the result obtained. The Group could not measure these factors but acknowledged their existence as it

prepared this Report.

For purposes of this Report, the Group would define costs, or expenses, as the total of litigation transaction costs plus indirect costs, e.g. costs to taxpayers caused by the judicial system's requirements for managing civil litigation to achieve a fair result. The Group defines delay as the unreasonable time, and therefore money, expended directly in civil litigation waiting for a just result (i.e. delays caused by the civil litigation process itself), plus unreasonable time, and therefore money, spent indirectly that delays a just result in civil litigation (e.g. a growing criminal docket, which will push off civil cases because of speedy trial and other requirements). The Congress has recognized this kind of indirect factor; see, e.g., 28 U.S.C. § 472(c)(1) (1988) (assessment of civil and criminal dockets, conditions of those dockets, trends in case filings, new legislation). With respect to the intangible negative factors cited above, the Group felt that these would be minimized through application of recommendations to reduce tangible costs and delays incident to litigation and thereby improve access to justice, and the quality of it, in federal civil litigation.

The Group identified several instances of cost and delay in the Middle District. To assist the Group in its study of cost and delay, the court sent a 112-question survey to 1300 lawyers who had appeared in a civil case in the Middle District during the past 5 years. Over 575 responded, and the results have been employed in preparing this Report. The survey, less the cover letter from the

Chief Judge, is attached as Appendix F. The identified instances of cost and delay follow.

a. Under Local Rule 203(c), all motions are heard on briefs, pleadings and admissible evidence in the court file unless the court grants a hearing. An examination of civil motions filed from January 1 through September 30, 1991, revealed that if no hearing was granted, 2.4 months elapsed between referral and decision. If a hearing was granted, 6.55 months elapsed between referral and decision. The survey results reflected this delay.

b. Although 65 percent of the respondents said that ineffective case management by magistrate judges was no or a slight problem, and 57 percent said the same about district judges, the biggest causes of excessive cost and delay were felt to be with failure to resolve discovery disputes or other motions promptly. With respect to magistrate judges, 39 percent felt delay in resolving discovery disputes were a moderate or substantial cause of cost or delay, and 28 percent said failure to resolve other motions promptly was a moderate or substantial cause of delay. The same pattern occurred with respect to the district judges: 28 percent for delay in resolving discovery disputes, and 41 percent for delay in resolving other motions.

c. The 1990 Judgeship Act added a fourth district judge for the Middle District. However, 8 months elapsed before that position was filled. Chief Judge Erwin took senior status in September 1992, with the result that another judge's position must be filled. Delay in the appointment of Judge Erwin's successor

will impact efficiency in case dispositions. The Group strongly urges the Executive and the Senate to proceed expeditiously to fill judicial vacancies, whether occurring in this or any other District.

d. The growing criminal docket partly caused by the federal war on drugs, an enlarged U.S. Attorney's office that can prosecute more cases, the fact that 24 percent of criminal case defendants plead not guilty and therefore take a full trial on the merits, and existing or projected legislation, have forced more civil cases into a holding pattern, thereby increasing the delay in final resolution after a relatively efficient pretrial under the Local Rules. The survey may have confirmed this as a developing problem; 32 percent of the lawyers surveyed said that failure of the court to set a reasonably prompt trial date was a moderate or substantial cause of delay. Forty-three percent of the respondents felt the criminal docket had impacted on civil litigation they had in the Middle District, but the survey did not point to any reasons why. For example, most respondents had no opinion as to the impact of the Sentencing Guidelines or the efficiency of the U.S. Attorney, defense counsel or the judges in using time allotted for criminal cases. (The Case Tracking and Management Committee of the Group stated in its report, however, the belief that the guidelines were a major cause of the lengthy criminal terms.) This may be explained in part by the fact that most respondents had a much higher percentage of civil practice than criminal defense in the Middle District. In any event, as noted in Part II.A above, the

Court has responded positively to the burgeoning criminal docket by a criminal term limitation plan.

e. The magistrate judges have been employed in civil and criminal litigation to the maximum permitted by the law. The result is that time for them to spend on deliberating dispositive and nondispositive matters has been sharply reduced. They are in court proportionally more of the time than before. The problem is compounded because the magistrate judge's law clerk must be in court or hearings with the judge. The survey revealed that delay in rulings on motions was the single largest factor in lawyer perceptions of excessive delay by magistrate judges, although only a minority of lawyers felt it was a moderate or excessive cause. See Part II.B.1.a.

f. The survey revealed that although 66 percent of the respondents had only occasionally or had never encountered delays in civil litigation, 46 percent said that when delays occurred, it was due to tactics of opposing counsel. (Judicial inefficiencies occurred in about 40 percent of the cases when delay was encountered; conduct of clients and insurers had negligible impact.) Forty-six percent said that delay was never worse, or only occasionally worse, than in State practice, and 49 percent said Middle District delays were never worse, or only occasionally worse, than other federal district courts. Nevertheless, 55 percent said that the cost and time it takes to litigate has substantially or moderately worsened during the past five years. A third of the respondents said it took 12 to 18 months, on

average, from the time their cases were ready for trial until trial actually began. Another 22 percent's trials started between 6 and 12 months after being ready. Survey respondents gave the same pattern of answers to questions about delay in civil litigation. The biggest - i.e. moderate or substantial - causes of costs or delays related to discovery abuse or overuse, unnecessary use of interrogatories, too many of them, too many depositions or too many questions at depositions, and overbroad document requests. In all but the last category, however, a majority - 58 to 62 percent - felt that these discovery tactics were either not a cause or only a slight cause of excessive cost or delay.

a. The Principal Causes of Excessive Cost and Delay.

Summarized, the principal causes of excessive cost and delay revealed by the survey and other research and analysis of the Group are:

(1) Time awaiting resolution of discovery disputes and other motions by magistrate judges or district judges;

(2) Time awaiting trial of civil cases, caused in part by the impact of the criminal docket;

(3) Time and costs lost due to opposing counsel tactics, particularly overuse or abuse of discovery.

The survey disclosed that only a third of the bar felt that these contributed moderately or substantially to excessive costs or delay in Middle District civil litigation. The types of cases and

differential case management given them, the full use of magistrate judges as permitted by 28 U.S.C. § 636 and Fed. R. Civ. P. 72-76, the efficient use of other court resources such as computerized record keeping, and continuous management of the court docket, have all contributed to relatively efficient disposition of civil cases. These are problem areas, however.

2. Factors.

a. The Types of Cases Filed in the District.

The civil docket in the Middle District is comprised of the types of federal cases that one would expect to find in a district that includes substantial urban development and strong, diverse commercial activity. Distribution statistics regarding case filings for 1988-91 show that two categories of Type I cases, prisoner cases and student and veteran loan cases, were the largest components of the docket in terms of sheer numbers. Of Type II cases, contract, civil rights, and "other" cases showed the heaviest filings. There were significant filings of additional Type II cases, including personal injury, patent and copyright, commerce, ERISA, and labor law cases.

"Weighted civil case filings" are a measurement of the judge time that is usually required in particular types of cases. Distribution statistics of weighted case filings for 1989-1991 show that in the Middle District the heaviest weighted filings were in civil rights, contract, prisoner, and personal injury cases.

There appears to the Group to be nothing unusual about the district's mix of civil cases, nothing that poses a particular risk of cost or delay. Historically, the mix has changed periodically, reflecting economic trends, legislative enactments, executive decisions by the Department of Justice, and other influences. There are always, of course, a number of major cases on the docket that are extraordinarily time-consuming for judges, and there are categories of cases, such as asbestos and environmental cases, requiring intensive management. Pro se and prisoner cases have heavily taxed the resources of the court for many years. Nonetheless, there appears to be no particular segment of the civil docket at this time that presents special problems of cost or delay.

b. Current Court Procedures and Rules for Case Management.

The Advisory Group recognized early on that if it hoped to identify recommendations to improve efficiency of the court's civil case management, it must first understand how the court currently operates its docket. In an organization as complicated as a federal district court, that task proved not to be easy.

The material that follows in Parts II.B.2.b(1) and II.B.2.b(2) of this section was prepared by members of the court for use by the Group. First, there is a description of how the judicial work of the court is divided between its two types of judges, district judges and magistrate judges. Second, there follows an outline of the case management procedures the court uses in civil cases. The

outline is oversimplified, in that it makes no attempt to account for hundreds of detailed operations routinely performed by the Clerk's Office or for unusual proceedings that occasionally require special handling. Still, the outline is useful as a summary that allowed the Group to evaluate the court's basic operating procedures for civil cases.

In Part 3 of this section, the Group evaluates the court's procedures to determine if any procedures appear to contribute to excessive cost or delay or to be ineffective methods of reducing cost or delay.

(1) District Judges and Magistrate Judges.

Article III of the U.S. Constitution vests the judicial power of the United States in judges who have lifetime appointments. Thus, within a U.S. District Court, the judicial power rests upon district judges who have been appointed by the President, have been confirmed by the Senate, and have life tenure. Magistrate judges are judges of the court appointed by the district judges in a merit selection process to serve 8-year terms. District judges delegate the power of the court to magistrate judges who, on such delegation, exercise the jurisdiction of the district court.

The jurisdiction of the district judge is the full judicial power granted by the Constitution. In general terms, it is the power to conduct civil and criminal trials in matters within the federal subject-matter jurisdiction, and to enter judgments therein.

The extent of the magistrate judge's exercise of power is established by statute, 28 U.S.C. § 636. Rather than listing judicial duties that magistrate judges can perform, the most easily understood statement of their jurisdiction is to recognize the judicial powers they cannot, under any circumstances, exercise under current law. Magistrate judges have no authority to conduct trials, enter guilty pleas, or enter sentences in criminal felony prosecutions, or to exercise the contempt powers of the court. Virtually all other judicial tasks can be performed by magistrate judges, acting either by order or by recommendation. For example, magistrate judges can (1) conduct trials and enter judgments in civil cases on consent of the parties; (2) conduct trials and enter judgments in criminal misdemeanor cases upon consent of the parties; (3) hear and determine nearly all nondispositive motions in civil or criminal proceedings; and (4) make recommendatory rulings to district judges on dispositive motions. In Magistrate Judge Jurisdiction and Utilization, the AO describes the jurisdiction of magistrate judges as falling into four broad categories: (1) initial proceedings in criminal cases; (2) trial of criminal misdemeanors; (3) reference by district judges of pretrial matters or other proceedings; and (4) trial of civil cases on consent.

The judicial work of the Middle District is assigned and delegated by district judges' instructions to the Clerk. Within the criminal docket, the two magistrate judges are assigned initial proceedings in criminal felony cases, including initial appearances, bail hearings, preliminary examinations and detention hearings. They are always on call for search and arrest warrants.

Magistrate judges conduct all proceedings, including trial, in misdemeanor cases. Arraignments in felony cases are conducted by magistrate judges or district judges, depending on scheduling circumstances. The district judges rule on felony pretrial motions, accept guilty pleas, conduct trials, and enter sentences. Grand jury proceedings are presided over by district judges or magistrate judges, depending on scheduling circumstances.

The civil docket presents a somewhat more complicated picture because of the greater variety of procedures involved. Generally, magistrate judges are delegated responsibility for all pretrial proceedings in civil cases, and district judges rule on dispositive motions and conduct trials, unless there is consent to the magistrate judge's trial jurisdiction. On occasion, district judges refer dispositive motions to magistrate judges.

In several categories of cases, magistrate judges are routinely assigned responsibility for entering findings and recommendations on dispositive motions: state and federal habeas corpus petitions (including death penalty cases), prisoner civil rights cases, and social security cases. Requests for a preliminary injunction or temporary restraining order are ordinarily handled by district judges because of the need for an immediate order, as opposed to a recommendation by a magistrate judge that would require passage of an "objection period" before a district judge's order can be entered. Miscellaneous motions or proceedings are assigned magistrate judges, including Internal Revenue Service (IRS) summons proceedings, post-judgment

proceedings, requests for guardian appointment, requests for appointment of counsel, applications to proceed in forma pauperis, subpoena disputes from cases filed in other districts, etc.

The division of the judicial workload between magistrate judges and district judges summarized above is the result of intentional planning to fully utilize the magistrate judges to take as much of the workload from district judges as is possible, to let district judges conduct trials and determine criminal felonies and civil cases. The magistrate judges of the Middle District regularly exercise the full authority delegable to them under 28 U.S.C. § 636 and Fed. R. Civ. P. 72-76.

(2) Civil Case Management.

(A) The Initial Intake by the Clerk of Court and Specialized Treatment of Particular Categories of Cases.

New civil cases filed with the Clerk's Office (except for cases filed by federal or state prisoners) must be accompanied by a civil docket cover sheet. See Local Rule 201(a). The cover sheet requires the plaintiff to identify the jurisdictional basis for the suit, the nature of the claims, the dollar amount of the demand for judgment, whether jury trial has been demanded, whether class action certification is desired, and whether there are related cases in this or other courts.

The new civil case is immediately assigned, on an alternating basis, to a specific district judge and magistrate judge. Alternating assignments are made under 4 categories -- business,

civil rights actions, prisoner cases, and all other cases -- to distribute on a roughly even basis litigation that is likely to be complex or protracted. Most cases are directed into the case-management procedure that begins with entry of an initial pretrial order. Several categories of cases are, however, routed into "streamlined" procedures. See Local Rule 204(a). For example, civil cases that include a request for a temporary restraining order or preliminary injunction are immediately referred to the assigned district judge for determination of preliminary relief.

Habeas corpus petitions from federal and state prisoners are also specially managed. They are sent directly to the assigned magistrate judge to determine if the petitioner has filed a complaint in proper form and if a response from the State of North Carolina, or the United States in a federal petition, should be required. The judge may enter a "screening order" requiring the petitioner to bring the complaint into proper form before it can be filed. Assuming that defects are corrected by the prisoner, the habeas petition is filed by the Clerk. By standing direction of the district judges, habeas petitions are referred to magistrate judges for recommended disposition on the merits. See 28 U.S.C. § 636(b)(1)(B). If evidentiary hearings are required, the magistrate judge conducts them.

Another category of civil cases given specialized treatment is civil rights actions filed by incarcerated persons. These are sent to the assigned magistrate judge, before filing, to determine if the complaint is legally frivolous and should be dismissed without

service of process on the defendant. If a complaint is in proper form and is not frivolous, the judge directs the Clerk to issue summons, and the case goes forward toward defendant's answer as in other litigation. All motions, dispositive or nondispositive, in this category are referred to the magistrate judge. Nondispositive motions are ruled on by order, and dispositive motions are addressed by a recommendation entered by the magistrate judge. See Fed. R. Civ. P. 72(a), 72(b). An order on the dispositive motion is entered by the assigned district judge after the time for objecting to the magistrate judge's recommendation has expired. Evidentiary hearings in prisoner civil rights cases, where summary judgment is denied both parties, are heard by a magistrate judge if there is no jury demand. If a jury demand has been filed, the case must be placed on the district judge's "ready for trial" list. See McCarthy v. Bronson, 111 S.Ct. 1737 (1991). The Clerk suggested hiring a law clerk for all pro se cases, analogous to the staff law clerks for the U.S. Court of Appeals for the Fourth Circuit.

A fourth category of cases given specialized treatment is social security cases. Typically, the plaintiff has been denied a finding of disability by the Social Security Administration and has appealed to the court for review. These cases call for an appellate standard of review; no trials are held. The Clerk establishes a briefing schedule on cross-motions for summary judgment, and these motions are referred to the assigned magistrate judge for a recommendation on disposition.

IRS summons proceedings are a fifth category of cases sent directly to the magistrate judge for recommendation without other pretrial procedures. See Local Rule 204(a)(3).

These five categories of cases have been identified by the court, on the basis of experience, as requiring only abbreviated pretrial proceedings, and they are ruled on as described above.

One additional category of civil cases is separated for special treatment; these are cases falling within the court's program for mandatory nonbinding court-annexed arbitration pursuant to 28 U.S.C. §§ 651-58 and Local Rules 601-08. Cases within the local rules' definition of arbitrable cases (generally, contract and tort cases with $150,000 or less in controversy) are identified by the Clerk when filed. They are placed on the arbitration management track by the Clerk's entry of an initial pretrial order under Local Rule 603.

Throughout the course of every case, the Clerk's Office carries out case-tracking functions to keep litigation moving from one stage to the next. The Clerk's Office, using computer docketing, identifies when motions are "ripe" for a ruling by a judge and sends the file to the judge's office. The Clerk is presently changing to a system in which the courtroom deputy clerk for each district judge is responsible for this tracking function. When the courtroom deputy clerk identifies a motion that is ready for a ruling, it is sent to the chambers of the assigned judge for disposition.

Civil cases not falling into the categories for specialized treatment described above enter the general case management plan established by the local rules. The plan begins with procedures for entry of an initial pretrial order.

(B) The Initial Pretrial Order.

Every civil case that enters the general case management plan of the court is controlled by an initial pretrial order. Local Rule 204 and Fed. R. Civ. P. 16(b). The initial pretrial order is entered by a magistrate judge. The order states stipulations by the parties on basic issues (often uncontested) of service of process, jurisdiction, joinder of parties, pleading amendments, and the like. The order identifies whether jury or nonjury proceedings are called for, and includes the parties' estimate of required trial time. Perhaps most importantly, the order establishes a schedule for the case. The order determines the time allowed for general and expert discovery. By establishing an end-date for discovery, the order assures that the case will move steadily through the pretrial process, always with an upcoming deadline in place. After the last day for discovery, dispositive motions are automatically due within 30 days' time. See Local Rule 206. There is no provision for a firm trial date in the Rule 204 order, however. The lawyer survey disclosed that 33 percent of the Middle District cases had a 12-18 month delay between being ready for trial and actual trial, and another 22 percent had a 6 to 12 month wait between being ready for trial and actual trial. (These times

do not include the time between filing and the final pretrial conference, which under Local Rule 207 establishes that a case is ready for trial.)

The local rules provide for alternate methods for entry of the initial pretrial order. As soon as the issue is joined (i.e. the answer is filed), the Clerk schedules an initial pretrial conference before the assigned magistrate judge. The parties are given an opportunity to enter into agreements concerning all the matters generally discussed at an initial pretrial conference, including scheduling discovery. They may, at least 10 days before the scheduled conference, submit a stipulated pretrial order. The magistrate judge reviews the stipulations; if the stipulated schedule for the case appears reasonable, the judge enters the pretrial order agreed upon by the parties and cancels the conference.

If the parties do not submit a stipulated pretrial order, the conference is convened as scheduled, with attorneys or pro se parties appearing. A "motion day" for each magistrate judge for initial pretrial conferences is scheduled each month. The judge conducts a full Fed. R. Civ. P. 16(b) pretrial conference and enters an order establishing a management plan. The order becomes the "road map" for the case.

The experience of the court has been that in a relatively high percentage of civil cases - more than half - counsel are able to reach case management agreements and therefore to submit a stipulated pretrial order. Many are routine cases requiring

special attention by the court or a particularized management plan. Occasionally even very complex cases result in a stipulated order, apparently because counsel recognize the need for early attention to management complexities and invest time on the matter. Cases requiring an in-court conference often include (1) complex cases that, from the outset, will clearly require intensive management by the court; (2) cases where counsel, for whatever reason, are unable to cooperate extensively; (3) pro se cases; and (4) cases where the parties have agreed to many preliminary matters, but want the court's direction or ruling on particular issues.

After entry of the initial pretrial order, the primary activity of the parties is conducting discovery.

(C) Discovery.

The standard time for discovery permitted by the court is 120 days, although adjustments may be made in the initial pretrial order depending upon the case's complexity. Discovery in many cases proceeds and ends without involvement by the court. Discovery disputes do, however, arise with significant frequency, and the court must resolve these disputes to keep the case moving forward.

The survey revealed that although two-thirds of the respondents had experienced no or slight excessive delays or costs in civil litigation, when it occurred the principal culprit was abuse or overuse of discovery: unnecessary use of interrogatories, too many interrogatories, too many depositions, too many questions

at depositions, and overbroad document requests. In all but the last category, however, a majority of lawyers - 58 to 62 percent - felt that these tactics were either not a cause or only a slight cause of excessive cost or delay.

When discovery motions are filed with the Clerk (e.g., a motion to compel, for a protective order or for a confidentiality order, etc.), it is referred to the assigned magistrate judge for a ruling. Local Rule 206(c) requires movant's counsel to advise the court in writing that personal consultation and diligent attempts to resolve differences have failed to reach an accord. The survey found that 46 percent of the respondents felt that requiring pre-hearing conferences with the Court would have moderate to substantial effect in expediting cases or reducing its cost, while 39 percent said the procedure would have little or no effect.

The overwhelming majority of these discovery motions are ruled on by magistrate judges without a hearing. A judge directs the Clerk to schedule a hearing only if the judge believes a hearing will significantly help resolve a difficult question, or if facts must be established. Magistrate judges routinely use telephone conferences when the court wants oral argument and only narrow issues are involved. Telephone conferences are also used during depositions when parties need an immediate order (subject, of course to the availability of the magistrate judge who may be in court on criminal or civil matters). Over two thirds of the lawyers surveyed said that increased availability of telephone

conferences with the court would moderately or substantially expedite litigation.

During discovery, parties file motions, e.g. motions to amend pleadings, to add parties, for extensions of time, etc. All of these, except for dispositive motions (e.g. Fed. R. Civ. P. 12(b)(6) or 56 motions) are referred to the assigned magistrate judge. As a general rule, all nondispositive civil motions are referred by the Clerk's Office to the assigned magistrate judge; all dispositive motions are referred to the assigned district judge. From time to time, the district judges refer dispositive motions in particular cases to the magistrate judges as well.

(D) Dispositive Motions.

Parties must give notice of any intent to file summary judgment motions 10 days after the close of discovery, and they must file such motions within 30 days after the end of discovery. If no dispositive motions are filed, the case is placed on the district judge's "ready for trial" list. (In the small number of cases where parties have consented to trial before a magistrate judge, the case is set for trial before that judge.) If dispositive motions are filed, they are referred to the district judge for a ruling and are placed on his list of motions pending.

The survey found that lawyers were about equally divided on whether a prehearing conference with the court on dispositive motions would expedite cases or reduce costs. Forty-five percent said this procedure would have moderate to substantial effect,

while 40 percent said it would have little or no effect. Adding a 30-page limit on briefs for the hearing would have moderate to substantial effect on expediting cases or reducing costs, 48 percent said; 39 percent felt it would have little to no effect.

The district judge files written orders on summary judgment motion submissions as time permits. There is no "chambers time" within the judge's calendar designed for working on dispositive motions. The judge, with the help of law clerks, must determine the motions and write opinions during whatever time can be found within criminal terms (e.g. between trials, plea hearings, sentencings, etc.) or sessions when civil trials are scheduled. The magistrate judge, if entertaining a dispositive motion, must also find time between criminal hearings and other civil proceedings.

Preparation of opinions and orders on dispositive motions is a time-consuming task. It is a tradition of the Middle District to file thorough and carefully reasoned opinions fully developing the law of the case. These opinions lead to trials in which parties understand controlling legal principles, or to dismissals that are fully explained. The survey results support continuation of this policy. As stated supra in Part II.B.1.a, a substantial majority of the bar felt there was no or only a slight problem with case management by the judges, and far less than half - between 28 and 41 percent - thought that there was excessive time taken to render decisions on motions. Between 72 and 59 percent saw the reasoned decision approach as either no cause, or only a slight cause, of

excessive cost and delay. The Group recommends retaining the policy.

When the summary judgment opinion is filed by the district judge, the case is placed on the judge's "ready for trial" list, assuming the case has survived the dispositive motions. The chief deputy clerk schedules civil trials from this list for each judge, using the trial time estimate given by the parties to determine when a case can fit in an available time slot. The chief deputy clerk works from a 6-month master calendar for each district judge. The first matters placed on these calendars are the criminal terms. The time that is left is for disposition of civil cases. The court's new criminal term limitation plan, described in Part II.A above, should result in more efficient use of criminal terms and thereby free up more civil trial time.

A motion day is left open each month for final pretrial conferences and oral arguments.

(E) The Final Pretrial Conference.

The final pretrial conference is conducted by the district judge who will try the case (or the magistrate judge, in cases where trial consent has been given). See Local Rule 207. The central purpose of the conference is to organize the trial of the matter so that it can proceed in an orderly, efficient fashion. Parties or their counsel are required to meet 15 days before the final pretrial conference, to bring the case into full readiness for trial, and to prepare a proposed final pretrial order. The

parties must also fully discuss settlement possibilities before the conference and be prepared to discuss settlement prospects at the conference.

At the conference, the court may rule on preliminary matters, and must determine if the case is in all respects ready for trial. The judge gives parties directions on matters relating to trial briefs, exhibit numbering, proposed findings of fact, and proposed jury instructions. The final pretrial order entered by the court controls trial of the action.

The chief deputy clerk schedules civil trials under the procedures described above. Once a trial date is established, the chief deputy clerk sets the case on before the assigned district judge for the final pretrial conference on a civil motion date reserved for the judge. The final pretrial conference is usually held about 30-45 days before trial.

The final pretrial conference brings to a close the case-management plan established by the local rules. The case is ready for trial, and trial time availability is a function of whatever time is left available to the judge between criminal terms. As noted above, the court's new criminal term limitation plan, described in Part II.A above, may increase court time available for civil trials.

Although the survey disclosed that 57 percent of the respondents felt that there was no or only a slight problem with case management by district judges, 32 percent said that the failure to assign a reasonable prompt trial date contributed

moderately or substantially to delay. Forty-three percent felt that the expanding criminal docket had impacted the civil docket ~~substantially~~ moderately or substantially. To the extent that the criminal docket forces cases that are ready for trial to be placed "on the shelf" to make room for criminal trials, there will be excessive costs and delay, although not because of the civil case management system of the Middle District.

(3) The Advisory Group's Evaluation of the Impact of Court Procedures.

The Advisory Group concludes that the Middle District procedures for managing civil litigation, in the context of the total docket, has generally met the CJRA goals for reducing or eliminating excessive cost and delay, with certain exceptions. The court's early and continued management and control of the civil docket, its differential case management procedures and its use of magistrate judges to the extent provided by law, are especially noteworthy. Problem areas remain, however.

3. Focal Points.

a. Overuse and Abuse of Discovery.

The survey revealed that a significant number of attorneys believe that discovery procedures are overused in civil litigation in the Middle District. The Advisory Group believes that additional case management differentiation, with presumptive limits on the number of depositions and interrogatories, would reduce unnecessary cost and delay without inhibiting litigants in their

pursuit of reasonable discovery. The consensus of the Group is that civil cases that are governed by an initial pretrial order (see Local Rule 204[a], which exempts Social Security cases, prisoner petitions, and IRS summons proceedings from the requirement of an initial pretrial order), should be divided into separate case management tracks identified as (1) Standard, (2) Standard, with an expedited trial [upon consent to a magistrate judge] and (3) Complex. In Standard cases, each side should presumptively be limited to 5 depositions and 25 single-part interrogatories in a 4-month discovery period. In Complex cases, each side should presumptively be limited to 10 depositions and 50 single-part interrogatories in a 7-month discovery period.

The Group also recommends the insertion of precatory language in Local Rule 205. That Rule should be amended to remind litigants of their duty to cooperate in discovery in matters of scheduling and to conduct discovery in good faith.

In state practice, nonstenographic (e.g. video) depositions can be taken on notice. N.C.R. Civ. P. 30(b)(4). Fed. R. Civ. P. 30(b)(4) allows nonstenographic depositions only upon stipulation or court order. The Group supports amendments to Rule 30, currently under consideration, to allow nonstenographic depositions on notice. Pending adoption of an amendment to Rule 30, Local Rule 205(a) should be amended to allow nonstenographic depositions on notice or stipulation. This would eliminate lawyer and judge time on such motions, which are nearly always granted.

Nearly 60 percent of the lawyers surveyed said that conditioning grants by the court of broader discovery upon the shifting of costs where the burden of responding to such requests appears to be out of proportion to the amounts or issues in dispute would moderately or substantially expedite litigation or reduce costs. Similarly, 55 percent said that the court's balancing the burden of expenses of discovery against its likely benefit would expedite litigation or reduce costs, and 57 percent said assessing costs of discovery motions on the losing party would also expedite cases or reduce costs. The Court's current practice under Fed. R. Civ. P. 26(b) and 26(c) can be used to apply these principles.

Fifty-six percent thought that requiring automatic disclosure before the final, pretrial conference of the qualifications, opinions and basis for opinions of experts to be called at trial would have a moderate to substantial impact on expediting litigation or reducing costs.

Survey respondents divided almost evenly on these procedures, under consideration in other fora, as to whether they would help in expediting litigation:

> (1) after joinder of issue, automatic disclosure of witnesses relied on to prepare pleadings or contemplated to be used to support parties' claims, defenses or damages;
>
> (2) after joinder of issue, automatic disclosure of a general description of documents used for the same purposes;
>
> (3) after joinder of issue, automatic disclosure of insurance agreements;
>
> (4) requiring discovery related to particular issues (e.g. venue), or a specified stage of the case (e.g. liability) to be completed before allowing discovery on other issues or stages (e.g. damages, experts.

A majority (56 percent) felt that providing less time for discovery would have little or no effect on expediting litigation.

b. Reducing time between submission and decision on pretrial motions.

Most Middle District lawyers liked the reasoned decision approach to opinions on pretrial matters, but a substantial minority felt that too much time elapsed between submission and decision. Presently there are two magistrate judges, each of which has a single law clerk, to undertake the full authority under law and the Federal Rules that has been granted by the court. Magistrate judges and their clerks spend most of their time in court and have little time for work in chambers. Providing a third magistrate judge, and allowing each magistrate judge a second law clerk, would permit more chambers time for opinions. Another improvement would be to provide for a staff law clerk to assist with prisoner cases. The Group notes that measures to reduce cost and delay to litigants may require an increase in costs to the government.

c. Reducing the time between when a civil case is ready for trial and the actual trial.

The Middle District's civil case management plan, as stated in the local rules and as experienced in practice, provides for relatively efficient movement of cases from filing to the final pretrial conference. The Group does recommend, however, additional case management differentiation between Standard cases, Standard

cases with an expedited trial before a magistrate judge, and Complex cases. (See Part II. B. 3(a).) The increasing criminal docket load has begun to lengthen the time between readiness for trial and trial as civil cases are put on the shelf, fully pretried, to make room for criminal cases. Twenty-six civil trials were held in SY 1988, and only ten in SY 92. The Group notes that relatively few cases are calendared for trial and suggests that adding back-up cases to civil trial calendars would insure that all available trial time is used and would probably result in earlier settlements.

d. Alternative Dispute Resolution.

A partial solution may be more use of alternative dispute resolution (ADR) techniques. The Middle District has had a successful court-annexed arbitration program for several years, being one of the initial 10 pilot districts authorized by Congress. The State of North Carolina has been a national leader in promoting ADR, with court-ordered arbitration in a third of the counties, a pilot court-annexed mediated settlement conference underway, and a statewide summary jury trial rule, in place. Many lawyers who appear in Middle District cases, most of whom have extensive civil practices in the State courts, are thus somewhat familiar with ADR techniques.

(1) Court-annexed arbitration.

The number of cases eligible for court-annexed arbitration has decreased since the jurisdictional amount for diversity cases has been raised to $50,000. About a fourth of the survey respondents said increasing the cap on mandatory reference to court-annexed arbitration from the present $150,000 cap to $250,000, $500,000 or $1 million would have no effect on expediting litigation. Another fourth of those surveyed had no opinion. Nevertheless, the Advisory Group would recommend increasing the cap on court-annexed arbitration when Congress authorizes such.

The Group believes that 28 U.S.C. § 653(b), if amended to require arbitration within a specified time after the parties are at issue, would be more realistic than the present requirement of arbitration 180 days after the answer is filed. The legislation does not take into account the probability of added parties and issues, which is common to litigation under the Federal Rules. Similarly, the 28 U.S.C. § 653(b) requirement of rulings on dispositive motions before sending a case to arbitration is wasteful of judicial time. If the non-movant's case is weak, i.e. lacking in key, probative facts, that would be revealed in arbitration without wastage of judicial time on the same issue. If the nonmovant prevailed at arbitration, the summary judgment movant could renew the motion after arbitration, with the possible award of sanctions against the motion loser. Conversely, it must be acknowledged that in cases where summary judgment is appropriate, a requirement that rulings on dispositive motions be delayed

pending arbitration could be wasteful of time of parties and expensive to them.

(2) Early Neutral Evaluation (ENE) and Mediation.

As noted above, the North Carolina mediated settlement conference program is in the pilot stage for some of the State's general trial courts. The pilot program ends in mid-1995, with a required report to the North Carolina General Assembly. Aside from the expected need to reexamine the rules at the end of the trial period, the State program has been hampered by a lack of trained, experienced mediators. Despite the relative newness of the concept for North Carolina, 55 percent of the survey respondents thought that voluntary court-annexed mediation for some or all issues in a case would have moderate to substantial effect in expediting litigation or reducing costs. Just under half of those surveyed had similar opinions on ENE. Fifty-eight percent thought that requiring parties and/or insurers to be present at settlement conferences would have moderate to substantial effect on expediting litigation or reducing costs. The Advisory Group's Case Tracking and Management Committee recommended a mediation rule if a way to establish firm trial dates could be found. The Committee also thought an early "status conference" for possible settlement assessment was a good idea, if there was substantial judicial involvement.

e. The impact of the criminal docket.

The delay in final resolution of civil cases after pretrial has been completed is also a function of the growing criminal docket. If the War on Drugs intensifies, if the number of personnel in the U. S. Attorney's office continues to increase so that more prosecutions can be initiated, if the present high percentage (24) of not guilty pleas continues, and if the Congress continues to enact new federal criminal offenses, the problem will only deepen. The problem has been compounded by delays in confirming new judges.

4. The Effect of Court Resources.

The relationship between delay in the civil case docket and availability of court resources to manage and determine civil cases is a direct one. The Advisory Group has examined court resources under categories of (1) district judges, (2) magistrate judges, (3) court facilities, (4) court staff, and (5) automation.

a. District Judges.

With respect to reducing delay in the civil docket, the single most important development within the court in the last several years has been addition of a fourth judgeship under the 1990 Judgeship Act. In 1989, just 3 years ago, the court was relatively current on civil cases, as statistics in Part II.A. of this Repcrt show. Between 1989 and 1991, the civil docket of the court slowed, and the median time from issue to trial of civil cases increased

markedly. The increasing delay in conducting civil trials and ruling on dispositive motions is due primarily to the dramatic increase in the number of criminal drug defendants being prosecuted in this district. One of the reasons given by Congress for passing the 1990 Act was the need for additional judges in courts where the criminal docket had exploded as a result of the federal drug war. The Middle District was precisely such a court, and it received a much needed additional judgeship.

It will likely be two or three years before the impact of the fourth judgeship on the civil case backlog can be accurately assessed. Moreover, there are other factors that will influence events in the next few years that are now difficult to assess. Chief Judge Erwin assumed senior status in September 1992. The district may therefore experience a judicial vacancy for some time, and that vacancy, if prolonged, certainly will contribute to delay in the civil docket.

Further, if there is no relief from the time presently required of judges in criminal cases, any opportunity to speed up the civil docket will undoubtedly be compromised. The United States Attorney's Office continues to add prosecutors and support staff. If the 24 percent rate of not guilty pleas continues, that will be another factor impacting the time needed for criminal cases. These facts suggest that a sustained or even greater number of criminal cases may be brought by the Government in the future. The court's new criminal term limitation plan, described in Part II.A above, may increase court time available for civil trials, but

the plan is too new for its impact to be measured.

b. Magistrate Judges.

The Middle District has had two magistrate judges since 1976. The magistrate judges, as described in Part II.B.2.b of this report, are utilized by the court across the entire range of the criminal and civil dockets. They are assigned all preliminary criminal felony proceedings, misdemeanor proceedings including trial, nondispositive civil pretrial proceedings, dispositive motions in several categories of civil cases, civil trials where consent is given, as well as many miscellaneous matters. AO management audits have repeatedly found that the Middle District makes maximum use of the judicial authority delegable to magistrate judges. Despite this fact, the former title "Magistrate" has resulted in some confusion by litigants. The Group believes that because of use of the term "Magistrate" in both North Carolina and federal practice, the Court should undertake a program to acquaint litigants with the nature and scope of the Magistrate Judge's authority in federal practice.

Although the magistrate judges are extensively utilized, there has nonetheless been a marked slowdown in the civil docket in the last 3 years. The time available to these judges for civil cases has diminished during this time. The rapid growth of the criminal docket has had the same impact on magistrate judges as it has on district judges. The magistrate judges conducted more preliminary criminal proceedings in 1989-92 than in 1988 or before, simply

because there were more felony defendants. They are ruling on more 28 U.S.C. § 2255 actions because of the increased number of persons convicted in this court. In addition, changes in the law effected by the Bail Reform Act of 1986, coupled with the increased number of drug cases, have resulted in a new kind of hearing, a detention hearing, and many of them. Detention hearings have become a significant drain on the time available to magistrate judges for other judicial work.

Magistrate judges in the district, like district judges, have less time available in 1992 to work on civil matters than they did just a few years ago. Assuming that there will be no substantial reduction in the criminal docket, the Group can find three solutions to allow magistrate judges to play an even more telling role than now with respect to the civil case docket.

First, a third magistrate judgeship could be added to the district. Location of the additional magistrate judge in Durham would not be difficult logistically. For preliminary criminal proceedings, addition of a magistrate judge would greatly assist federal law enforcement agencies. More to the point of this Report, however, the addition of a third magistrate judge would create a valuable resource for addressing the civil case slowdown.

With an additional magistrate judge, magistrate judges would, for the first time, have time available to handle a more significant portion of pending dispositive motions in Type II civil cases. Additionally, in light of the time that would then be available to them, it would be feasible for the Clerk's Office to

begin an aggressive program to educate counsel and litigants concerning the consent-trial jurisdiction of the magistrate judges in civil cases, consistent with 28 U.S.C. § 636 and Fed. R. Civ. P. 72-76. Unquestionably, addition of a third magistrate judge would be a major step toward addressing the civil case slowdown in this court.

Second, even a more modest increase in the resources of the magistrate judges' office would pay significant dividends to the civil docket. Magistrate judges are currently authorized only one law clerk by the AO. This clerk is generally required to be in court or hearings with the magistrate judge, with the result that no research or writing is ongoing in chambers for major portions of the work week. This fact severely limits the work, particularly on dispositive motions, that magistrate judges can produce. The work of the law clerk is especially critical with respect to dispositive motions, where considerable legal research is required.

It appears clear to the Group that, if each magistrate judge had a second law clerk, the magistrate judges of the District would be a considerably strengthened resource for gaining and maintaining control of the civil docket.

Third, addition of a staff law clerk for researching prisoner cases would assist with disposition of those cases, whose number is likely to increase with the number of criminal convictions. This trend for 28 U.S.C. § 2255 cases has already begun.

c. Court Facilities.

(1) Greensboro.

When current projects are completed in Greensboro (approximately December 1993), chambers and courtrooms will be adequate for the next five years.

The available space for the clerk's office is already stretched to the maximum. When the additional personnel recognized as required by the current staff study are authorized, additional office space for the clerk's operations will be required. This space will have to be obtained from areas now occupied by the U.S. Attorney. The U.S. Attorney plans to move out of the courthouse as soon as the General Services Administration obtains suitable space. It is expected that this process will take 2 to 3 years. In the meantime, attorney conference rooms will have to be used as space for clerical operations.

(2) Winston-Salem.

Chambers space for an additional judge is already required. Office space for the court reporter currently assigned to Winston-Salem must be obtained. The current grand jury room must be renovated to make it more usable.

(3) Durham.

If an additional magistrate judge is authorized and is assigned to Durham, chambers for him or her will be required. Also, if greater use is made of the Durham courtroom, a visiting

judge's chambers will be needed. It is anticipated that the circuit judge presently housed in the Durham facility will soon move. If so, space for a visiting judge's chambers can be created by moving the clerk's office to the space formerly occupied by the Probation Office (now used for the circuit judge's library). Also, the space now used for the circuit judge's chambers could be converted to chambers for the magistrate judge.

d. Court staff.

As previously stated, the clerk of court's office is understaffed by at least 37 percent. There is a direct correlation between effective case management and the number of persons available to support the judges in implementing case management procedures. When the recommendation for additional deputies recognized by the staff study conducted by the AO is implemented, the clerk's office will be much more able to assist the court in attaining the objectives of the Civil Justice Reform Act of 1990.

Also, implementation of the recommendations of this Advisory Group that an additional magistrate judge be authorized and that an additional law clerk be authorized for each magistrate judge, will provide the additional manpower necessary to eliminate the backlog which has developed with the disposition of civil cases. It is believed that the addition of such law clerks, after the current backlog is eliminated, will do much to insure that a new backlog in the final disposition of civil cases does not develop.

e. Automation.

The court has laid the groundwork for the implementation of automated technology to assist in the tracking and control of case information. Additional resources (both software and hardware) will be necessary to achieve the maximum benefits of developing technology.

5. Practices of Litigants and Attorneys.

Forty-nine percent of the lawyers surveyed said they had only occasionally experienced delay, and 41 percent said litigation had only been occasionally unnecessarily costly, in Middle District practice. While 17 percent felt they had never experienced unnecessary delay, 23 percent reported delay most or all of the time. And while 23 percent thought Middle District litigation was never unnecessarily costly, 21 percent said it was too costly most or all of the time. The thrust of the survey results is that most Middle District lawyers are generally satisfied to highly satisfied with the pace and cost of Middle District civil cases. There was also a statistical bias toward the view that Middle District litigation was about the same, in terms of cost and delay, as in the North Carolina State courts or in other federal courts. Nevertheless, 55 percent said that the cost and time to litigate has worsened over the past five years.

Clients and insurers were not to blame, the survey revealed. The results were overwhelming - from 72 to 80 percent - that clients or insurers conduct had little to no impact on cost or

delay. Personal or office inefficiencies had little impact either. (Judicial inefficiency as a cause of delay was almost evenly divided, with 48 percent saying this had little or no effect, and 39 percent feeling that judges' inefficiency moderately or substantially contributed to delay. Judges contributed even less to increased cost; 58 percent said they had little to no impact, while 29 percent said judges' actions moderately or substantially contributed to increased costs.)

A majority of respondents - 54 percent - said opposing counsel tactics played little or no role in increasing delay, while 36 percent felt that opposing lawyers' actions moderately to substantially contributed to unreasonable delays. The results were more even for increased costs; 48 percent felt that opposing counsel tactics had little or no impact on unnecessary costs, while 38 percent said lawyer tactics moderately to substantially added to unnecessary costs.

The picture that emerges from the survey, and the Advisory Group concurs, is that there is little to no problem with client or insurer tactics in increasing unnecessarily the costs or delays incident to Middle District litigation, and only a minor problem with respect to the lawyers or the practices of judges. The Group attributes this, in part at least, to the general spirit of cooperation among most lawyers who practice in the Middle District, the general practice of most lawyers who appear in the Middle District to proceed efficiently while observing the rules, as well as the workable case management rules of the court, which encourage

this. There are exceptions and gaps, to be sure. Dissatisfaction with the growing delay in resolving civil litigation therefore comes, in large part, from reasons outside the civil litigation system in the Middle District. As developed elsewhere in this report, a primary cause is the expanding criminal case docket.

6. Assessment of the Impact of Legislation and Executive Action on Cost and Delay in Civil Litigation.

New legislation and executive action have been the predominant cause of delay in disposing of civil litigation in the Middle District with its attendant costs during the past few years. As Part II.A.1 has demonstrated, the sharply increased number of drug war defendants being prosecuted in the District has decreased the percentage of civil trials, as a function of total trials in the District, from 60 percent to about 10 percent between 1986 and 1992. To be sure, the total civil filings have also fallen, but not as precipitously as the rise in criminal filings. Part of this increase in executive action can be traced to increases in the size of the U.S. Attorney's staff.

Recent federal legislation has also played a role in delaying resolution of civil litigation. Use of sentencing guidelines, plus mandatory minimum sentences for many offenses, have prompted more defendants to plead not guilty and request jury trial, with the result that more court time is taken up with criminal trials. Twenty-four percent of Middle District defendants pleaded not guilty, as compared with 12 percent in the Eastern District and 6

percent in the Western District. And when the trial is over, sentencing, with its required, complicated findings, consumes more court time, and there is the prospect of increased 28 U.S.C. § 2255 filings.

On the positive side, the recent Executive Order 12,778, § 1(c), 56 Fed. Reg. 55195, 55196 (1991), stating the Executive's policy to seek ADR options to resolve civil disputes in which the Government or its agencies are parties, is a positive step that has promise of helping shunt government-oriented civil litigation out of the conventional path. As Graph 5-1 in Appendix E demonstrates, civil cases in which the Government is a party jumped dramatically in 1992. Executive Order 12,778 came none too soon.

The latter palliatives are no substitutes for a careful assessment, before enactment of new federal criminal legislation, of the impact of such on the civil dockets of the District Courts. The same can be said for executive actions. The Government has a fair estimate on how many cases a new prosecutor can handle and how much time these cases will take to complete. The Congress, through its appropriation power for the Executive, should likewise be able to assess what impact hiring new prosecutors for a District will have in indirectly contributing to delay in civil litigation through an increased volume of criminal prosecutions, particularly if criminal defendants elect jury trial because of the known range of possible sentences under the guidelines and mandatory minimum sentences.

III. Recommendations and Their Basis.

A. Recommended Measures, Rules, and Programs.

1. Discovery Control.

a. Rewrite Local Rule 205 to include precatory language stating obligations and responsibilities regarding overuse or abuse of discovery.

Insertion of this language would remind counsel and parties of their obligations to use discovery procedures in good faith. Specific reference to Fed. R. Civ. P. 37 and Local Rule 122 sanctions should be included. This may help curtail overbroad discovery problem areas shown by a minority of the bar in the survey as contributing to unnecessary cost and delay.

b. Amend Local Rule 205 to allow nonstenographic depositions upon notice or stipulation.

This would conform the Rule to State practice, would anticipate a noncontroversial proposed amendment to the Federal Rules of Civil Procedure, and would eliminate attorney time in preparing motions and briefs as well as judicial resources in consideration of the matter. If there is objection to a nonstenographic deposition, e.g. for prejudice, that relatively infrequent issue can be heard upon motion under the usual procedure.

2. Amendment of Local Rule 204 and Form 1, Initial Pretrial Conference Stipulations and Order.

The initial pretrial conference procedure, mandated by Fed. R. Civ. P. 16(b) and Local Rule 204 except for cases shunted to court-annexed arbitration under Local Rule 603 or exempted for certain cases under Local Rule 204(a), should be amended in several respects to expedite civil litigation.

a. Amend Local Rule 204 and Form 1 to provide for automatic disclosure of certain information.

The survey revealed that 47 percent of the lawyers felt that automatic disclosure of witnesses relied on in preparing pleadings or contemplated to be used to support parties' claims, defenses or damages would moderately or substantially expedite cases. Thirty-nine percent said disclosure would have little or no effect. Forty-six percent thought that automatic disclosure of a general description of documents relied on to prepare pleadings or contemplated to be used to support parties' allegations or calculation of damages would expedite cases. Forty percent thought such disclosure would have little or no effect. The percentages were similar for existence and content of insurance agreements, 46 percent in favor, and 36 percent saying such would have little or no effect. Under Fed. R. Civ. P. 26(b)(1), discovery of the names, etc. of witnesses used as stated above and the contents of documents used as stated above would be allowed. Fed. R. Civ. P. 33(c) allows specification of a document and its location, with the option to the proponent of the interrogatory to inspect such, if

the burden of deriving the answer is substantially the same for the party serving the interrogatory as for the party served. It is also common practice for parties serving interrogatories to ask the party served if the party will attach a copy of the document without a motion to produce, thereby eliminating a follow-on Fed. R. Civ. P. 34 notice to produce. Under Fed. R. Civ. P. 26(b)(2), parties can learn the existence and contents of insurance agreements if such agreements might cover liability for a judgment in the case. Automatic disclosure of witnesses' names, contents of documents, or the existence and contents of insurance agreements, would move forward the inevitable to an earlier stage of the litigation without exchange of paperwork.

The Advisory Group believes that the previously-stated automatic disclosure methods will expedite Middle District civil litigation. The Group further believes that the fulcrum point for such should be the initial pretrial order. Counsel are required under Local Rule 204(c) to submit stipulations for what are usually noncontroversial issues as well as various aspects of a discovery plan, or appear for an initial pretrial conference under Rule 204(b). The additional burden to stipulate witnesses and documents used to prepare pleadings, and insurance agreements, at that time as well should be slight. Since copies of the documents or insurance agreements would generally be forthcoming under Fed. R. Civ. P. 34 in most cases, these could also be produced. Similarly, addresses and telephone numbers of witnesses should also be in counsel's files.

Therefore, the Group recommends amending Rule 204 and Form 1 to require, as a part of the pretrial order:

> (1) names, addresses and telephone numbers of possible witnesses relied on by a party to prepare pleadings;
>
> (2) general description of documents relied on to prepare pleadings, with the option to append copies of the documents themselves;
>
> (3) the existence and contents of insurance agreements discoverable under Fed. R. Civ. P. 26(b)(1), with the option to append copies of the documents themselves.

The amendment to Rule 204 should state that exchange of witness information, production of any documents, or descriptions thereof, may be subject to the nonfiling requirements of Local Rule 205(a)(2). It is contemplated that the Local Rule 204 amendment would be subject to the usual rules of privilege and work-product, e.g. Fed. R. Civ. P. 26(b)(1), 26(b)(3), or to an appropriate protective order, Fed. R. Civ. P. 26(c).

b. Controlling discovery through management of types, frequency and amount of discovery; Amendment of Local Rule 204.

The survey revealed that lawyers were about evenly divided on whether limitations of the use of particular discovery procedures would expedite civil litigation in the Middle District. The consensus of the Advisory Group is that such limitations, particularly when placed within differentiated case management tracks, would make a significant contribution to reducing unnecessary cost and delay. The Group therefore recommends amending Local Rules 204 and 205 and Form 1 to provide for an additional case management plan along these lines:

LOCAL RULE 204 (Amended)
INITIAL PRETRIAL ORDER

(a) **Requirement for Initial Pretrial Order.** [Unchanged, except for recommendations stated elsewhere in this Report.]

(b) **Differential Case Management.** Every case in which an initial pretrial order is entered (except for cases referred to court-annexed arbitration) shall be assigned, by stipulation of the parties or order of the court, to one of three differentiated case management plans. The plans are described as follows:

(1) **Standard.** The standard case management plan permits 4 months for discovery from entry of the initial pretrial order. Depositions, inclusive of expert depositions, are limited to 5 by the plaintiffs, 5 by the defendants, and 5 by the third-party defendants. Interrogatories are limited to 25 interrogatories by the plaintiffs, 25 by the defendants, and 25 by the third-party defendants. The discovery period and the per-side limitations on use of depositions and interrogatories may be altered only by stipulation of the parties, if approved by the court, or by order of the court for good cause shown. Trial of the action shall be scheduled for as early a date as the criminal and civil dockets of the assigned district judge permit.

(2) **Standard, with expedited trial.** This case management plan is contingent upon the consent of the parties under 28 U.S.C. § 636(c) to trial by a magistrate judge. The plan provides for the same presumptive discovery period and limitations on use of depositions and interrogatories as set out in the standard plan, but also provides for mandated disposition of the case within 9 months of the initial pretrial order. A trial date shall be established at or shortly after the time of the initial pretrial order and may be continued only upon a finding by the court of extraordinary good cause.

(3) **Complex.** The case management plan for complex cases permits 7 months for discovery from entry of the initial pretrial order. Depositions, inclusive of expert depositions, are limited to 10 by the plaintiffs, 10 by the defendants, and 10 by the third-party defendants. Interrogatories are limited to 50 interrogatories by the plaintiffs, 50 by the defendants, and 50 by the third-party defendants. The discovery period and the per-side limitations on use of depositions and interrogatories may be altered only by stipulation of the parties, if approved by the court, or by order of the court for good cause shown. Trial of the action shall be scheduled for as early a date as the criminal and civil dockets of the assigned district judge permit. If the parties consent to trial by a magistrate judge, a trial date shall be set for approximately 15 months after entry of the initial pretrial order unless the court finds the case to be so unusually complex as to require additional time for trial preparation.

(c) **Initial Pretrial Order By Conference.** [Unchanged except that this section now appears as (c) rather than (b), and as recommended elsewhere in this Report.]

(d) **Initial Pretrial Order By Stipulation.** [Unchanged except that this section now appears as (d) rather than (c), and as recommended elsewhere in this Report, and subsection (13) is amended to read:]

. . . .

(13) The case management plan (standard, standard with expedited trial, or complex) that shall control the case, along with any stipulations (subject to approval by the court) regarding the time for discovery and limitations on the use of depositions and interrogatories.

RULE 205 (Amended)
DISCOVERY

. . . .

(b) [Deleted.]

c. Inquiry as to trial by magistrate judge.

Parties should be given notice of the opportunity to stipulate to trial before a magistrate judge, consistent with 28 U.S.C. § 636; Fed. R. Civ. P. 16(c)(6), 73-75, Fed. R. Civ. P. 84, Forms 33-34. Language should be inserted in Local Rule 204 and Form 1 to this effect to give parties notice of this option and an opportunity to elect disposition of the case by this method.

d. Inquiry as to court-annexed arbitration.

Parties should be given notice of the opportunity to stipulate to court-annexed arbitration under 28 U.S.C. §§ 651-58, Fed. R. Civ. P. 16(c)(7), and Local Rules 601-08. Language should be inserted in Local Rule 204 and Form 1 to this effect to give parties notice of this option and the opportunity to elect possible disposition of the case by this method, to avoid the possible expense and delay of a traditional trial.

e. Inquiry as to binding arbitration.

Parties should be given notice of the opportunity to stipulate to binding arbitration, which under 28 U.S.C. § 651(b) and Local Rule 602(c)(2) must be conducted in accordance with the Federal Arbitration Act (FAA). Language should be inserted in Local Rule 204 and Form 1 to give parties notice of this option and the opportunity to elect disposition of the case by this method, to conserve the expense and delay of conventional pretrial, discovery and trial. Experience has shown that binding arbitration is not

always less expensive and time-consuming from the perspective of the parties, but in some situations it may be a considerable saver of time and money, particularly if both sides are familiar with it, e.g. in construction, labor or maritime-related disputes. Whether helpful to the parties or not, shunting any case to binding arbitration by agreement of the parties will result in time and cost savings to the court and other litigants, whose cases can be moved up on the docket.

f. Inquiry as to mediation.

Parties should be given notice of the opportunity to stipulate to court-annexed mediation (and therefore an opportunity for an early neutral evaluation (ENE)) of the case pursuant to the local rules of the court, consistent with 28 U.S.C. § 473(a)(6)(B) and Fed. R. Civ. P. 16(c)(7). Language should be inserted in Local Rule 204 and Form 1 to this effect to give parties of this option an opportunity to elect possible disposition of the case by this method. The Group also believes that in certain cases the judge should play an active role in the mediation process.

g. Inquiry as to appointment of a master.

Parties should be given notice of the opportunity stipulate to appointment of a master to resolve some or all issues in the case, consistent with 28 U.S.C. § 636(b)(2), Fed. R. Civ. P. 53, and Local Rules 402(a)(2)(ii) and 403. Language should be inserted in Local Rule 204 and Form 1 as to the magistrate judge-master and the Rule 53 master options to give parties notice of them and an

opportunity to elect disposition of part or all of the case by this method, which may cut litigation costs and delay if a critical issue or issues can be resolved by a master.

3. Amendment of Fed. R. Civ. P. 16(b) to key the time for filing the initial pretrial order to a time after the parties are "at issue."

It is beyond the powers of the Advisory Group to amend the Federal Rules of Civil Procedure. However, the Group recommends that the Supreme Court of the United States amend Rule 16(b) to key the time for filing the Rule 16(b) initial pretrial order to a reasonable time after the parties are at issue, rather than counting the days after the complaint has been filed. The latter method is unrealistic, given the possibility of multiple claims and parties under the Federal Rules, and can lead to unnecessary motions, briefs, orders and trips to the courthouse (and therefore extra time and expense) for extension orders, that would be eliminated if the Rule 16(b) clock begins ticking "at issue."

4. Amend Local Rule 207 to require disclosure of information on experts to be called at trial.

Fifty-six percent of lawyers surveyed thought that requiring automatic disclosure, before the final pretrial conference, of qualifications, opinions, and basis for opinions of experts to be called as witnesses at trial would moderately or substantially expedite cases. Local Rule 204 contemplates a discovery period for experts, and presumably much of the information on the qualifications, opinions and basis for opinions of experts to be

called at trial would be available to the parties. However, addition of a statement, that the parties have received such information, in Local Rule 207 and Form 2 might close the loop in situations where this information is not available. Local Rule 207(a) requires a conference of attorneys 15 days before the final pretrial conference, and this would be the proper time for such an exchange. The Group concurs with the majority of lawyers surveyed and recommends amendments to Rule 207 and Form 2 to this effect.

5. Amendment of Local Rule 207 and Form 2, Final Pretrial Conference Order, to include alternative dispute resolution (ADR) options.

Although use of some ADR methods frequently occur early in a case (e.g. mandated court-ordered arbitration), or may be chosen early in a case (e.g. ENE), the current state of the docket, with civil cases ready for trial but deferred because of the press of criminal cases, indicates that ADR methods or other ways to dispose of a case may seem more attractive after a case has been fully pretried and is awaiting trial. These options should be incorporated into Local Rule 207 and Form 2:

a. Inquiry as to trial by a magistrate judge.

Parties should be required to state whether they have stipulated to trial before a magistrate judge, consistent with 28 U.S.C. § 636; Fed. R. Civ. P. 16(c)(6), 73-75; and Fed. R. Civ. P. 84, Forms 33-34. Language should be inserted in Local Rule 207 and Form 2 to this effect to give notice of this option and an

opportunity to elect disposition of the case by this method.

b. Inquiry as to reference to a master.

Parties should be required to state whether they have stipulated to use of a master to resolve some or all issues in the case, consistent with 28 U.S.C. § 636(b)(2), Fed. R. Civ. P. 53, and Local Rules 402(a)(2)(ii) and 403. Language should be inserted in Local Rule 207 and Form 2 as to the magistrate judge-master and the Rule 53 master options to give parties notice of them and an opportunity to elect disposition of part or all of the case in this method. Use of a master, particularly where a specialized issue is at stake (e.g. accounting problems) may be particularly helpful after a case has been fully pretried and discovered. For example, liability issues could be left for jury determination, with damages involved in complicated accounting procedures being sent to a master. Alternatively, the accounting could be sent to the master ahead of trial of liability, and the accounting result used as the basis for settlement negotiations or stipulations. Either way, court time would be saved, and if settlement is achieved on the basis of the master's report, the parties will have an expedited result, with still more court time saved.

c. Inquiry as to court-annexed arbitration.

Parties should be required to state whether they have stipulated to court-annexed arbitration under 28 U.S.C. §§ 651-58, Fed. R. Civ. P. 16(c)(7), and Local Rules 601-08. Language should be inserted in Local Rule 207 and Form 2 to this effect to give

parties notice of this option and the opportunity to elect possible disposition of the case by this method, to avoid the possible delay and expense of waiting for a trial. Although court-annexed arbitration is usually thought of as an ADR option for the beginning of litigation, there is no reason why Local Rules 602(c), 604-08 could not be employed at this stage for a relatively inexpensive option while awaiting trial.

d. Inquiry as to binding arbitration.

Parties should be required to state whether they have stipulated to binding arbitration, which under 28 U.S.C. § 651(b) and Local Rule 602(c)(2) must be conducted in accordance with the Federal Arbitration Act (FAA). Language should be inserted in Local Rule 207 and Form 2 to give parties notice of this option and the opportunity to elect disposition of the case by this method, to avoid the expense and time spent in waiting for and conducting a conventional trial. Although binding arbitration under the FAA is normally considered early in the case as an alternative to litigation, and the parties will have already expended time and money on pretrial and discovery, there may be savings in stipulating to binding arbitration and using materials discovered in litigation in the arbitration.

e. Inquiry as to mediation.

Parties should be required to state whether they have stipulated to court-annexed mediation of the case pursuant to the

local rules of the court, consistent with 28 U.S.C. § 473(a)(6)(B) and Fed. R. Civ. P. 16(c)(7). Language should be inserted in Local Rule 207 and Form 2, retaining the language of Rule 207(c) and Form 2, ¶ 24 with respect to private party negotiated settlement as another option, to give parties notice of this option and an opportunity to elect possible disposition of the case by mediation. Mediation late in the case may be particularly useful. The case will have been pretried and discovered, the parties will know their relative strengths and weaknesses, and the pretrial/discovery record will be a useful data base for the mediator. If mediation is successful, the cost and time differential between mediation and waiting for and trying the case will be saved. The Group also believes that in certain cases the judge should play an active role in the mediation process.

f. Inquiry as to settlement possibilities; use of final pretrial conference as settlement conference.

Present Local Rule 207 and Form 2 require parties to state that they have discussed settlement and to report the chances of settlement. This philosophy and language should be retained, but Local Rule 207 should include a notice that parties should be prepared to participate in a discussion of settlement at the final pretrial conference. Although Fed. R. Civ. P. 16 requires that counsel with settlement authority attend the conference, this should be repeated in Local Rule 207.

6. Alternative Dispute Resolution (ADR) for the Middle District.

The Middle District of North Carolina currently has several alternatives to the traditional civil litigation path. Negotiated settlement is encouraged. See Local Rules 207(c), 215, 607(d), 608(e)(2), and Form 2, ¶ 24. Magistrate judges have been given full authority and responsibility under 28 U.S.C. § 636 and Fed. R. Civ. P. 72-76 to conduct civil trials with parties' consent. They may serve as masters. See Local Rules 402(a)(2)(ii), 403. A case may be referred to a master under Fed. R. Civ. P. 53 as well. The Middle District has court-annexed arbitration available. Parts III.A.2 and III.A.6 recommend including a checklist of these options, plus binding arbitration and other ADR alternatives, in Local Rules 204 and 207 and Forms 1 and 2 to make parties more aware of their availability and to give opportunity for a conscious, but not coerced, choice. This Part follows up with recommendations for ADR rules, amendments to existing ADR rules, or other suggestions, to further implement these recommendations.

a. Court-annexed arbitration.

(1) Increasing the cap on cases that can be mandated to court-annexed arbitration.

At present the Middle District has an $150,000 cap on court-annexed arbitration. Although the survey results were ambivalent as to cost savings and time if the cap were increased, the Group recommends that the cap be increased to the maximum allowed by the Congress in a future amendment of 28 U.S.C. §§ 651-52 or similar

legislation. Large cases sometimes may be arbitrated more quickly than they can be tried, and the award may induce settlement, thereby eliminating the cost and delay of waiting for a trial and trying the case.

(2) Amendment of 28 U.S.C. § 653(b).

The Group cannot amend federal statutes, but the Group recommends Congressional revision of 28 U.S.C. § 653(b) in two respects:

(A) Key the times for arbitration to a time after the parties are at issue, rather than counting days after the answer has been filed. The latter method is totally unrealistic, given the possibility of multiple claims and parties under the Federal Rules, can lead to unnecessary trips to the courthouse for extension orders (and therefore extra time and expense), or sua sponte orders, that would be eliminated if the clock begins ticking "at issue."

(B) Allow court-annexed arbitration hearings before judicial resolution of summary judgment motions, as 28 U.S.C. S 636(b) now requires. An arbitrator, since he or she sits in lieu of a fact-finding judge, in effect makes the same decision as a judge would on a summary judgment motion - the absence of a genuine issue of fact.

(3) Technical amendment to Local Rule 601.

Local Rule 601 as now in force might require amendment if other ADR methods are stated in the local rule. For example, material in the last sentence might be elevated into more general

terms in a new Rule 600, as recommended in Part III.A.7.f.

b. Court-annexed mediation; early neutral evaluation (ENE).

The Advisory Group recommends adoption of local rules for these procedures, modeled on the North Carolina legislation (G.S. § 7A-38) and its implementing rules. Using the State rules as a basis will minimize problems for lawyers in learning two sets of rules, with attendant extra cost and delay in the first federal mediations they experience. Having similar rules will also simplify training and certifying federal mediators, who in many cases may be drawn from State panels.

The State program is in the pilot stage, and statutory and rules amendments are likely before the State program becomes a permanent feature of North Carolina ADR. Therefore, the Group recommends preparation of draft mediation rules but delaying implementation until the time when the court is satisfied that the State program is workable and suitable as a federal model. Delay in implementation will also afford time for State mediators to be trained and gain experience, so that they can be certified for the federal program with minimal additional training time and expense.

c. Adoption of a general rule for ADR.

Part III.A.7.a(3) has recommended technical amendments to Local Rule 601 to tie it more into court-annexed arbitration. If other ADR methods are adopted for the Middle District, the Group recommends adoption of a general ADR rule, perhaps numbered Local

Rule 600, to state the general philosophy of ADR.

7. Amend Local Rule 107 to state a presumptive 35-page limit for briefs for hearings.

Although lawyers surveyed were about evenly divided on the issue, 45 percent said adding a 30-page limit to briefs would moderately or substantially expedite cases. Presently Fed. R. App. P. 28 has a 50-page presumptive limit on opening briefs and a 25-page limit on reply briefs, and N.C.R. App. P. 28(j) has similar limits of 35 and 15 pages for the Court of Appeals. A 35-page presumptive limit, exclusive of table of contents, etc., seems reasonable to the Group for briefs and response briefs. Reply briefs, if allowed, should carry a shorter limit, perhaps 10 pages. Drafters of a revision to Local Rule 107 should determine whether these limits are reasonable for criminal cases and other matters governed by Rule 107. If it is determined that other cases should not be bound by these limitations, a special local rule for civil cases should be prepared. With these caveats, the Group recommends amendment of Local Rule 107 to state a 35-page limit for briefs and a 10-page limit for reply briefs if otherwise permitted.

8. Amending the local rules to state use of the telephone for conferences with the court or among counsel.

Currently Local Rule 205(c) permits telephone conferences by attorneys for attempts to resolve discovery disputes before applying to the court for relief. The court's present practice is to conduct conferences by telephone if issues are narrow and

relatively simple and there is time on the court's schedule. Sixty-eight percent of lawyers surveyed said increased availability of telephone conferences with the court would have moderate to substantial effect on expediting civil cases. The Group recommends giving the court discretion to conduct hearings by telephone, perhaps with use of facsimile transmissions for submission of documents necessary for the hearing but which could not have been filed with briefs, etc., as the local rules now provide, in e.g. Local Rules 203-207, as appropriate. Facsimile should be permitted only if all counsel have the service; an example of its use would be a document tendered a witness at a deposition, the court being asked to rule on questions propounded to the witness that are related to the document. Facsimile should not be a substitute for failure to file under, e.g., Local Rule 203.

Local Rule 207(a) requires counsel to "meet" to discuss the final pretrial order. Local Rule 205(c) requires a personal conference on discovery matters before a hearing by the court. Local Rule 204 does not have any requirement for a personal conference for the initial pretrial order stipulation. Although the survey did not inquire as to time and money saved through telephone conferences among counsel, the Group believes that eliminating the apparent requirement of a face-to-face counsel conference would result in considerable time being saved, particularly with the widespread availability of facsimile machines. Permissive language should be inserted in Local Rule 205 and 207 to allow telephone conferences as an option to face-to-face

meetings. This option should be stated for other required attorney conferences adopted, e.g. for any required meetings before dispositive motion hearings.

9. Discretion to require attendance of parties or insurers at settlement conferences or other dispute resolution proceedings.

Fifty-eight percent of the lawyers surveyed felt that requiring attendance of parties or insurers at settlement conferences conducted by the court would moderately to substantially expedite cases. Local Rule 606(f) requires parties' attendance at hearings in court-annexed arbitration cases. In cases involving minors or incompetents, they as well as guardians or parents must be present when the court approves settlements. See Local Rule 213. Local Rule 207(c) requires that counsel "be fully prepared," i.e. have settlement authority or contact with the client or insurer available at the time of the first pretrial conference. If, as recommended in Parts III.A.2.f, III.A.5.e, and III.A.6.c, the court adopts the State practice on mediation, presence of parties and insurers may be required. See N.C.R. Implem. Ct.-Ord. Mediated Settlement Conf. 4(a).

Thus, depending on what amendments to the local rules are ultimately adopted, requiring presence of parties or insurers may be appropriate, not only at settlement conferences, but also at a variety of other proceedings. For example, having parties at a discovery conference where key evidence is sought and objected to may be the fulcrum for settlement. On the other hand, there may be

occasions where party or insurer presence may be useless or counterproductive from a time and cost situation. An example might be a financially disadvantaged party in a diversity case who lives far from the Middle District and for whom travel here would amount to a financial clubbing into settlement.

Therefore, the Group recommends amendments to the local rules, e.g. Local Rule 213, or additions to any new local rules involving settlement or other dispute resolution proceeding (e.g. mediation, ENE), giving the court discretion to require presence of parties or insurers at settlement or other dispute resolution conferences. This requirement might be consolidated into one local rule. The Group does not recommend mandatory attendance under all circumstances; the permissive procedure of Local Rule 606(f) should be paralleled.

10. Provision for a third magistrate judge position for the Middle District.

As stated in Parts II.B.2.b(1), II.B.2.b(2), and II.B.3.b, the two Middle District magistrate judges have been employed to the maximum allowed under 28 U.S.C. § 636 and Fed. R. Civ. P. 72-76. The increasing criminal docket load, as well as shouldering responsibilities for the civil docket that the district judges have assigned while the latter hear criminal trials, demonstrates that a third magistrate judge position should be created. Although the Group has no authority to create such a position, the Group recommends that such be authorized.

11. Provision for a second law clerk for each magistrate judge.

The magistrate judges' law clerks accompany them to court to assist with hearings. Creation of positions for a second law clerk for each magistrate judge would permit employment of one clerk for research in chambers while the other accompanies the judge to court. While this has been advocated as an alternative to Recommendation 10 (see Part II.B.3.b), the Group believes that provision for a second law clerk might be considered in addition to adding a third magistrate judge, as recommended in Part III.A.10. This would provide more judicial resources to handle the growing caseload of the District. Moreover, if the magistrate judges retain clerks on a two-year, alternating basis, the "senior" clerk could train the "junior" clerk, a practice common among district judge clerks. This would promote even more efficiency in the magistrate judges' chambers. Although the Group has no authority to create additional law clerk positions, the Group recommends that such be authorized.

12. Provision for a staff law clerk for prisoner and similar cases.

As a partial alternative for Recommendations 10 and 11, the Group recommends creation of a staff law clerk's position to assist the court in all prisoner cases, whether filed under 28 U.S.C. §§ 2254 or 2255, or 28 U.S.C. § 1343 and 42 U.S.C. § 1983, and similar litigation. The U.S. Court of Appeals for the Fourth Circuit has employed staff law clerks for such purposes for over 25 years; the

Middle District needs one now. Except for 28 U.S.C. § 2255 cases, these claims are currently declining in number. With the increase in federal criminal convictions, the number of § 2255 cases is certain to increase even more, a trend that has already begun. There is enough research and drafting work connected with these kinds of cases to justify such a position now; it could be withdrawn if the caseload drops or could be changed to a general law clerk's position in the future. For the present, as a partial alternative to Recommendations 10 and 11, the Group recommends creation of a staff law clerk's position for the Middle District.

B. Significant Contributions to be Made by the Court, Counsel and the Parties.

1. The Court.

Consistent with the limitations in federal legislation and the Federal Rules of Civil Procedure, the court, through its district judges and magistrate judges who sign initial pretrial and final pretrial orders, will encourage parties to agree to alternative dispute resolution (ADR) both early and late in litigation. Commensurate with their other responsibilities, magistrate judges are available to serve as masters. The Clerk will enter orders as permitted by the local rules. Court personnel will be available for participation in continuing legal education (CLE) and similar programs.

2. Counsel.

Counsel will be required to counsel clients on ADR methods to resolve civil disputes both early and late in the litigation. To be prepared for meaningful ADR participation, counsel will be required to take CLE; North Carolina State Bar membership carries with it 12 hours of mandatory CLE a year. Counsel will be available, as they have in the past, for service in binding arbitration and court-annexed arbitration and as masters. Counsel will serve in the proposed mediation programs. Beyond active service, counsel will be involved in relevant CLE for these programs, some of which can be quite time-intensive. (For example, mediator qualification in the State program requires 40 hours of training.)

3. The Parties.

Parties, whether appearing pro se or through counsel, will have the ultimate decision on whether to participate in ADR unless it is mandatory, e.g. in court-annexed arbitration, and this will place a relatively early decision burden on them. Presently parties must be present for court-annexed arbitration hearings, unless excused by the arbitrator. See Local Rule 606(f). Other ADR options will require party participation at hearings, e.g. binding arbitration and mediation. If the court so directs, parties and insurers will be required to be present at settlement or other dispute resolution proceedings. Beyond direct participation, burdens will be placed on parties to cooperate in

preparation for ADR, which frequently operates on tighter schedules than conventional litigation. (In the Middle District court-annexed arbitration program, for example, discovery must be completed within 90 days under a relatively ironclad rule, whereas other cases carry a 120-day minimum deadline that can be extended upon motion.)

C. Principles and Techniques for Litigation Management and Cost and Delay Reduction.

As noted in other Parts of this Report, the Middle District already has many of the principles and techniques listed in 28 U.S.C. § 473 for management of civil litigation and reduction of cost and delay.

1. Principles of Litigation Management and Cost and Delay Reduction, 28 U.S.C. § 473(a).

a. Systematic, differential treatment of civil cases, 28 U.S.C. § 473(a)(1).

As indicated in Part II.B.2.b(2), the Middle District has employed differential case treatment for years.

All civil complaints, except for prisoner petitions, must be accompanied by a civil docket cover sheet upon filing. The sheet provides basic information about the case, which is then assigned on an alternating basis to a specific district judge and magistrate judge. The alternating assignments are made under 4 categories - business, civil rights, prisoner cases, and all other - to even out among the judges the cases that are likely to be complex or protracted.

Case management continues with the required entry of an initial pretrial order in all cases, with certain exceptions: (1) cases in which a temporary restraining order or preliminary injunction has been filed, which go immediately to the assigned district judge for a determination; (2) postconviction cases, which first go to magistrate judges for examination as to the form of the complaint and ultimately are referred to that judge for recommended disposition on the merits; (3) prisoner civil rights cases, managed in similar fashion; (4) social security appeals, heard on cross-motions for summary judgment by the magistrate judge for recommended disposition by the district judge; (5) IRS summons proceedings, also sent to the magistrate judge. The Clerk enters a special initial pretrial order in cases mandated to court-annexed arbitration; this places these cases on a special management track. Computer docketing is also used to identify motions that are ripe for ruling.

The Group concludes that the Middle District is using the principle of systematic, differential case management as stated in 28 U.S.C. § 743(a)(1). However, the Group recommends additional procedures that should permit more efficient dispositions. The Group has recommended that a civil case tracking system be instituted. See Part III.A.2.b. The Group has also recommended amendments to 28 U.S.C. § 653(b) to key times for cases mandated to court-annexed arbitration to a time after the parties are at issue, and to allow such cases to proceed to arbitration even though a dispositive motion has been filed. See Part III.A.6.a(2), which

states why these proposals will save court time.

b. Early and ongoing control of the pretrial process, 28 U.S.C. § 473(a)(2).

As noted in Part III.C.1.a, control of civil litigation begins with the civil docket cover sheet, filed with the complaint. That process continues throughout the pretrial phase of the case.

The initial pretrial order required by Local Rule 204 establishes a plan for the case, stating the time allowed for general and expert discovery; stipulations on basic issues such as process, jurisdiction, party joinder, pleading amendments, etc., thereby removing those issues from the case or identifying problems; whether jury trial has been demanded; and the estimated length of trial. Notice of the initial pretrial order is given not earlier than 20 days after the parties are at issue, or roughly 60 days after suit has been filed, assuming that there have been no serious problems with service. The pretrial order issued under Local Rule 603, for cases mandated to court-annexed arbitration, is issued 10 days after the parties are at issue, or about 50 days after suit has been filed, if there have been no serious problems with service.

The Group has recommended amendments to Rule 204 and the standard initial pretrial order, Form 1:

(1) amending Rule 204 and Form 1 to provide for automatic disclosure of certain discoverable information, Parts III.A.2.a;

(2) amending Rule 204 and Form 1 to provide for the parties' statement as to whether they stipulate to various alternative dispute resolution (ADR) methods, including trial by magistrate judge, court-annexed arbitration, binding arbitration, mediation, and/or appointment of a master, Parts III.A.2.c - III.A.2.g;

(3) amending the local rules to give the court discretion to require presence of parties or insurers at settlement or other dispute resolution proceedings (e.g. mediation), Part III.A.9.

The Group recommends amendment of Fed. R. Civ. P. 16(b) to require the initial pretrial conference at a time after the parties are at issue, in Part III.A.3. The Group recommends that Local Rule 204 be amended to permit holding the initial pretrial conference by telephone if feasible. See Part III.A.8.

Discovery motions are subject to management control. Parties are required, under Local Rule 205, to confer before the court hears any such motion, and the movant must report the results of such conference to the court. Motions are heard on briefs and papers filed with the court, usually by the magistrate judge. Telephone conferences are used where there are narrow issues and oral argument is desired by the court and for matters needing an immediate order, e.g. during depositions. The Group has recommended other procedures for discovery control, i.e. amending Rule 205 to include precatory language stating obligations and responsibilities regarding overuse or abuse of discovery, Part III.A.1.a. The Group also recommends amending the local rules to permit conducting the Rule 205 prehearing conference and the hearing by telephone if feasible. See Part III.A.8.

If a dispositive motion has been decided against the movant, the case joins others on the district judge's "ready for trial" list. If the parties have consented to trial by the magistrate judge, the case is placed on that judge's list. The chief deputy clerk then schedules civil trials for the judge, using the trial time estimate stated in the initial pretrial order, working from a 6-month master calendar for each district judge. Priority is given criminal cases, with the time remaining allotted to civil litigation. Were it not for the criminal case overload, the typical case would be ready for trial within 6 months if there are no dispositive motions, 9.4 months if there are dispositive motions that do not merit a hearing, and 13.55 months if there are dispositive motions requiring a hearing. Nevertheless, all cases except those with dispositive motions that require a hearing could be set for trial within 12-15.4 months after filing by the clerk, operating from the 6-month master calendar. Depending on the estimated length of the trial, even cases with dispositive motions that require a hearing could be set for trial within 18 months. The problem is, however, that the growing criminal docket has eaten up available trial time for civil matters, thereby pushing trial dates further and further into the future. As noted in Part II.A, in early 1992 the court instituted a criminal term limitation plan to restore some balance to the civil docket. Hopefully, this will cut the civil case backlog, but it is too early to gauge. The Group applauds this action by the court.

A final pretrial conference, conducted by the judge who will try the case, is usually held 30-45 days before the trial date.

The Group has recommended these amendments to the local rules with respect to control of the case through and after the final pretrial conference:

> (1) amending Rule 207 to require disclosure of information on experts to be called at trial, Part III.A.4;
>
> (2) amending Rule 207 and Form 2 to provide for the parties' statement as to whether they have stipulated to various ADR methods, including trial by a magistrate judge, referral to a master, court-annexed arbitration, binding arbitration or mediation, Part III.A.5;
>
> (3) amending the local rules to give the court discretion to require presence of parties or insurers at settlement or other dispute resolution proceedings (e.g. mediation), Part III.A.9.

The Group recommends that the local rules be amended to permit the initial meeting of counsel before the final pretrial conference, and the final pretrial conference, to be conducted by telephone if feasible. See Part III.A.8.

The Group concludes that the Middle District has exercised and will continue to exercise early and ongoing control of the pretrial process. The goal of 28 U.S.C. § 473(a)(2)(B) for a firm trial date 18 months after suit has been filed could be met, but for the growing criminal docket. (An amendment to Local Rule 204 to require a target trial date has been recommended by the Group, as noted above.) This factor has eaten up judges' chambers time and court time for hearing and deciding dispositive motions, thereby delaying resolution of them. The criminal docket has also taken away calendar time for trying civil cases, thereby further delaying

final resolution of them. The court's response to the problem, a criminal term limitation plan, has been noted above.

c. Managing complex cases, 28 U.S.C. § 473(a)(3).

As noted in Part II.A.2.a, the number of Type II, more complex cases has remained constant for 1986-92. The same, basic pretrial and discovery procedure described in Part III.C.1.b applies for all Middle District cases, whether simple or complex.

Thus Form 1, the Initial Pretrial Stipulations and Order, contemplates that parties declare whether or not issues should be separated for discovery or trial, and whether there are related actions pending or contemplated in the Middle District or elsewhere. As with any case, however, the court controls the length, volume and phasing of discovery.

Similarly, the Final Pretrial Order (Form 2) and Local Rule 207 explicitly require settlement discussions, and a report to the court as to the potential for settling the case. The Final Order and Rule 207 specifically require statement of the parties' contentions and the remaining issues in the case. If the initial order has identified issues suitable for bifurcated treatment, and that method of resolution still seems appropriate, that procedure will also be noted in the final order.

Other local rules assist in the management and control of complex cases. Local Rule 212 sets forth special pleading and motion rules for class actions. Local Rule 214 establishes procedure for claims of unconstitutionality of State or federal

laws where the State or the U.S. Government or their officers or agencies are not parties, and for three-judge courts. Local Rule 211 supplements Fed. R. Civ. P. 65 for cases involving temporary restraining orders or preliminary injunctions, so that those claims can be given expedited treatment.

The Group concludes that the Middle District has in place, and is exercising, measures to control and manage complex cases as stated in 18 U.S.C. § 743(a)(3). However, the Group has recommended inclusion of a case management plan for discovery in complex cases as part of the revision of Local Rule 204. See Part III.A.2.b.

Many of the Advisory Group's recommendations for early and continuing control of the pretrial process, notably the automatic disclosure amendment, the experts disclosure requirement, and the provision for conferences and hearings by telephone, should also enhance management of complex cases. See Part III.C.1.b.

d. Encouragement of cooperative discovery, 28 U.S.C. § 473(a)(4).

Local Rule 204 requires that parties state in the initial pretrial order their stipulation or position on discovery. If parties can agree on discovery, and the court approves, that agreement becomes the initial pretrial order. Although primarily concerned with time deadlines for discovery, the order can also recite sequencing and types of discovery, e.g. conducting general discovery with a special 60-day period for discovery of experts. Since counsel are first given an opportunity to frame the discovery

plan, and in more than half of the cases they do, this means that in over half the cases discovery begins in a spirit of cooperation among the parties. Rule 204's requirement of stipulations or positions as to preliminary matters such as jurisdiction, etc., means that these issues can be eliminated early in the case, perhaps without any discovery if facts can be stipulated. Local Rule 205 also encourages cooperation among counsel by requiring a prehearing conference before the court hears discovery disputes. See Part III.C.1.e.

The Group concludes that the Middle District already has procedures for, and is encouraging, cooperative discovery as contemplated by 28 U.S.C. § 743(a)(4). The Group has recommended procedures to further encourage cooperation in discovery among counsel: automatic disclosure of certain discoverable information; precatory language in Local Rule 205; automatic disclosure of information on experts. See Parts III.A.1.a, III.A.2.a, III.A.4. These provisions should further improve cooperation of counsel during discovery.

e. Prohibition of consideration of discovery motions unless movant certifies there has been a reasonable, good faith effort to reach agreement with the opposing party on matters in the motion, 28 U.S.C. § 473(a)(5).

Local Rule 205(c) covers this point precisely, and the Group concludes that the Middle District already has a procedure observing the principles of 28 U.S.C. § 473(a)(5). The Group has also recommended that these prehearing conferences, and the

hearings themselves, be conducted by telephone if feasible. See Part III.A.8.

f. Authorization to refer appropriate cases to alternative dispute resolution (ADR), 28 U.S.C. § 473(a)(6).

Presently the Middle District has several ADR mechanisms in place. The court-annexed arbitration program is mandatory for certain cases where the claim is $150,000 or less. There are provisions for court-annexed nonbinding arbitration if the parties so stipulate, or for binding arbitration under the Federal Arbitration Act if they so elect. See Local Rules 601-08. Local Rules 207(c) and 215 provide encouragement or incentives for settlement. Local Rules 401(a)(2)(ii) and 403 implement the authority of the magistrate judge to serve as a master, and Local Rule 402 empowers them to try civil cases if the parties consent.

As noted in Parts III.A.2, III.A.5 and III.A.6, the Group has recommended new local rules and procedures for other ADR options, i.e. court-annexed mediation conferences. The Group has recommended amendments to Local Rules 204 and 207, and the forms for the initial and final pretrial orders, to notify parties of all ADR options available and to encourage them to choose among them for resolution of the case. The Group has also recommended amending the local rules to give the court discretion to require attendance of parties or insurers at settlement conferences or other dispute resolution proceedings, e.g. during mediation. See Part III.A.9.

The Group concludes that the Middle District has observed the principle of 28 U.S.C. § 473(a)(6) in authorizing court-annexed arbitration for any case, a procedure designated for use in the District by 28 U.S.C. § 658(1), and has made available, or has encouraged, the ADR devices of settlement, reference to a master, and consent to trial by a magistrate judge. The Group further concludes, however, that the Middle District should make available additional ADR options, i.e. mediation, and that all ADR options should be noted for both the initial and the final pretrial conferences. See Parts III.A.2, III.A.5.

g. The final pretrial conference and trial of the case.

Although not stated as a principle of litigation management under 28 U.S.C. § 473(a), the final pretrial conference is an essential tool for managing the final, and sometimes most costly, component of civil litigation - trial of the case itself. Saving in cost and delay in pretrial and discovery can be eaten up if a trial is not conducted fairly and efficiently. This is particularly true when indirect costs and delay components are considered, i.e. the time of judges, jurors, other court officials, and the use of courtrooms and other facilities. It is the very factor of extraordinary demands on judicial and administrative time and courtrooms for criminal cases that has dragged down the Middle District civil docket.

With a couple of exceptions, the Middle District has a thorough, workable final pretrial plan, Local Rule 207. Rule

207(a) requires counsel to meet 15 days before the pretrial conference with the court. To prepare for the meeting, parties must prepare a proposed order, which covers, inter alia, these points:

(1) each party's contentions as to claims and defenses;

(2) suggested stipulations as to facts not genuinely in dispute;

(3) a list of premarked exhibits, and making available copies of exhibits for exchange with other parties, unless they cannot be copied, in which case they must be available for inspection;

(4) stipulations as to authenticity or admissibility, with objections noted;

(5) lists of witnesses to be called, and summaries of their expected testimony;

(6) lists of triable issues.

The parties must also discuss settlement at the meeting. Plaintiff's counsel prepares the final pretrial order, essentially in the format of Form 2, Order on Final Pretrial Conference.

The Order is sent to the court at least 5 days before the final pretrial conference. Besides reciting matters stated above, the Order also recites counsel's certification of readiness for trial, probable length of trial, and settlement prospects.

At the final pretrial conference, the court considers pending motions, if any, and announces requirements for filing trial briefs, requests to charge, proposed findings of fact and conclusions of law, how exhibits must be marked and how many exhibit copies are needed. The court also discusses settlement prospects; Local Rule 207(c) requires prior consultation with

clients, or availability of clients at the time of the conference, in this regard. Rule 207(c) also declares that the court will help with settlement negotiations "to the extent deemed appropriate or as may be requested by the parties." The court also sets the actual or tentative trial date. There is an explicit sanctions provision, Rule 207(f), for failure to appear or for noncompliance with Rule 207. The Order, together with any memorandum entered by the court at the end of the conference, controls trial of the case. The order may be modified by the parties' stipulation and approval of the court, or by the court itself "to prevent manifest injustice." For example, only exhibits listed in the Order may be introduced at trial, but the court in the interest of justice may allow such introductions. The same principles apply to material points of evidence to be established by a witness, or a witness not listed in the pretrial order.

Thus Local Rule 207 provides a reasonably comprehensive road map for trial of the case. However, the Group has recommended several measures that may reduce cost and delay incident to trial still further:

(1) Given the heavy criminal docket and demands on judicial time for trial of these cases, there has been a growing likelihood that trial of civil cases may be delayed. The Group has recommended insertion of ADR options into Rule 207 and Form 2. See Part III.A.5. ADR techniques, e.g. court-annexed arbitration or mediation, may not have seemed feasible or otherwise attractive at the time of the initial pretrial conference. Those alternatives

may become more feasible because issues may have been simplified through discovery, and an arbitration date may be available sooner than a date for a conventional trial.

(2) The Group has recommended explicit requirements in Rule 207 for disclosure of experts to be called at trial. See Part III.A.4. This is implicitly covered by Rule 207(b)(6), but addition of explicit terms to cover experts will make the point clear.

(3) The Group has recommended amending Local Rule 205 to allow video depositions on notice or by stipulation. See Part III.A.1.b. This should facilitate use of them at trial, particularly for expensive experts, as Fed. R. Civ. P. 32 and Local Rule 207(b)(6)(v) contemplate, and thereby reduce expense and time. No parallel amendment of Rule 207 is needed if Rule 205 is amended in this regard.

(4) The Group has recommended that the local rules state that the court may require presence of parties or insurers at settlement or other dispute resolution conferences. See Part III.A.9. This could save time if a face-to-face conference with parties present results in settlement rather than a lengthy, costly trial. The Group has also recommended more explicit description of the Rule 207 conference as an opportunity for settlement, and that language from Fed. R. Civ. P. 16, requiring counsel with settlement authority to be present, be inserted in the Local Rule.

2. Civil Litigation Management and Cost Reduction Techniques, 28 U.S.C. § 473(b).

a. Discovery-case management plan to be presented by counsel, 28 U.S.C. § 473(b)(1).

Local Rule 204 requires that an initial pretrial order in every case, except for Social Security and similar administrative review cases, prisoner petitions, and IRS summons proceedings. Counsel may stipulate to the order, which under Rule 204(c) requires a statement of whether separation of issues would be feasible or desirable for discovery purposes, and the time reasonably required to complete general discovery and expert discovery. Form 1, Initial Pretrial Stipulations and Order, declares that the usual discovery period will be 120 days, with a special 60-day period for experts. Parties desiring a longer period must set forth reasons for needing more time. The court must approve such stipulations, which occur in over half of the civil cases. If the court believes the stipulations are inadequate to control the litigation or that a conference will materially help manage the orderly, efficient conduct of the litigation, the court will call counsel into conference. For cases where there is no stipulation, the court holds the conference and enters the order.

The Middle District already has a procedure for establishing a discovery-case management plan by counsel for the initial pretrial conference. Implicit in Local Rule 204 is the explanation that must be given at the conference held when no stipulations can be achieved. The Middle District already employs the technique suggested by 28 U.S.C. § 473(b)(1). As noted above, the Group has

recommended refinements, including limiting discovery by type of case. See III.C.1.b.

b. Attendance at pretrial conferences by attorney with binding authority, 28 U.S.C. § 473(b)(2).

There is no explicit statement in the local rules requiring attendance at each pretrial conference by an attorney with binding authority for the client. However, Fed. R. Civ. P. 16(d) requires such for the final pretrial conference, Local Rule 204 and its Form 1 require that counsel for parties sign stipulations for the initial conference in the Initial Pretrial Order, and counsel for parties similarly participate in development of the Local Rule 207 Final Pretrial Order. The experience of the court has been that counsel with binding authority always attend pretrial conferences as contemplated by 28 U.S.C. § 473(b)(2). However, to underscore the importance of employing the final pretrial conference as an opportunity for settlement, the Group recommends repetition of the Fed. R. Civ. P. 16(d) requirement for presence of counsel with settlement authority in Local Rule 207, together with a notice of the nature of the conference as a time for settlement discussions. See III.A.5.f.

c. Requirement that requests for discovery deadline extensions or postponement of trial be signed by counsel and client, 28 U.S.C. § 473(b)(3).

Local Rule 105 requires that all motions for extensions to perform an act, i.e. to complete discovery, must show good cause, prior consultation with opposing counsel, and opposing counsel's

views, and be filed before the expiry of time except in cases of excusable neglect. A motion to continue a trial must be presented through the clerk's office, reflect opposing counsel's views, and be submitted reasonably in advance of trial. Thus Local Rule 105 procedure complies with this aspect of 28 U.S.C. § 473(b)(3). Except for pro se parties, there is no requirement that a party sign such motions. The opinion of the Group is that adding such a mandatory procedure, to require represented parties' signature for such motions, is not appropriate.

d. Early neutral evaluation program, 28 U.S.C. § 473(b)(4).

Presently the Middle District does not have a formal early neutral evaluation (ENE) program, but mediation, which can come early in the litigation, has been recommended along with other ADR options by the Group. See Parts III.A.2.f and III.A.6.b.

e. Presence of parties with authority to settle at settlement conferences on notice by the court, 28 U.S.C. § 473(b)(5).

Except for requiring parties' presence unless excused by the arbitrator in court-annexed arbitration hearings under Local Rule 606(f), there is no provision in Middle District practice for required party attendance at settlement conferences. Parties, plus parents or guardians, must be present for settlements in cases involving minors or incompetents. See Local Rule 213. Fifty-eight percent of attorneys surveyed said that such a procedure would moderately or substantially expedite civil litigation. The Group

has recommended that the local rules state the discretion of the court to require presence of parties and insurers at settlement conferences and other dispute resolution proceedings. See Part III.A.9.

f. Other features the court considers appropriate after considering the Advisory Group recommendations, 28 U.S.C. § 473(b)(6).

The Group has recommended, and the court agrees, that these techniques will assist in civil litigation management and cost and delay reduction:

(1) Amending Local Rule 107 to state a presumptive 35-page limit for briefs for hearings. See Part III.A.7.

3. Recommended Measures Beyond the Scope of the Court's Authority.

Parts III.C.1 and III.C.2 have summarized the Group's recommendations that are within the court's rule making or management authority. Besides these recommendations, the Group has recommended other measures, with which the court concurs, that are within the purview of other branches or agencies of the Government (e.g. the Congress, the Supreme Court of the United States):

(a) Amendment of Fed. R. Civ. P. 16(b) to key the time for filing the initial pretrial order to a time after the parties are "at issue." See Part III.A.3.

(b) Amendment of 28 U.S.C. § 653(b) to key times for court-annexed arbitration to a time after the parties are at issue, and to allow court-annexed arbitration before resolution of summary judgment motions. See Part III.A.6.a(2).

(c) Provide for a third magistrate judge position for the Middle District. See Part III.A.10.

(d) Provide for a second law clerk for each magistrate judge. See Part III.A.11.

(e) Provide for a staff law clerk for prisoner and similar cases. See Part III.A.12.

(f) Provide additional staff required for clerk's office. See Part II.3(b) and Part II.B.4.d.

(g) Provide additional court facilities required. See Part II.B.4.c.

As an additional point, the court would observe that recent federal legislation, or proposed legislation, declaring certain activities to be federal crimes or establishing procedures or sentences for criminal procedure (e.g. sentencing guidelines, mandatory minimum sentences) have contributed greatly to delays in civil case dispositions. The Congress has recognized this possibility. See 28 U.S.C. § 472(c)(1). However, the Congress should also assess the possible impact of such new legislation, at the time of enactment, on the federal courts' dockets, particularly in the context of expanded staffs for the Office of the U.S. Attorney. The same sort of assessment should be made when the Congress considers enactment of legislation giving new private rights of action or civil procedures.

D. Recommendation that the Court Develop a Plan.

After consideration of the condition of the Middle District docket; the reason for cost and delay in the District; the recommendations of the Advisory Group, the contributions to be made by court, counsel and parties; and considerations of principles and

techniques stated in 28 U.S.C. § 473 as already applied or recommended for application in the District, the Group recommends that the court develop its own plan for reducing cost and delay in civil litigation. The proposed plan is stated in Appendix C, Cost and Delay Reduction Plan, which incorporates portions of Part III.A by reference.

APPENDICES

APPENDIX A

A. Membership of the Advisory Group

The CJRA, 28 U.S.C. § 478, provides for appointment of the advisory group by the chief judge of the district court, after consultation with the other judges of the court. The Advisory Group "shall be balanced and include attorneys and other persons who are representative of major categories of litigants" in the court. Group members may serve for four years, with the United States Attorney as a permanent member of the group.

Pursuant to the Act, Chief Judge Richard C. Erwin of the Middle District appointed this advisory group:

William K. Davis, Esquire, Chairman
Bell, Davis & Pitt, P.A.
Winston-Salem, N.C.

Daniel W. Fouts, Esquire, Vice-Chairman
Adams, Kleemeier, Hagan, Hannah & Fouts
Greensboro, N.C.

Professor George K. Walker, Reporter
Wake Forest University School of Law
Winston-Salem, N.C.

S. Fraley Bost, Esquire
Womble Carlyle Sandridge & Rice
Winston-Salem, N.C.

Walter F. Brinkley, Esquire
Brinkley, Walser, McGirt, Miller, Smith & Coles
Lexington, N.C.

B. Ervin Brown, II, Esquire
Moore & Brown
Winston-Salem, N.C.

Joseph P. Creekmore, Clerk,
ex-officio member
U.S. District Court for the Middle District
of North Carolina
Greensboro, N.C.

Ronald H. Davis
Vice President-Administration
Carolina Steel Corporation
Greensboro, N.C.

Mickey W. Dry
Executive Vice President
Wachovia Corporation
Winston-Salem, N.C.

Walter T. Johnson, Esquire
Greensboro, N.C.

Kathy E. Manning, Esquire
Smith Helms Mullis & Moore
Greensboro, N.C.

James B. Maxwell, Esquire
Maxwell & Hutson, P.A.
Durham, N.C.

Grover C. McCain, Jr., Esquire
Chapel Hill, N.C.

William L. Osteen, Sr., Esquire
Osteen & Adams
Greensboro, N.C.

C. Edward Pleasants, Jr.
President and Chairman of the Board
Pleasants Hardware Co.
Winston-Salem, N.C.

Honorable P. Trevor Sharp
Magistrate Judge, ex officio member
U.S. District Court for the Middle District
of North Carolina
Greensboro, N.C.

Norman B. Smith, Esquire
Smith, Follin & James
Greensboro, N.C.

Carmon J. Stuart, Esquire
Retired Clerk of Court, currently of counsel,
Patton, Boggs & Blow
Greensboro, N.C.

Honorable Jerry G. Tart
Bankruptcy Judge, ex officio member
U.S. District Court for the Middle District
of North Carolina
Greensboro, N.C.

David K. Tate, Esquire
Senior Counsel and Assistant Secretary
Law Department
R.J. Reynolds Tobacco Company
Winston-Salem, N.C.

Daniel R. Taylor, Esquire
Petree Stockton & Robinson
Winston-Salem, N. C.

Honorable N. Carlton Tilley, Jr.
District Judge, ex officio member
U.S. District Court for the Middle District
of North Carolina
Durham, N.C.

Benjamin H. White, Jr., Esquire
Chief Assistant U.S. Attorney
Middle District of North Carolina
Greensboro, N.C.

The appointment of William L. Osteen, Sr. as U.S. District Judge for the Middle District of North Carolina was confirmed by the U.S. Senate after the Group was constituted, and Judge Osteen continued to serve with the Group. Miriam M. Murphy, Esquire, Head of Public Services of the Wake Forest University Law School Library, was appointed by the Group to serve as statistician.

B. Operating Procedures--The Work of the Advisory Group

An initial planning meeting to outline the scope of the Advisory Group's work was held in May 1991. Chief Judge Erwin presided at the meeting, attended by the Chairman, the Reporter, and the Clerk of Court. The Chief Judge pledged the full assistance of the court and its staff in support of the work of the Group. The planning group set the first meeting of the Group for June 5, 1991, and identified initial questions that should be addressed by the advisory group, including, among others: What is delay? Does the Middle District want to be an early-implementation court? Should the three district courts in North Carolina work together in this matter?

The Group met as a committee of the whole on four occasions. These meetings typically lasted throughout the morning hours of the meeting day. Chairman Bill Davis presided at each meeting. Early meetings were characterized by wide-ranging discussions; discussions became more focused in later meetings as the advisory group began to identify particular topics that required investigation and consideration.

Much of the work of the Group was accomplished in committees. In September 1991, the Chairman appointed these committees to study aspects of the CJRA charge:

Case Tracking and Management

Kathy E. Manning, Chairman
Joseph P. Creekmore
Walter F. Johnson
C. Edward Pleasants, Jr.
Carmon J. Stuart
George K. Walker
Benjamin H. White, Jr.

Discovery

James B. Maxwell, Chairman
Magistrate Judge P. Trevor Sharp
Norman B. Smith
Daniel R. Taylor
David K. Tate

Pleading and Motion Practice

S. Fraley Bost, Chairman
B. Ervin Brown, II
Daniel W. Fouts
Mickey W. Dry
Bankruptcy Judge Jerry G. Tart

Final Pretrial and Trial

Walter F. Brinkley, Chairman
Ronald H. Davis
Grover C. McCain
District Judge William L. Osteen, Sr.
District Judge N. Carlton Tilley, Jr.

The committees met as needed. Their findings and reports were submitted for discussion at regular meetings of the Group. At its November 8, 1991, meeting, the Group determined that it would be useful to send a survey on many CJRA topics to lawyers practicing in the Middle District. It was agreed that the survey should be directed to all attorneys admitted to practice in the Middle

District who had an address within the district and who had appeared in at least one civil case in the past five years. A copy of the survey is attached as Appendix F. Of 1300 attorneys mailed the survey in May 1992, 575, or 44 percent, responded. The survey results served to inform the deliberations and recommendations of the Group, as noted throughout this Report.

C. PROPOSED COST AND DELAY REDUCTION PLAN

1. Introduction.

The Advisory Group recommends local rules amendments and additions to procedures in Part 2. The Group believes that the proper agency for developing these changes is the Middle District Local Rules Committee.

a. Legal Considerations.

The Group accepts the analysis of the General Counsel of the AO in his July 5, 1991 memorandum to Abel J. Mattos, Court Administration Division - CPB. Summarized, the memorandum says that the CJRA must be read in pari materia with the Rules Enabling Act, 28 U.S.C. § 2072, which authorizes the Federal Rules of Civil Procedure, and legislation governing court-annexed arbitration, 28 U.S.C. §§ 651-58. The Group has authority only under the CJRA. The Local Rules Committee, under the supervision of the court, has plenary authority under Fed. R. Civ. P. 83 to prepare local rules that are not inconsistent with the Civil Rules, consistent with 28 U.S.C. §§ 651-58, and consistent with the later-enacted CJRA. Thus, the Group could recommend and develop local rules for mediation, mini-trial and summary jury trial under 28 U.S.C. § 473(a)(6)(B), but it could not recommend and develop local rules

for court-annexed arbitration, omitted from the § 473(a)(6)(B) list. That authority is in 28 U.S.C. § 651-58 and Fed. R. Civ. P. 83. Cf. the July 5 memorandum, p. 4. Similarly, although the CJRA approves procedures that go beyond specific provision of the Civil Rules, the CJRA does not provide a roving commission for local rules that go beyond any and all of the Civil Rules. See 28 U.S.C. §§ 473(a)(2)(c), 473(a)(3)(c), 473(a)(5), 473(b)(3); S. Rep. No. 101-416, at 55-59, 1991 U.S.C.C.A.N. at 6844-48; July 5 memorandum, pp. 2-3. Thus to the extent that the Group might recommend local rule amendments that go beyond CJRA authority, e.g. the proposal to allow nonstenographic depositions on notice under Local Rule 205 or the proposal to adopt general page limitations on briefs, the Group might be overstepping its charge. The result is that part of the Group's recommendations might proceed directly to the court for adoption, and others must be sent to the court for Local Rules Committee consideration under Fed. R. Civ. P. 83. Another aspect of rules revision is the renumbering project urged by the September 1988 resolution of the Judicial Conference of the United States. Rather than charging the Group with this task, as suggested by Judge Keeton in his March 25, 1992, letter and declined by Judge Erwin in his April 30, 1992, letter, the two projects might be combined under the Local Rules Committee into one thorough revision that could consider other proposed revisions, e.g. dealing with criminal practice or bankruptcy matters having nothing to do with the scope of the CJRA.

b. Practical Considerations.

Beyond the legal issues, sending the Report and Plan to the Local Rules Committee for drafting and recommendations for local rules is appropriate from a practical perspective. The Committee may have other local rules proposals that would interact with the Group's proposals. The Group's statutory life is 4 years under 28 U.S.C. § 478; the Committee's life is unlimited. Last, the Committee and the Group have common members, so that institutional memory will not be lost.

So long as the Local Rules Committee proceeds promptly with such a task, the Group does not believe that the spirit of CJRA is violated by this approach.

2. Elements of the Plan; Timing.

a. Rewrite Local Rule 205 to include precatory language regarding obligations and responsibilities regarding overuse or abuse of discovery; to be accomplished by December 31, 1993. See also Part III.A.1.a.

b. Amend Local Rule 205 to allow nonstenographic depositions upon notice or stipulation; to be accomplished by December 31, 1993. See also Part III.A.1.e.

c. Amend Local Rule 204 and Form 1 to provide for automatic disclosure of certain information; to be accomplished by December 31, 1993. See also Part III.A.2.a.

d. Amend Local Rule 204 to control discovery through management of types, frequency and amount of discovery; to be accomplished by December 31, 1993. See also Part III.A.2.b.

e. Amend Local Rule 204 and Form 1, to include positive provisions for:

(1) inquiry as to trial before a magistrate judge; to be accomplished by December 31, 1993.

(2) inquiry as to use of court-annexed arbitration; to be accomplished by December 31, 1993.

(3) inquiry as to binding arbitration, to be accomplished by December 31, 1993.

(4) inquiry as to court-annexed mediation; to be accomplished, when in the judgment of the Middle District Local Rules Committee, the parallel North Carolina pilot mediated settlement conference program has developed a permanent procedure and sufficient trained mediators, from which a comparable Middle District procedure can be developed, but in any event no later than December 31, 1995.

(5) inquiry as to appointment of a master to resolve some or all issues, to be accomplished no later than December 31, 1993.

(6) insert Form 1, footnote 2 material into Local Rule 204, to be accomplished no later than December 31, 1993.

See also Part III.A.2.

f. Amend Local Rule 207 to require disclosure of information on experts to be called at trial, to be accomplished no later than December 31, 1993. See also Part III.A.4.

g. Amend Local Rule 207 and Form 2, to include provisions for:

(1) stipulation to trial before a magistrate judge; to be accomplished by December 31, 1993.

(2) stipulation to appointment of a master to resolve some or all issues, to be accomplished no later than December 31, 1993.

(3) stipulation to use of court-annexed arbitration; to be accomplished by December 31, 1993.

(4) stipulation to binding arbitration, to be accomplished by December 31, 1993.

(5) stipulation to court-annexed mediation to be accomplished, when in the judgment of the Middle District Local Rules Committee, the parallel North Carolina pilot mediated settlement conference program has developed a permanent procedure and sufficient trained mediators, from which a comparable Middle District procedure can be developed, but in any event no later than December 31, 1995.

(6) inquiry as to settlement possibilities and use of final pretrial conference as settlement conference.

See also Part III.A.5.

h. Increase the cap on cases that may be assigned to court-annexed arbitration under Local Rules 601-08, to be accomplished when and if the Congress raises the cap in 28 U.S.C. §§ 651-52 or similar legislation. See also Part III.A.6.a(1).

i. Research, draft and promulgate local rules for a court-annexed mediation program, to be accomplished, when in the judgment of the Middle District Local Rules Committee, the parallel North Carolina pilot mediated settlement conference program has developed a permanent procedure and sufficient trained mediators from which a comparable Middle District procedure can be developed,

but in an event no later than December 31, 1995. See also Parts III.A.6.b and III.A.6.c.

k. Amend Local Rule 107 to state a presumptive 35-page limit for briefs for hearings; to be accomplished no later than December 31, 1993. See also Part III.A.7.

l. Amend the local rules to give the court discretionary authority to require attendance of parties or insurers at settlement conferences or other conferences related to dispute resolution; to be accomplished no later than December 31, 1993. See also Part III.A.9.

D. The Statutory Charge to the Advisory Group

The Civil Justice Reform Act of 1990 (CJRA or the Act), enacted as part of the Judicial Improvements Act of 1990, includes this Congressional Statement of Findings:

> (1) The problems of cost and delay in civil litigation in any United States district court must be addressed in the context of the full range of demands made on the district court's resources by both civil and criminal matters.
>
> . . . .
>
> (3) The solutions to problems of cost and delay must include significant contributions by the courts, the litigants, the litigants' attorneys, and by the Congress and the executive branch.
>
> . . . .
>
> (5) Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including -
>
> (A) the differential treatment of cases . . .;
>
> (B) early involvement of a judicial officer in planning the progress of a case . . .;
>
> (C) regular communication between a judicial officer and attorneys . . .; and
>
> (D) utilization of alternative dispute resolution programs in appropriate cases.
>
> (6) [I]t 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.

(Section 102 of Pub. L. 101-650.)

The CJRA requires, under 28 U.S.C. § 471, that each district court implement a civil justice and delay reduction plan to be developed by the court, or a model plan to be 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."

The district court plan must be developed after consideration of recommendations in a public report by an Advisory Group appointed by the court. The public report, according to 28 U.S.C. § 472(b), must include:

> (1) an assessment of the condition of the court's civil and criminal dockets;
>
> (2) the basis for its recommendation that the district court develop a plan or select a model plan;
>
> (3) recommended measures, rules and programs; and
>
> (4) an explanation of the manner in which the recommended plan complies with the provisions of 28 U.S.C. § 473.

In preparing this report, the Group is required by the Act, 28 U.S.C. § 472(c)(1) to:

> (1) determine the condition of the civil and criminal dockets;
>
> (2) identify trends in case filings and in the demands being placed on the court's resources;

(3) 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

(4) 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)(2) requires the Group to "take into account the particular needs and circumstances of the . . . court, litigants in such court, and the litigants' attorneys," in developing its recommendations. The Group "shall ensure that its recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts." 28 U.S.C. 472(c)(3).

The Act, 28 U.S.C. § 473, provides for the content of the expense and delay reduction plan to be developed by the district court in accordance with the following procedures:

(a) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under [28 U.S.C. § 478], shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction:

(1) systematic, differential treatment of civil cases . . .;

(2) early and ongoing control of the pretrial process through involvement of a judicial officer . . .;

(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 . . .;

(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 . . .;

(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 [28 U.S.C. §] 478 . . ., 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 . . .;

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

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

(4) a neutral evaluation program . . .;

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

(6) such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in [28 U.S.C. §] 472(a) . . ..

As the above outline of the CJRA shows, the statutory charge to a Group is a demanding one. The objective of the Group is to develop recommendations to address problems of excessive cost and delay, to the extent they are found to exist within the civil docket of the district court. Recommendations are to be made by the Group only after hearing from the many constituencies of the court. The ultimate goal is to improve the civil justice system in its delivery of judicial relief to aggrieved parties.

APPENDIX E

E. Caseload Statistics

U.S. DISTRICT COURT -- JUDICIAL WORKLOAD PROFILE

NO. CAROLINA MIDDLE

			TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN U.S. CIRCUIT	
			1992	1991	1990	1989	1988	1987		
OVERALL WORKLOAD STATISTICS	Filings*		1,026	904	1,024	1,270	1,438	1,113		
	Terminations		891	901	1,117	1,291	1,196	1,161		
	Pending		934	788	786	927	949	707		
	Percent Change In Total Filings Current Year	Over Last Year. . .		13.5					26	3
		Over Earlier Years. . .			.2	-19.2	-28.7	-7.8	66	9
	Number of Judgeships		4	4	3	3	3	3		
	Vacant Judgeship Months		2.9	7.0	.0	1.8	.0	.0		
ACTIONS PER JUDGESHIP	FILINGS	Total	257	226	341	423	479	371	87	9
		Civil	182	163	237	343	398	290	89	9
		Criminal Felony	75	63	104	80	81	81	21	6
	Pending Cases		234	197	262	309	316	236	86	9
	Weighted Filings**		241	218	296	320	360	301	88	9
	Terminations		223	225	372	430	399	387	89	9
	Trials Completed		33	31	47	33	34	25	39	5
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	5.3	5.3	5.2	4.7	3.6	3.1	30	2
		Civil**	8	9	10	7	7	9	15	3
	From Issue to Trial (Civil Only)		35	0	19	14	24	18	92	9
OTHER	Number (and %) of Civil Cases Over 3 Years Old		38 5.3	20 3.2	11 1.9	7 .9	7 .9	6 1.0	40	5
	Average Number of Felony Defendants Filed per Case		1.6	1.8	1.8	1.5	1.5	1.5		
	Jurors	Avg. Present for Jury Selection	29.87	30.84	23.74	25.23	25.30	27.05	29	5
		Percent Not Selected or Challenged	19.1	26.7	14.4	20.6	21.2	24.2	19	5

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

1992 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	727	64	102	135	52	3	38	77	80	29	83	-	64
Criminal*	286	-	21	63	8	17	7	63	5	33	2	51	16

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

U.S. DISTRICT COURT -- JUDICIAL WORKLOAD PROFILE

ALL DISTRICT COURTS

			TWELVE MONTH PERIOD ENDED JUNE 30					
			1992	1991	1990	1989	1988	1987
OVERALL WORKLOAD STATISTICS	Filings*		261,698	241,420	251,113	263,896	269,174	268,023
	Terminations		270,298	240,952	243,512	262,806	265,916	265,727
	Pending		261,181	274,010	273,542	265,035	268,070	264,953
	Percent Change In Total Filings Current Year	Over Last Year. . .		8.4				
		Over Earlier Years. . .			4.2	-.8	-2.8	-2.4
	Number of Judgeships		649	649	575	575	575	575
	Vacant Judgeship Months		1,340.4	988.7	540.1	374.1	485.2	483.4
ACTIONS PER JUDGESHIP	FILINGS	Total	403	372	437	459	467	466
		Civil	350	320	379	406	417	416
		Criminal Felony	53	52	58	53	51	50
	Pending Cases		402	422	476	461	466	461
	Weighted Filings**		405	386	448	466	467	461
	Terminations		416	371	423	457	462	462
	Trials Completed		31	31	36	35	35	35
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	5.9	5.7	5.3	5.0	4.3	4.1
		Civil**	9	9	9	9	9	9
	From Issue to Trial (Civil Only)		14	15	14	14	14	14
OTHER	Number (and %) of Civil Cases Over 3 Years Old		19,423 8.7	28,421 11.8	25,207 10.4	22,391 9.2	21,487 8.8	19,782 8.1
	Average Number of Felony Defendants Filed per Case		1.5	1.6	1.4	1.4	1.4	1.4
	Jurors	Avg. Present for Jury Selection	37.84	36.79	35.84	35.89	3 2.7	3 1.1
		Percent Not Selected or Challenged	34.3	34.0	34.2	35.8	33.7	32.1

NUMERICAL STANDIN WITHIN U.S. CIRCUI

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

1992 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	226895	8415	17475	46452	7797	10143	15800	33771	36469	5670	23419	506	2097
Criminal*	33994	1906	1490	4005	606	1685	4602	6994	1060	6169	624	1804	304

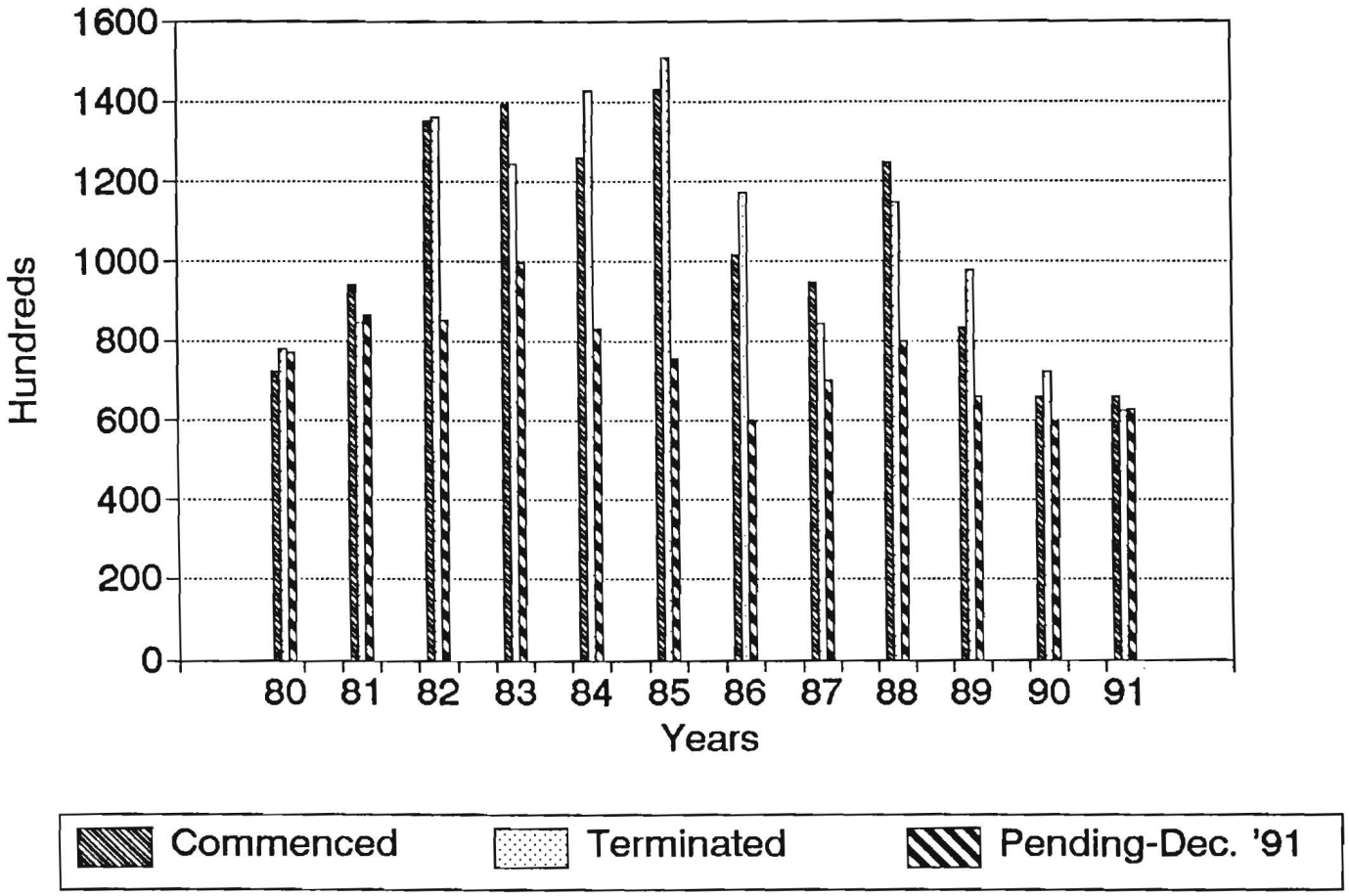
* Filings in the "Overall Workload Statistics" section include criminal transfers, while filings "by nature of offense" do not.
**See Page 167.

MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL CASES COMMENCED AND TERMINATED
BY CALENDAR YEAR, AND PENDING AT THE
CLOSE OF YEAR 1991

TOTAL CIVIL CASES

CALENDAR YEAR	COMMENCED	TERMINATED	PENDING DEC. 31
1980	726 (295 govt)	782 (311 govt)	769
1981	940 (520 govt)	846 (337 govt)	863
1982	1348 (934 govt)	1360 (935 govt)	851
1983	1391 (933 govt)	1245 (800 govt)	997
1984	1261 (781 govt)	1426 (926 govt)	832
1985	1429 (904 govt)	1506 (926 govt)	755
1986	1015 (449 govt)	1171 (597 govt)	599
1987	945 (373 govt)	843 (316 govt)	701
1988	1248 (421 govt)	1148 (456 govt)	801
1989	835 (323 govt)	977 (347 govt)	659
1990	661 (243 govt)	723 (274 govt)	597
1991	659 (233 govt)	625 (186 govt)	631

CIVIL CASES-COMMENCED, TERMINATED
AND PENDING-CLOSE OF CY 1991, USDC,MDNC



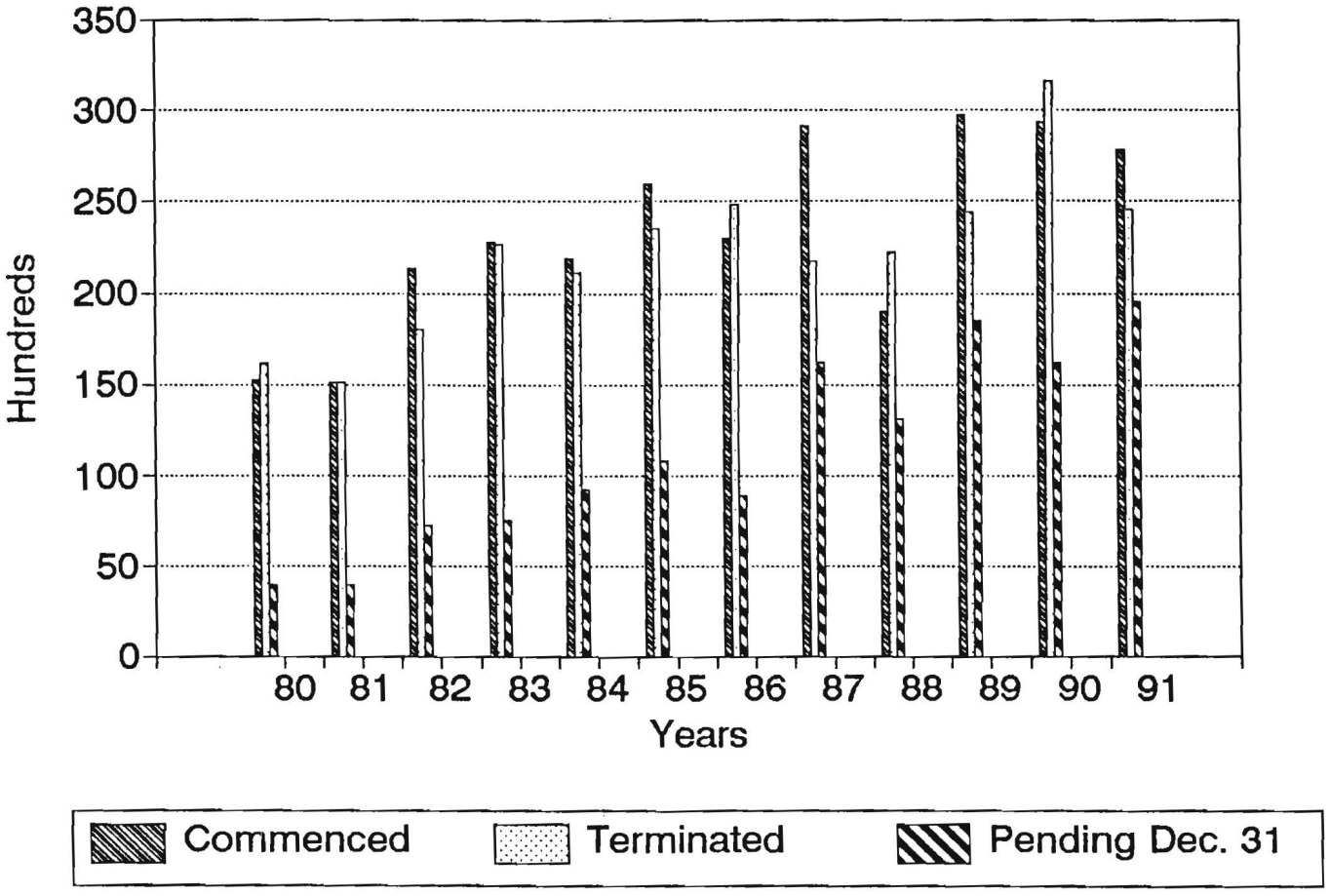
MIDDLE DISTRICT OF NORTH CAROLINA
CRIMINAL CASES COMMENCED AND TERMINATED
BY CALENDAR YEAR AND PENDING AT THE
CLOSE OF YEAR 1991

TOTAL CRIMINAL CASES

CALENDAR YEAR	COMMENCED	TERMINATED	PENDING DEC. 31
1980	153	162	40
1981	151	151	40
1982	213	180	73
1983	228	226	75
1984	219	211	93
1985	260	235	108
1986	229	248	89
1987	291	217	163
1988	190	222	131
1989	298	244	185
1990	294	316	163
1991*	278	245	196

* 480 Defendants Commenced
* 454 Defendants Terminated
* 295 Defendants Pending

CRIMINAL CASES COMMENCED, TERMINATED
& PENDING-CLOSE OF CY YEAR 1991, MDNC

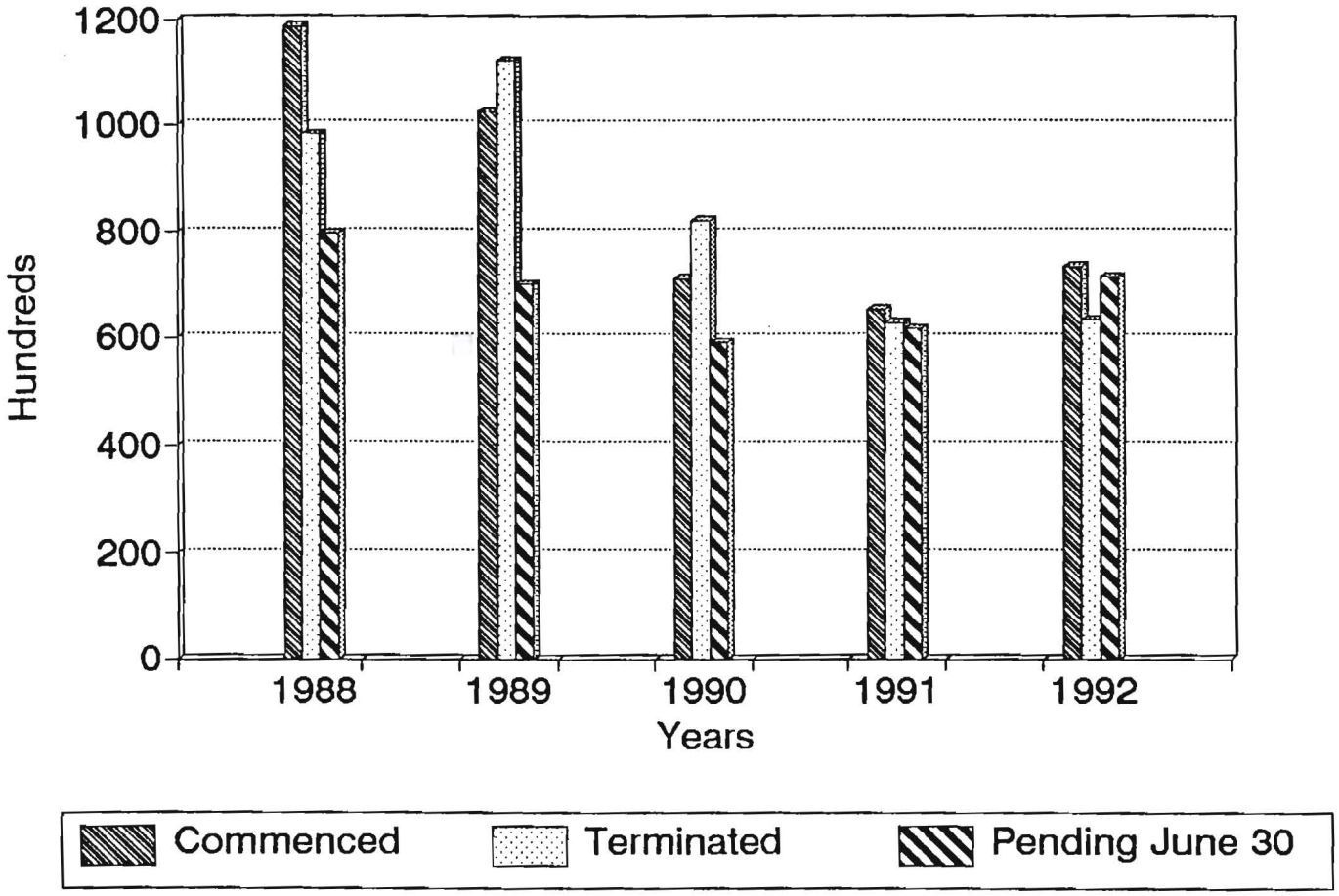


MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL CASES COMMENCED AND TERMINATED
YEAR BEGINNING WITH SY 1988

TOTAL CIVIL CASES

Year	Commence	Terminated	Pending June 30
1988	1188	985	797
1989	1027	1123	701
1990	712	822	591
1991	654	628	617
1992	735	635	717
INCREAS DECREASE 92 v 91	12.3853%	1.1146%	16.2075%

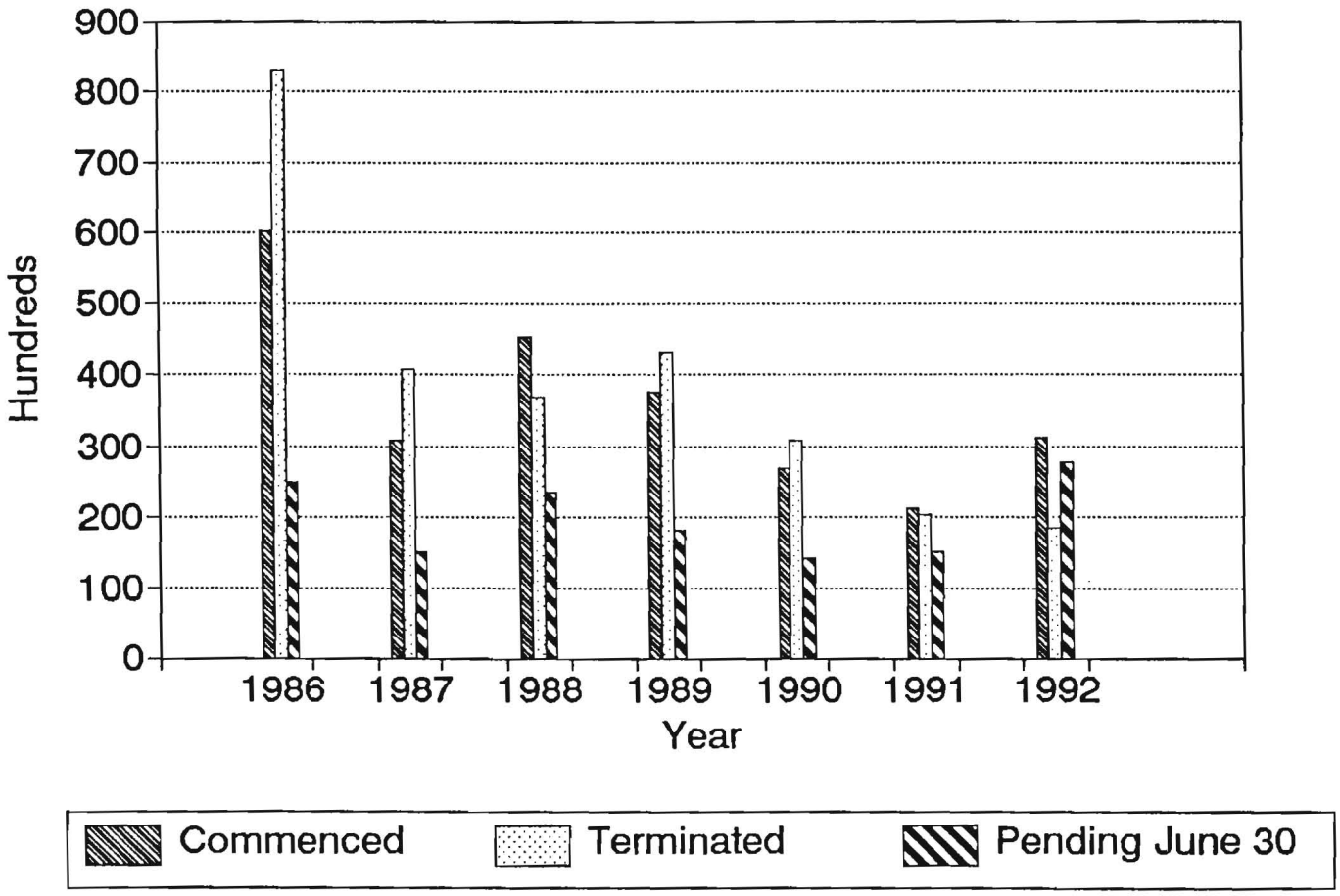
USDC-MDNC TOTAL CIVIL CASES
SY 88 - SY 92



MIDDLE DISTRICT OF NORTH CAROLINA
UNITED STATES CIVIL CASES COMMENCED AND TERMINATED
BY YEAR, AND PENDING JUNE 30 OF EACH
YEAR BEGINNING WITH SY 1986

Year	Commenced	Terminated	Pending June 30
1986	602	830	250
1987	308	407	151
1988	452	367	236
1989	375	430	181
1990	271	308	144
1991	212	205	151
1992	312	185	278
INCREASE/ DECREASE 92 v 91	47.1698%	-9.7561%	84.1060%

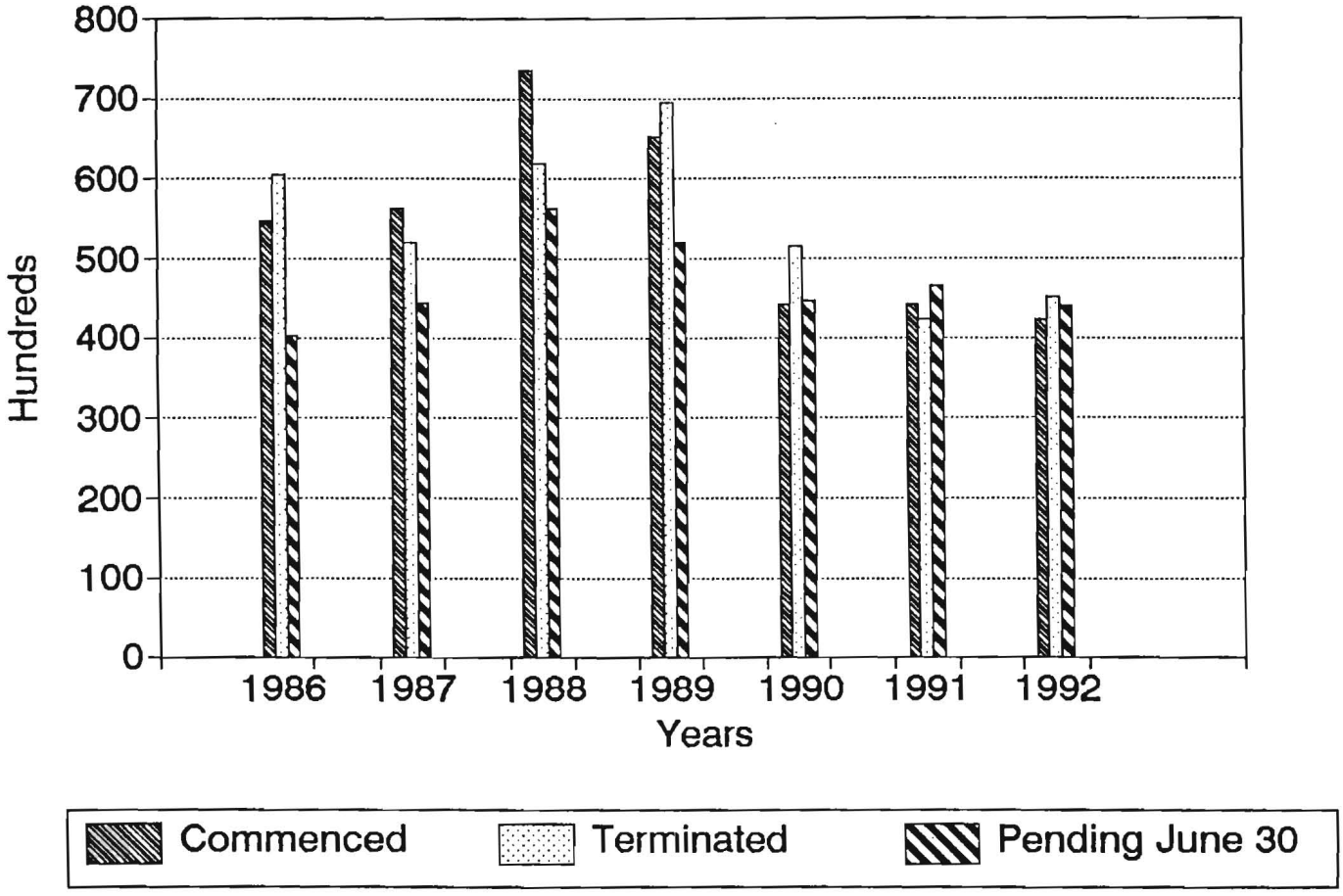
USDC-MDNC, U.S. CIVIL CASES
SY 86 - SY 92



MIDDLE DISTRICT OF NORTH CAROLINA
PRIVATE CIVIL CASES COMMENCED AND TERMINATED
BY YEAR, AND PENDING JUNE 30 OF EACH
YEAR BEGINNING WITH SY 1986

Year	Commenced	Terminated	Pending June 30
1986	547	605	402
1987	562	521	443
1988	736	618	561
1989	652	693	520
1990	441	514	447
1991	442	423	466
1992	423	450	439
INCREASE/ DECREASE 92 v 91	-4.2986%	6.3830%	-5.7940%

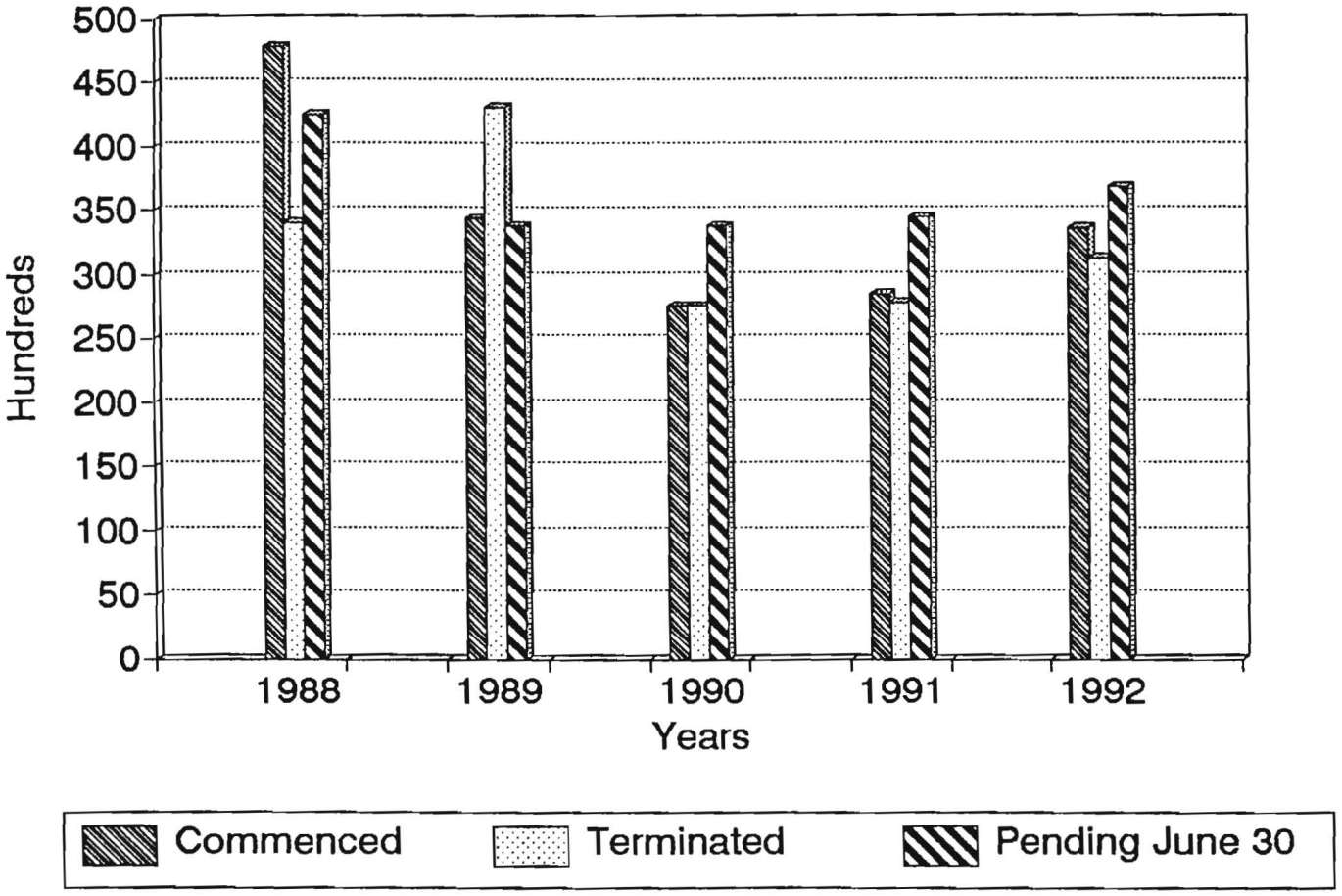
USDC-MDNC, PRIVATE CIVIL CASES
SY 86 - SY 92



MIDDLE DISTRICT OF NORTH CAROLINA
PRIVATE CIVIL CASES
MINUS PRISONER CASES
COMMENCED, TERMINATED AND PENDING
SY 88 - SY 92

Year	Commenced	Terminated	Pending June 30
1988	478	341	425
1989	344	431	338
1990	276	276	338
1991	285	278	345
1992	337	313	369
INCREASE/ DECREASE 92 V 91	18.2456%	12.5899%	6.9565%

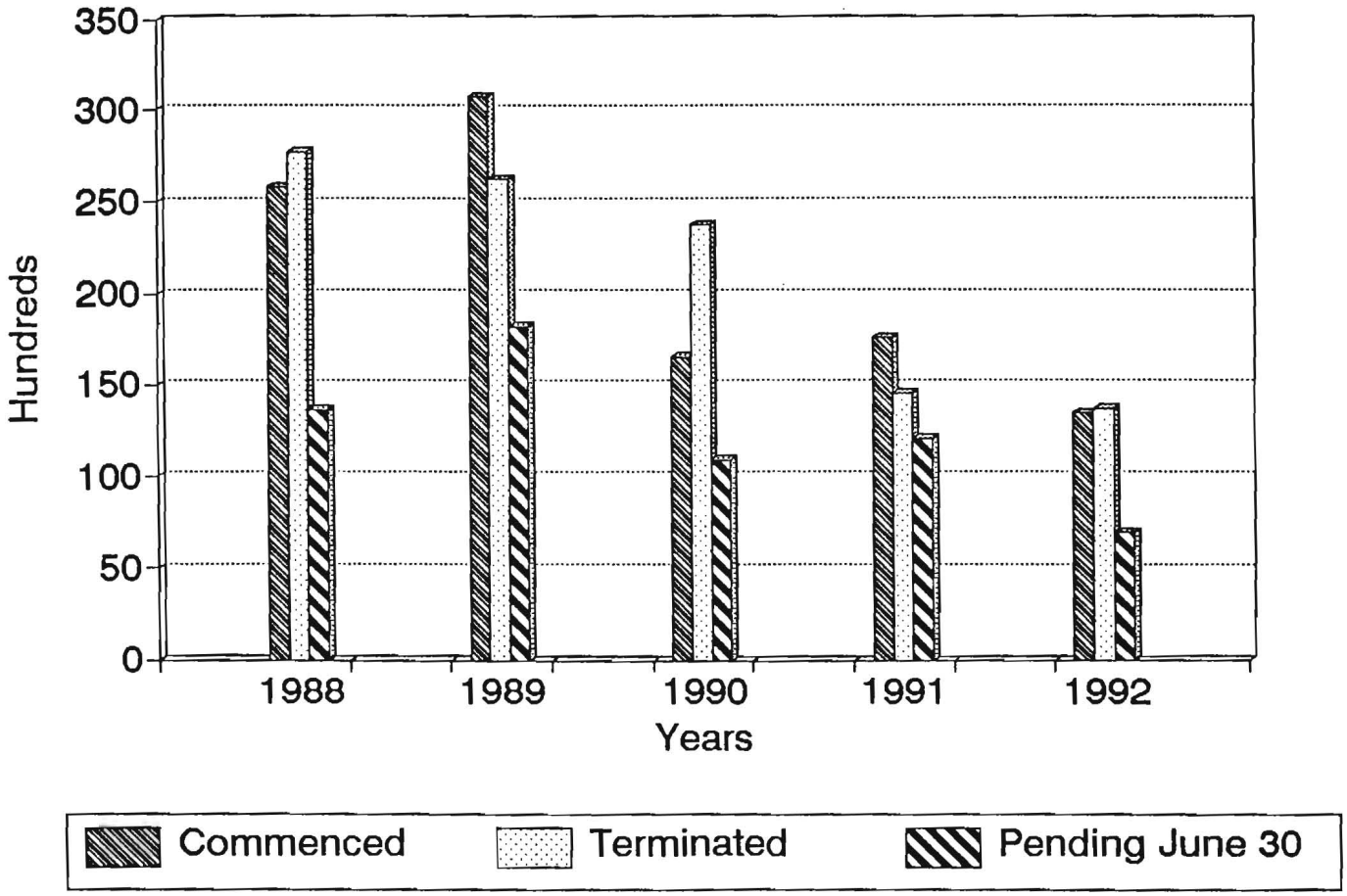
USDC-MDNC, PRIVATE CIVIL MINUS PRISONER
SY 88 - SY 92



MIDDLE DISTRICT OF NORTH CAROLINA
PRIVATE PRISONER CASES
SY 88 - SY 92

Year	Commenced	Terminated	Pending June 30
1988	258	277	136
1989	308	262	182
1990	165	238	109
1991	176	145	121
1992	135	137	70
INCREASE/ DECREASE 92 v 91	-23.2955%	-5.5172%	-42.1488%

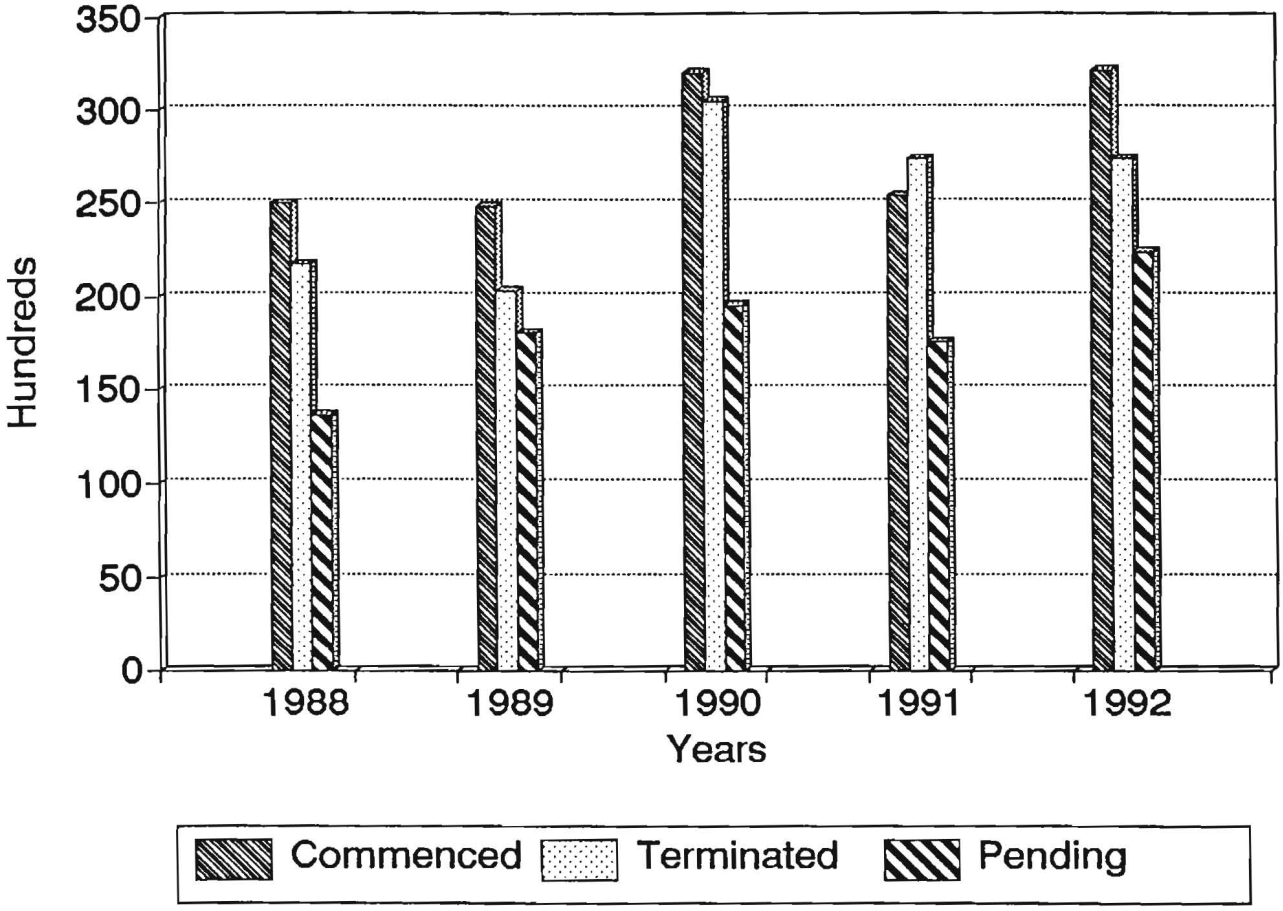
USDC-MDNC, PRIVATE PRISONER CASES
SY 88 - SY 92



MIDDLE DISTRICT OF NORTH CAROLINA
CRIMINAL CASES COMMENCED AND TERMINATED
BY YEAR, AND PENDING JUNE 30
OF EACH YEAR BEGINNING WITH SY 88

Year	Commenced	Terminated	Pending June 30
1988	250	217	136
1989	248	203	181
1990	320	305	196
1991	254	274	176
1992	322	274	224
INCREASE/ DECREASE 92 v 91	26.7717%	0.0000%	27.2727%

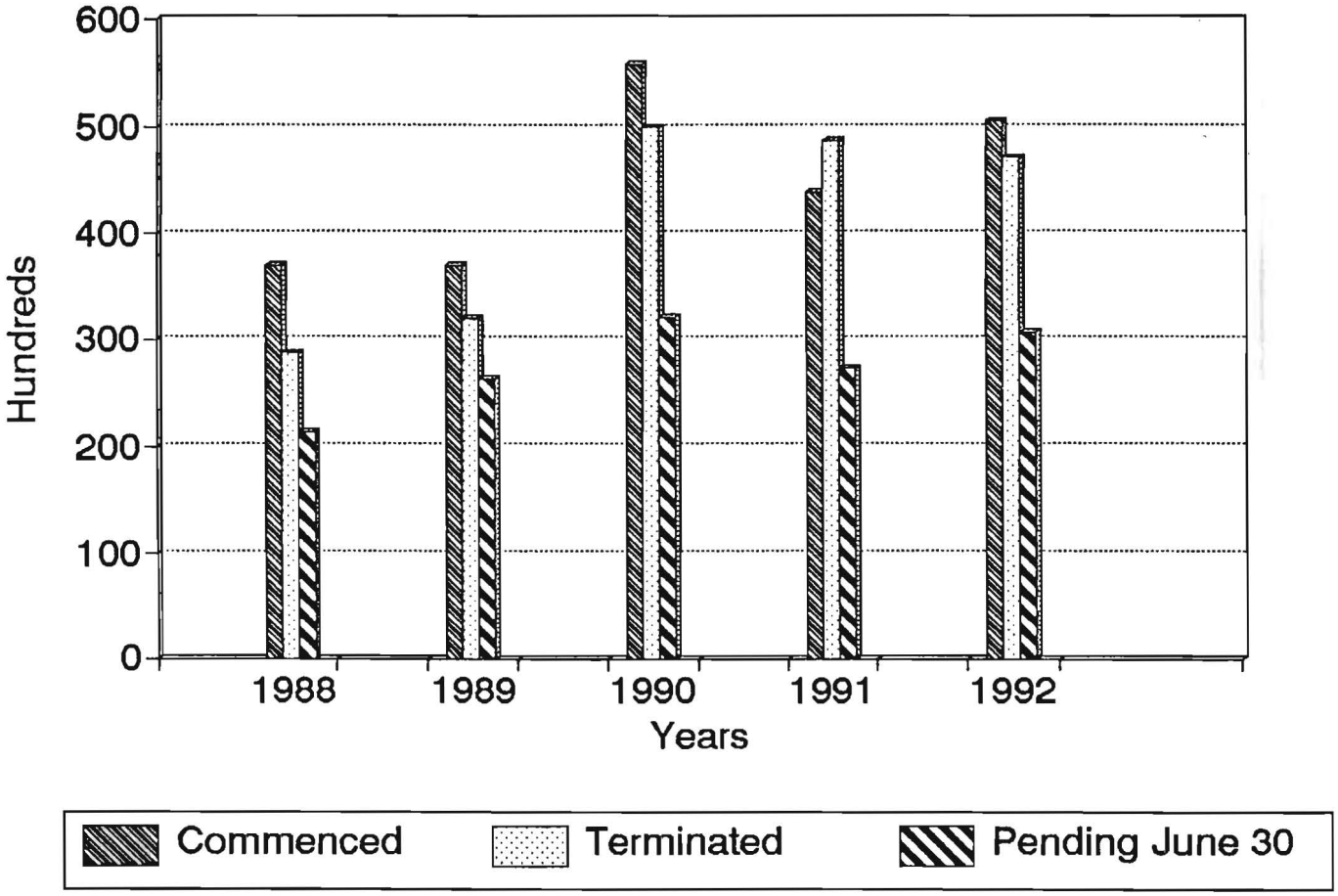
U.S. DISTRICT COURT, MDNC
CRIMINAL CASES - SY 88 - SY 92



MIDDLE DISTRICT OF NORTH CAROLINA
CRIMINAL DEFENDANTS COMMENCED, TERMINATED
AND PENDING AS OF JUNE 30 IN EACH YEAR
BEGINNING WITH SY 88

Year	Commenced	Terminated	Pending June 30
1988	370	288	214
1989	370	320	264
1990	558	501	321
1991	440	488	273
1992	506	472	307
INCREASE/ DECREASE 92 v 91	15.0000%	-3.2787%	12.4542%

USDC-MDNC, CRIMINAL DEFENDANTS
SY 88 - SY 92



CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ATTORNEY SURVEY, MAY, 1992

As part of the nation-wide study of the Federal Judicial System mandated by the Civil Justice Reform Act of 1990, the following survey is being conducted by the Advisory Group of the U.S. District Court for the Middle District of North Carolina, to study whether there are unnecessary costs and delays associated with civil litigation in this District and, if so, how they can be reduced. Because the criminal docket necessarily affects civil litigation, certain questions have been asked in connection with that aspect of Middle District practice as well. The Group is seeking your opinions as a practicing attorney in the District to assist it in making recommendations for improving the management of civil litigation. The survey should take no longer than thirty minutes to complete. We are grateful for your taking the time to participate in this study. Confidentiality will be maintained.

When answering the questions, please use the attached scantron form and a number 2 pencil for filling in the selected letters for each question (e.g. (A - E) completely. Please fill in 1 response for each question, except for Questions 109-112 which are optional. You may attach comments to this Survey if there is insufficient space after Questions 109-112.

Please return the survey and the scantron form in the enclosed postage prepaid envelope. Please do not fold the scantron form; to do so may obliterate responses along the creases. Using the scantron form will save considerable time, and therefore taxpayer dollars, in the compilation. Again, many thanks for taking the time to participate in this study.

Please use no. 2 pencil and the attached scantron form to indicate your response by completely filling in the appropriate "dot" (e.g. (A) - (E) for some questions), for each inquiry.

PART I: Background Information

1. How many years have you been practicing law?

no ans	multi ans	(A) 0-3	(B) 4-8	(C) 9-15	(D) 16-25	(E) 25+
1%	0%	4%	20%	29%	29%	17%

2. What percentage of your practice has been in litigation?

no ans	multi ans	(A) 0-20	(B) 21-40	(C) 41-60	(D) 61-80	(E) 81-100
1%	0%	10%	11%	12%	23%	43%

3. During the past five years, what percentage of your practice has been in the North Carolina state trial courts?

no ans	multi ans	(A) 0-20	(B) 21-40	(C) 41-60	(D) 61-80	(E) 81-100
2%	0%	29%	17%	16%	21%	17%

4. During the past five years, what percentage of your practice has been in the federal courts in North Carolina?

no ans	multi ans	(A) 0-5	(B) 6-15	(C) 16-25	(D) 26-40	(E) 41-100
1%	0%	25%	19%	20%	16%	18%

5. During the past five years, what percentage of your practice has been in the Middle District?

no ans	multi ans	(A) 0-5	(B) 6-15	(C) 16-25	(D) 26-40	(E) 41-100
1%	0%	37%	29%	13%	7%	12%

6. What percentage of your practice has been in criminal litigation in the Middle District?

no ans	multi ans	(A) 0-5	(B) 6-15	(C) 16-25	(D) 26-40	(E) 41-100
1%	0%	90%	3%	0%	1%	4%

7. What percentage of your practice has been devoted to civil litigation in the Middle District?

no ans	multi ans	(A) 0-5	(B) 6-15	(C) 16-25	(D) 26-40	(E) 61-100
1%	0%	40%	32%	12%	7%	8%

8. What percentage of your practice has consisted of representating civil plaintiffs in the Middle District?

no ans	multi ans	(A) 0-5	(B) 6-15	(C) 16-25	(D) 26-40	(E) 41-100
1%	0%	66%	19%	5%	2%	6%

9. What percentage of your practice has consisted of representating civil defendants in the Middle District?

no ans	multi ans	(A) 0-5	(B) 6-15	(C) 16-25	(D) 26-40	(E) 41-100
5%	0%	55%	24%	7%	4%	4%

10. How would you describe your practice setting?

	no ans	5%
(A)	Private law firm	90%
(B)	Federal government	0%
(C)	State government	1%
(D)	Local government	2%
(E)	Other	2%
	multi ans	0%

11. How many practicing lawyers are there in your firm or organization?

no ans	multi ans	(A) 1-3	(B) 4-8	(C) 9-15	(D) 16-25	(E) 25+
5%	0%	17%	20%	10%	9%	39%

PART II: Possible Delays and Unnecessary Costs Caused by Counsel, Magistrate Judges, and District Judges

The following questions pertain to your civil litigation experience in the Middle District, unless otherwise indicated, during the past five years.

A. General Questions

12. Have you encountered unreasonable delays in civil litigation?

(A) Always	(B) Most of the time	(C) Occasionally	(D) Never	(E)
5%	18%	48%	17%	3%

no ans - 7% multi ans - 0%

How much have each of the following contributed to these delays, if any?

	No Contribution	Slight Contribution	Moderate Contribution	Substantial Contribution	
13. Tactics of opposing counsel					
no ans	multi ans	(A)	(B)	(C)	(D)	(E)
9%	0%	23%	31%	25%	11%	1%
14. Conduct of clients					
no ans	multi ans	(A)	(B)	(C)	(D)	(E)
10%	0%	52%	28%	9%	1%	0%
15. Conduct of insurers					
no ans	multi ans	(A)	(B)	(C)	(D)	(E)
10%	0%	62%	15%	8%	4%	0%
16. Personal or office practice inefficiencies					
no ans	multi ans	(A)	(B)	(C)	(D)	(E)
10%	0%	46%	37%	6%	1%	0%
17. Judicial inefficiencies					
no ans	multi ans	(A)	(B)	(C)	(D)	(E)
10%	0%	22%	26%	23%	16%	3%

18. Do you feel that delay is greater than in state court practice:

(A) Always	(B) Most of the time	(C) Occasionally	(D) Never	(E) Not applicable
9%	25%	28%	18%	13%

no ans - 7% multi ans - 0%

19. Do you feel that delay is greater than in other U.S. district courts?

(A) Always	(B) Most of the time	(C) Occasionally	(D) Never	(E) Not applicable
4%	15%	30%	19%	25%

no ans - 7% multi ans - 0%

20. Have you found Middle District litigation to be unnecessarily costly?

(A) Always	(B) Most of the time	(C) Occasionally	(D) Never	(E) Not applicable
4%	17%	41%	23%	7%

no ans - 7% multi ans - 1%

How much of each of the following contributed to unnecessary costs, if any?

	No Contribution	Slight Contribution	Moderate Contribution	Substantial Contribution	
21. Conduct of counsel	(A)	(B)	(C)	(D)	(E)
11%	26%	22%	25%	13%	2%
22. Conduct of clients	(A)	(B)	(C)	(D)	(E)
12%	46%	26%	12%	2%	1%
23. Conduct of insurers	(A)	(B)	(C)	(D)	(E)
13%	58%	14%	8%	5%	2%
24. Personal or office practice inefficiencies	(A)	(B)	(C)	(D)	(E)
12%	49%	29%	8%	1%	1%
25. Judicial inefficiencies	(A)	(B)	(C)	(D)	(E)
12%	32%	24%	18%	11%	3%

no ans multi ans

0% 0% 0% 0% 0% 0%

26. Do you feel that Middle District litigation is more costly than similar cases in state court?

(A) Always	(B) Most of the time	(C) Occasionally	(D) Never	(E) Not applicable
13%	29%	24%	12%	13%

no ans - 8%; multi ans - 1%

27. Do you feel that Middle District litigation is more costly than in other federal courts?

(A) Always	(B) Most of the time	(C) Occasionally	(D) Never	(E) Not applicable
3%	11%	26%	28%	24%

no ans - 8%; multi ans - 0%

B. Tactics of Counsel

28. To what extent have tactics of counsel contributed to unreasonable delays or unnecessary costs in the Middle District?

no ans	multi ans	(A) None	(B) Slight	(C) Moderate	(D) Substantially
9%	0%	15%	36%	28%	10%

Please state whether these are a cause:

	Not a Cause	Slight Cause	Moderate Cause	Substantial Cause	Not Applicable
29. Unnecessary use of interrogatories					
no ans: 10% / multi ans: 1%	(A) 35%	(B) 27%	(C) 18%	(D) 9%	(E) 0%
30. Too many interrogatories					
no ans: 10% / multi ans: 0%	(A) 34%	(B) 26%	(C) 19%	(D) 10%	(E) 0%
31. Too many depositions					
no ans: 10% / multi ans: 0%	(A) 34%	(B) 25%	(C) 20%	(D) 10%	(E) 0%
32. Too many deposition questions					
no ans: 11% / multi ans: 0%	(A) 32%	(B) 26%	(C) 20%	(D) 12%	(E) 1%
33. Overbroad document requests					
no ans: 10% / multi ans: 1%	(A) 22%	(B) 23%	(C) 24%	(D) 19%	(E) 1%
34. Overbroad responses to document production requests					
no ans: 11% / multi ans: 0%	(A) 41%	(B) 25%	(C) 17%	(D) 6%	(E) 0%
35. Unavailability of witness or counsel					
no ans: 10% / multi ans: 0%	(A) 38%	(B) 36%	(C) 12%	(D) 3%	(E) 1%
36. Raising frivolous objections					
no ans: 11% / multi ans: 0%	(A) 29%	(B) 35%	(C) 18%	(D) 6%	(E) 1%
37. Unwarranted sanctions motions					
no ans: 10% / multi ans: 0%	(A) 45%	(B) 28%	(C) 12%	(D) 3%	(E) 0%
38. Lack of professional courtesy					
no ans: 11% / multi ans: 0%	(A) 34%	(B) 33%	(C) 16%	(D) 6%	(E) 0%

	Not a Cause	Slight Cause	Moderate Cause	Substantial Cause	Not Applicable

39. Failure to attempt in good faith to resolve issues without court intervention

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
11%	0%	23%	30%	22%	13%	1%

40. Other_____

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
43%	0%	35%	7%	6%	6%	3%

C. Magistrate Judge and Clerk Management

41. To what extent has ineffective case management by Magistrate Judges or the Clerk in the Middle District contributed to unnecessary delays or unreasonable costs?

no ans	(A) None	(B) Slight	(C) Moderate	(D) Substantial	multi ans
10%	40%	25%	17%	7%	0%

Please state whether these are a cause:

	Far Too Many	Somewhat Too Many	Reasonable Number	Somewhat Too Few	Far too Few

42. No. of status conferences

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
14%	0%	5%	9%	54%	13%	6%

43. Pre-motion conferences

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
13%	0%	4%	10%	57%	10%	6%

44. Extension of deadlines

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
14%	0%	6%	10%	59%	8%	3%

	Far Too Permissive	Somewhat Permissive	Reasonable	Somewhat Too Restrictive	Far Too Restrictive

45. Are extension of deadlines:

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
11%	0%	3%	9%	55%	17%	4%

Please indicate the extent to which each of the following possible instances of ineffective case management by Magistrate Judges or the Clerk contributed to your assessment:

	Not a Cause	Slight Cause	Moderate Cause	Substantial Cause	Not Applicable
46. Delays in entering scheduling orders	(A)	(B)	(C)	(D)	(E)
no ans 11% / multi ans 0%	53%	16%	9%	2%	9%
47. Excessive time periods provided for in scheduling orders	(A)	(B)	(C)	(D)	(E)
no ans 11% / multi ans 0%	60%	13%	5%	2%	9%
48. Failure to resolve discovery disputes promptly	(A)	(B)	(C)	(D)	(E)
no ans 11% / multi ans 0%	28%	24%	16%	13%	9%
49. Failure to resolve other motions promptly	(A)	(B)	(C)	(D)	(E)
no ans 11% / multi ans 1%	23%	20%	17%	20%	8%
50. Scheduling too many motions on different cases concurrently	(A)	(B)	(C)	(D)	(E)
no ans 12% / multi ans 0%	48%	16%	9%	3%	12%
51. Failure to tailor discovery to needs of the case	(A)	(B)	(C)	(D)	(E)
no ans 10% / multi ans 0%	36%	21%	13%	9%	10%
52. Failure by Magistrate Judge to initiate settlement discussions	(A)	(B)	(C)	(D)	(E)
no ans 10% / multi ans 0%	35%	19%	17%	8%	11%
53. Inadequate supervision of settlement discussions	(A)	(B)	(C)	(D)	(E)
no ans 11% / multi ans 0%	35%	20%	15%	7%	11%
54. Inadequate judicial preparation for conferences or proceedings	(A)	(B)	(C)	(D)	(E)
no ans 11% / multi ans 0%	52%	16%	8%	3%	10%
55. Other_____	(A)	(B)	(C)	(D)	(E)
no ans 41% / multi ans 9%	29%	4%	4%	5%	17%

D. District Judge Management

56. To what extent has ineffective case management by District Judges contributed to unnecessary delays or unreasonable costs?

no ans	multi ans	(A) None	(B) Slight	(C) Moderate	(D) Substantially	(E)
11%	1%	29%	28%	19%	11%	1%

Please state whether these are a cause:

		Far Too Many	Somewhat Too Many	Reasonable Number	Somewhat Too Few	Far too Few
57. No. of status conferences						
no ans	multi ans	(A)	(B)	(C)	(D)	(E)
11%	1%	5%	7%	43%	18%	15%

Please indicate the extent to which each of the following possible instances of ineffective case management by District Judges contributed to your assessment:

		Not a Cause	Slight Cause	Moderate Cause	Substantial Cause	Not Applicable
58. Failure to resolve discovery disputes promptly						
no ans	multi ans	(A)	(B)	(C)	(D)	(E)
11%	0%	27%	21%	18%	10%	13%
59. Failure to resolve other motions promptly						
no ans	multi ans	(A)	(B)	(C)	(D)	(E)
10%	0%	19%	18%	19%	22%	12%
60. Scheduling too many motions on different cases concurrently						
no ans	multi ans	(A)	(B)	(C)	(D)	(E)
11%	0%	45%	16%	10%	3%	15%
61. Failure by District Judge to initiate settlement discussions						
no ans	multi ans	(A)	(B)	(C)	(D)	(E)
11%	0%	36%	19%	15%	7%	13%

	Not a Cause	Slight Cause	Moderate Cause	Substantial Cause	Not Applicable
62. Inadequate supervision of settlement discussions					
no ans / multi ans	(A)	(B)	(C)	(D)	(E)
10% / 0%	37%	19%	14%	6%	14%
63. Inadequate judicial preparation for conferences or proceedings					
no ans / multi ans	(A)	(B)	(C)	(D)	(E)
11% / 1%	48%	15%	10%	2%	14%
64. Failure by District Judge to assign reasonably prompt trial dates					
no ans / multi ans	(A)	(B)	(C)	(D)	(E)
10% / 1%	17%	18%	16%	16%	13%
65. Failure by District Judge to meet assigned trial dates					
no ans / multi ans	(A)	(B)	(C)	(D)	(E)
10% / 0%	42%	14%	10%	6%	16%
66. Other_____					
no ans / multi ans	(A)	(B)	(C)	(D)	(E)
39% / 0%	27%	4%	4%	3%	25%

PART III. Possible Solutions

The following questions describe solutions which have been implemented in other U.S. District Courts or are under active consideration in this or other Districts to address concerns regarding unnecessary delays and unreasonable costs in federal civil litigation. With respect to each proposed solution, please indicate your opinion as to its effectiveness in expediting civil litigation or reducing its cost in the Middle District.

		No Effect at All	Slight Effect	Moderate Effect	Substantial Effect	No Opinion
67.	Shorter time limits for completing various stages of litigation					
	no ans: 8% / multi ans: 0%	(A) 26%	(B) 22%	(C) 21%	(D) 14%	(E) 8%
68.	Requiring counsel to attempt to resolve issues before court intervention					
	no ans: 7% / multi ans: 0%	(A) 15%	(B) 24%	(C) 26%	(D) 24%	(E) 4%
	Requiring pre-motion conferences with the court for these kinds of motions:					
69.	Dispositive motions (dismissal, summary judgment.)					
	no ans: 8% / multi ans: 1%	(A) 22%	(B) 18%	(C) 22%	(D) 23%	(E) 6%
70.	Discovery motions					
	no ans: 8% / multi ans: 0%	(A) 19%	(B) 20%	(C) 26%	(D) 20%	(E) 6%
71.	Other motions					
	no ans: 8% / multi ans: 0%	(A) 22%	(B) 23%	(C) 23%	(D) 14%	(E) 10%
72.	Providing a 30-page limitation for memoranda of law, except for good cause shown					
	no ans: 8% / multi ans: 0%	(A) 18%	(B) 21%	(C) 24%	(D) 24%	(E) 5%

Given that the Middle District Rules have a $150,000 cap on court-annexed arbitration for many cases, will court-annexed arbitration of cases with these values decrease delays while achieving justice?

		No Effect at All	Slight Effect	Moderate Effect	Substantial Effect	No Opinion
73.	$250,000 cap					
	no ans / multi ans	(A)	(B)	(C)	(D)	(E)
	8% / 0%	23%	15%	18%	12%	23%
74.	$500,000 cap					
	no ans / multi ans	(A)	(B)	(C)	(D)	(E)
	8% / 0%	26%	14%	16%	11%	25%
75.	$1,000,000 cap					
	no ans / multi ans	(A)	(B)	(C)	(D)	(E)
	8% / 0%	29%	13%	14%	11%	25%
76.	Providing court-annexed mediation upon mutual consent of parties for some or all issues in dispute					
	no ans / multi ans	(A)	(B)	(C)	(D)	(E)
	8% / 0%	8%	21%	30%	25%	8%
77.	Making available attorneys who are experts in the subject matters in dispute to evaluate claims and defenses and to assist parties in settlement negotiations ("early neutral evaluation")					
	no ans / multi ans	(A)	(B)	(C)	(D)	(E)
	8% / 0%	15%	22%	25%	24%	7%
78.	Requiring attendance of parties and/or insurers at court settlement conferences					
	no ans / multi ans	(A)	(B)	(C)	(D)	(E)
	8% / 0%	10%	18%	24%	34%	5%
79.	Providing for summary jury trials, as now available in the State courts under N.C. Prac. R. 23, upon mutual consent for an advisory verdict to serve as a basis for settlement negotiations					
	no ans / multi ans	(A)	(B)	(C)	(D)	(E)
	8% / 0%	13%	24%	25%	22%	9%

	No Effect at All	Slight Effect	Moderate Effect	Substantial Effect	No Opinion

80. Providing for mandatory summary jury trial verdicts if the parties consent to such

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
8%	0%	11%	25%	24%	21%	11%

81. Providing for mini-trials, by which principals of parties hear abbreviated versions of the case, as a settlement procedure, if the parties agree

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
8%	0%	13%	27%	24%	19%	8%

82. Requiring Rule 11 sanctions motions to be separately filed and not appended to another motion

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
8%	0%	22%	23%	17%	17%	12%

83. Increased availability of telephone conferences with the court

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
8%	0%	5%	14%	32%	36%	5%

Requiring automatic disclosure of the following information shortly after joinder of issue:

84. Identity of certain witnesses relied upon in preparing pleadings or contemplated to be used to support parties' claims, defenses or damages

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
9%	0%	17%	22%	24%	23%	5%

85. General description of documents relied upon in preparing pleadings or contemplated to be used to support parties' allegations or calculation of damages

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
9%	0%	17%	23%	24%	22%	5%

86. Existence and contents of insurance agreements

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
8%	0%	16%	20%	21%	25%	9%

	No Effect at All	Slight Effect	Moderate Effect	Substantial Effect	No Opinion
87. Requiring automatic disclosure before the final pretrial conference of qualifications, opinions and basis for opinions of experts to be called as trial witnesses					
no ans / multi ans	(A)	(B)	(C)	(D)	(E)
8% / 0%	9%	22%	27%	29%	5%
88. Conditioning grants by the court of broader discovery upon the shifting of costs in instances where the burden of responding to such requests appears to be out of proportion to the amounts or issues in dispute					
no ans / multi ans	(A)	(B)	(C)	(D)	(E)
8% / 0%	7%	18%	25%	34%	7%
89. Defining the scope of permissible discovery by balancing the burden or expenses of the discovery against its likely benefit					
no ans / multi ans	(A)	(B)	(C)	(D)	(E)
8% / 0%	11%	20%	26%	29%	6%
90. Assessing costs of discovery motions on losing party					
no ans / multi ans	(A)	(B)	(C)	(D)	(E)
8% / 0%	9%	20%	26%	31%	5%
91. Providing less time for completing discovery					
no ans / multi ans	(A)	(B)	(C)	(D)	(E)
8% / 0%	33%	23%	18%	13%	5%
92. Requiring discovery relating to particular issues (e.g. venue, class certification) or a specified stage of the case (e.g. liability) to be completed before permitting discovery respecting other issues or another stage (e.g. damages, experts)					
no ans / multi ans	(A)	(B)	(C)	(D)	(E)
9% / 0%	20%	22%	21%	22%	7%

	No Effect at All	Slight Effect	Moderate Effect	Substantial Effect	No Opinion

93. Limiting the number of interrogatories presumptively permitted from the 50 now allowed by Local Rule 205(b) to 25

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
8%	0%	36%	21%	15%	14%	5%

94. Limiting the type of interrogatories (e.g. identification, contention) presumptively permitted at various stages of discovery

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
8%	0%	30%	25%	17%	12%	8%

95. Limiting the number of depositions presumptively permitted

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
8%	0%	23%	25%	22%	15%	6%

96. Limiting the length of depositions presumptively permitted

no ans	multi ans	(A)	(B)	(C)	(D)	(E)
9%	0%	26%	24%	21%	14%	7%

97. During the past five years, the cost and time it takes to litigate civil actions has:

(A) Substantially improved; 2%
(B) Moderately improved; 9%
(C) Remained unchanged; 23
(D) Moderately worsened; 39%
(E) Substantially worsened 16%

no ans	multi ans
10%	0%

98. During the past five years, how many months (on average) has it taken from the time your civil cases were ready for trial to the time that trial actually began?

(A) 0-2 months	(B) 2-6 months	(C) 6-12 months	(D) 12-18 months	(E) Not applicable
3%	10%	22%	33%	23%

no ans	multi ans
11%	0%

PART IV. Impact of the Criminal Case Docket

99. Has the criminal case docket impacted on any civil litigation you have had in the Middle District?

(A) Yes	(B) No	(C) Not applicable - don't have civil cases	(D)	(E)
43%	28%	9%	0%	4%

no ans	multi ans
16%	1%

100. Do you feel that the current Sentencing Guidelines are a cause of delay?

(A) Not a cause	(B) Slight cause	(C) Moderate cause	(D) Substantial cause
8%	8%	5%	11%

(E) Not applicable	no ans	multi ans
49%	19%	0%

101. Do you feel that the Sentencing Guidelines achieved justice in the cases you have had in the Middle District?

(A) All of the time	(B) Most of the time	(C) Less than half the time	(D) Never
0%	4%	6%	5%

(E) No opinion	no ans	multi ans
70%	14%	1%

102. Would you favor abolishing the Sentencing Guidelines and returning to plea bargaining or other settlement procedures for criminal cases?

(A) For all cases	(B) For some cases	(C) For no cases	(D) No opinion	(E)
14%	9%	25%	31%	28%

no ans	multi ans
14%	2%

103. Do you feel that the Sentencing Guidelines have resulted in more pleas of not guilty with resulting trials?

no ans	(A) Yes	(B) No	(C) No opinion	(D)	(E)	multi ans
14%	17%	3%	41%	3%	23%	1%

104. Do you feel that the Sentencing Guidelines have resulted in more demands for criminal jury trial?

no ans	(A) Yes	(B) No	(C) No opinion	(D)	(E)	multi ans
14%	18%	2%	40%	2%	23%	0%

105. Do you feel that the U.S. Attorney's office is efficient in using time allotted for criminal cases?

(A) Always	(B) Most of the time	(C) Less than half the time	(D) Never
2%	10%	5%	2%

(E) No opinion	no ans	multi ans
67%	14%	1%

106. Do you feel that criminal defense counsel are efficient in using the time allotted for criminal cases?

(A) Always	(B) Most of the time	(C) Less than half the time	(D) Never
4%	10%	3%	1%

(E) No opinion	no ans	multi ans
68%	14%	1%

107. Do you feel that the Magistrate Judges have been efficient in using the time allotted for criminal cases?

(A) Always	(B) Most of the time	(C) Less than half the time	(D) Never
3%	9%	3%	1%

(E) No opinion	no ans	multi ans
70%	14%	0%

108. Do you feel that the District Judges have been efficient in using the time allotted for criminal cases?

(A) Always	(B) Most of the time	(C) Less than half the time	(D) Never
5%	10%	2%	1%

(E) No opinion	no ans	multi ans
57%	16%	0%

109. (Optional) If <u>delay</u> is a problem in the Middle District for disposing of <u>civil</u> cases, what additional suggestions or comments do you have for reducing those delays?

no ans - 93%; (A) - 2%; (B) - 1%; (C) - 0%; (D) - 0%; (E) - 3%; multi ans - 0%

110. (Optional) If <u>delay</u> is a problem in the Middle District for disposing of <u>criminal</u> cases, what additional suggestions or comments do you have for reducing those delays?

no ans - 95%; (A) - 4%; (B) 0%; (C) - 0%; (D) - 0%; (E) - 1%; multi ans - 0%

111. (Optional) If <u>costs</u> associated with <u>civil</u> litigation in the Middle District are unreasonably high, what additional suggestions or comments do you have for reducing those costs?

no ans - 95%; (A) - 1%; (B) - 1%; (C) - 0%; (D) - 0%; (E) - 2%; multi ans - 0%

112. (Optional) If <u>costs</u> associated with <u>criminal</u> litigation in the Middle District are unreasonably high, what additional suggestions or comments do you have for reducing those costs?

no ans - 95%; (A) - 0%; (B) - 1%; (C) - 2%; (D) - 1%; (E) - 1%; multi ans - 0%