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

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August 12, 1993

Mark Shapiro, Esquire
Administrative Office of the United States Courts
Washington, DC 20544

RE: Civil Justice Reform Act Advisory Group Report for the District of South Carolina

Dear Mr. Shapiro:

Per your earlier request, I am enclosing a copy of the Report for the Civil Justice Reform Act Advisory Group for the District of South Carolina. This report has been submitted to our district court. The proposed plan at Appendix C is, therefore, merely the advisory group proposal. It has neither been adopted nor commented on by our judges.

Sincerely,

Virginia L. Vroegop

VLV/jfe

Enclosure

cc: Marvin D. Infinger, Esq.
Norma Reed

FINAL REPORT

of the

CIVIL JUSTICE REFORM ACT

ADVISORY GROUP

for the

DISTRICT OF SOUTH CAROLINA

Adopted: July 29, 1993

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FINAL REPORT
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INTRODUCTION AND OVERVIEW

In December 1990, the Civil Justice Reform Act ("CJRA") was signed into law. 28 U.S.C. §§ 471-482. The CJRA requires each district to develop a civil justice expense and delay reduction plan. To aid in the development of those plans, the CJRA directs the appointment of an advisory group for each district. These advisory groups are to study the condition of the docket and to make recommendations to the court to assist in developing an expense and delay reduction plan. This report is submitted by the advisory group for the District of South Carolina pursuant to that directive.[1]

In assessing the condition of the docket, the advisory group has necessarily had to rely on many quantitative measures such as time to disposition, average caseload and the like. These measures are only an indication of the speed with which the court accomplishes its tasks.

The business of the courts is the dispensing of justice as expeditiously as possible. No pursuit of better statistics should, however, compromise the quality of the decisions rendered. Our recommendations attempt to balance these competing concerns.[2]

The analysis of the "State of the Docket" in South Carolina demonstrates that, overall, our district disposes of cases expeditiously. On average, cases are disposed of in less than one year.

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[1] The advisory group for the District of South Carolina was comprised of court officials, private attorneys from throughout the state (representing both the plaintiff's and defense bar), other representatives of major categories of litigants, and a representative of the United States Attorney's Office. The members of the advisory group and their subcommittee assignments are listed at Appendices A and B to this report.

[2] "Justice delayed is justice denied" has become the phrase most associated with the CJRA. While this battle cry has its merits, it must be remembered that swift decisions are not necessarily swift justice.

Certain areas exist, however, in which the advisory group believes improvements could be made without sacrificing the quality of the justice dispensed. Recent improvements in the technology available to our district have made many of these suggested procedural changes possible. Recommendations directed to the courts are found at Sections III-VII of this report.

Not all recommendations are, however, directed to the courts. Congress also invited the advisory groups to identify significant contributions that might be made by "the litigants, the litigants' attorneys, and by the Congress and the executive branch." 104 STAT 5089 § 102(3) (1990) (Congressional Statement of Findings) (reprinted at 28 U.S.C.A. § 471, Legislative History). In addressing the barriers to swift adjudication, we have, therefore, considered both the "source" of the problem and numerous sources of the solution.

For instance, some of the changes recommended in this report require the active cooperation of attorneys practicing before the district court. Such changes are addressed by proposed changes to the local rules or changes in the enforcement of current rules. These include experimental changes in discovery mechanisms similar to those in the proposed revisions to the Federal Rules of Civil Procedure.

Similarly, some recommendations are directed to the legislative and executive branches. Congress, for instance, must consider the impact on the judiciary whenever it passes legislation which provides a remedy enforceable in federal court. This is not to say that Congress should not pass such legislation. Rather, Congress should realistically consider the legislation's impact and provide funding to handle it. Likewise, the executive branch must consider the impact on the docket of any stepped up enforcement measures.

STATE OF THE DOCKET

I. DESCRIPTION OF THE COURT AND DISTRICT

A. General Description of the District

The United States District Court for the District of South Carolina is divided into eleven divisions. These divisions are: Aiken, Beaufort, Charleston, Columbia, Florence, Orangeburg, Greenville, Spartanburg, Anderson, Greenwood, and Rock Hill. 28 U.S.C. § 121 (Cum. Supp. 1991)

The district covers the entire State of South Carolina and serves a diverse population. Major differences throughout the state in the density of the populations, industries and incomes contribute to the diversity. For instance, the three northwestern divisions, Anderson, Greenville and Spartanburg, are more urban and industrialized with generally higher incomes. The Columbia division, located in the state capital, includes two of the counties with the highest per capita income. It is also more urban and industrialized than many of the divisions. Other divisions with a "smaller town" feel but still higher than average per capita income include the Aiken and Beaufort divisions. A number of divisions for which the less urban environment is accompanied by substantially lower per capita income also exist. A greater discussion of the demographics of the district and supporting data are located at Exhibit 2 to this report.

B. Judicial Positions

For the statistical years ("SY")[3] 1985 through 1990, the District was authorized eight judgeships. In SY 1991 a ninth judgeship was authorized. 28 U.S.C. § 133 (Cum. Supp. 1991).

[3] A statistical year ("SY") runs from July 1, through June 30.

This position has since been filled. In addition, the district has two active senior district judges.[4] A tenth (temporary) judgeship was authorized during SY 1992 but has not been funded.[5]

The District is also authorized six magistrate judges. Four of these positions are full time and two are part time. As of the writing of this report, all magistrate positions were filled.[6]

C. Case Distribution within the District

As a result of the case assignment methods utilized in this district, differences in the divisions do not necessarily translate into differences in the judges' caseloads. For instance, appeals of Social Security benefit denials (which would be expected to be concentrated in the more populous areas) and prisoner petitions (which would otherwise be concentrated in the divisions in which the prisons are located) are rotated among all the judges regardless of their division.[7]

Also in an effort to evenly distribute caseloads, certain United States plaintiff cases are rotated among the judges within a division. These cases, which are generally disposed of with less judicial time than the "average" case, include: veterans' overpayments; student loan cases; and foreclosures. With the exception of asbestos cases and L-Tryptophan cases, all other cases

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[4] In SY 1991, the district's senior judges were assigned 459 newly filed cases and closed 468 cases. This amounted to 12.9% of the cases filed and 16.2% of the cases closed within the district. S. Roberson, Office of the Clerk of Court, D.S.C. at Exhibit 18. See also Exhibit 4 (general statistics).

[5] SY 1992 weighted case filings for the District averaged 466 per judgeship. Additional judicial positions are generally considered when a district reaches 450 weighted filings per judgeship. The Honorable Ann Birch, Clerk of Court, D.S.C.

[6] Two magistrate judge positions, both in the Columbia division, were filled in SY 1991 and SY 1992. One position remained vacant from May 20, 1991 through October 1, 1991. The other was vacant from May 31, 1992 through September 2, 1992. Both positions continued to receive case assignments during the vacancies. S. Roberson, Office of the Clerk of Court, D.S.C. The time gap with accruing caseloads plus heavy motions assignments appear to have contributed to disproportionate backlogs for these magistrates. See Exhibit 19 (Magistrate Judge Data).

[7] The Chief Judge and one senior judge do, however, take a reduced percentage of these cases.

A. Condition of the Docket

1. Filings and Judgeships

For the statistical years ("SY") 1985 through 1989, case filings and weighted case filings in the District of South Carolina demonstrated a pattern of slow but steady increase.[10] See figure 1 below. Case filings increased gradually from 3,813 in SY 1985 to 4,004 in SY 1989. This represents a total five percent (5%) increase over the course of five years. Expressed in terms of per authorized judgeship, the figures increased from 478 to 501 filings. Weighted filings[11] per authorized judgeship increased from 362 in SY 1985 to 421 in SY 1989 -- an increase of sixteen percent (16%) for the same period. During this five year period, the District of South Carolina was authorized eight judgeships which remained filled all but 3.7 "judgeship months" of the full period.

A substantial, but brief, decrease in case filings in SY 1990 foreshadowed an offsetting increase in SY 1991. There were 3,494 total case filings in SY 1990, compared to 4,238 in SY 1991. The average for the two years, 3,866 per year, was within the range for the preceding five years. Also in SY 1991, an additional judgeship was authorized. Had all judgeships been filled, the per judgeship case filings would have remained reasonably stable compared to the preceding five year average.[12] A total of 12.4 "vacant judgeship months" in SY 1991, however, resulted in an eleven percent (11%) increase in the total case filings per filled judgeship for SY 1991. In SY 1992, filings increased to 4,535. This represents a seven percent (7%) increase over SY 1991

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[10] Unless otherwise noted, all statistical data in this report is derived from the February 28, 1991 *Guidance to Advisory Groups* Memoranda ("*Guidance Memos*") with its October 1991 Update ("Update") and the Judicial Workload Profile for SY 1986 through SY 1991, all of which are located at Exhibit 4 to this Report.

[11] The "weighted filing" figures takes into account the anticipated workload imposed by the different categories of cases.

[12] Total case filings per filled judgeship increased from an average of 477 for the 5 preceding years to 529 in SY 1991. Case filings per authorized judgeship for SY 1991 was a much lower 471.

(4,238 filings) and a thirteen percent (13%) increase over the previous high in SY 1989 (4,004 filings).

Similarly, weighted case filings per authorized judgeship dropped in SY 1990 to 380 but rose again in SY 1991 to 425. This compared to an average of 386 for the preceding four years and a high in SY 1989 of 421. Although the SY 1991 weighted filings per authorized judgeship increased substantially over the SY 1990 figure, it barely exceeded the SY 1989 figure. By contrast, weighted filings per filled judgeship jumped from a relatively low 380 in SY 1990 (and the average of about 386) to 529 in SY 1991.[13] Had the newly added judgeship been filled, the weighted filings figure of 425 would have been in line with the trend of slow but steady growth, particularly when the balancing impact of SY 1990's low filing rate is taken into account.[14]

The SY 1992 figures, however, represented a further significant increase. Weighted filings per judgeship jumped to 466 from 425 in SY 1991. This increase is roughly ten percent (10%) higher than either SY 1991 or SY 1989 figures.

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[13] The Judicial Workload Profile shows a weighted filings per judgeship of 425. To correct for the vacancy of the newly added judgeship, we made the following calculations: {[authorized judgeships] x [weighted filings]}/[filled judgeships]= 9 x 425/8 = 478.

[14] Total case filings for each year with respective percentage changes from the prior year were as follows: SY 1985--3813 filings; SY 1986--3824 filings (+.3%); SY 1987--3875 (+1.3%); SY 1988--3895 (+.4%); SY 1989--4004 (+2.8%); SY 1990--3495 (-12.7%); SY 1991--4238 (+21%). Although SY 1991 filings represent a 21% increase over SY 1990, they represent only a 6% increase over SY 1989. SOURCE: 1991 Guidance Memo with Update (Exhibit 4 to this Report).

Figure 1.

Filings, Weighted Filing and Judgeships for District of South Carolina

Statistical Year:	85	86	87	88	89	90	91	92
Filings	3813	3824	3875	3895	4004	3494	4238	4535
Weighted Filings (per authorized judgeship)	362	362	382	379	421	380	425	466
Authorized Judgeships	8	8	8	8	8	8	9	9
Vacant Judgeship Months	0	0	3.7	0	0	1.9	12.4	7.6

SOURCE: Judicial Workload Profiles attached at Exhibit 4.

Prior to receiving the SY 1992 figures, this group speculated that two specific and non-recurring factors might have accounted for the majority of SY 1990's low and SY 1991's high filing rates: Hurricane Hugo and the L-Tryptophan multidistrict litigation. Hurricane Hugo, which struck South Carolina in the fall of 1989, disrupted not only lives and non-legal business but also law practices and court schedules in much of the state. As a result, Hugo probably contributed to the low filing rate for SY 1990 (July 1, 1989 through June 30, 1990). By the latter half of calendar year 1990 and throughout 1991, the District began seeing Hugo-related cases--thus, Hugo "contributed" to the high SY 1991 rate. The L-Tryptophan multidistrict litigation, which currently accounts for over 654 cases, likewise became a factor in SY 1991. These cases were treated as filed in the district during SY 1991.

With further increases reflected in the SY 1992 figures, however, it seems increasingly likely that this district may be experiencing a long-term change in filing trends.[15] The significant increase in weighted filings per judgeship is of particular concern.

As shown by the chart at figure 2 below, the number of diversity cases grew slowly from just under 1,000 in SY 1984 to just over 1,200 in SY 1988. Diversity cases then dropped slightly in SY 1989 (to approximately 1,160) and substantially in SY 1990 (to 945). The drop in SY 1990 was followed by a sharp increase in SY 1991 to 1,445. In the same period, federal question cases have risen steadily from 585 in SY 1984 to 970 in SY 1991. Only in SY 1988 was there any decrease.

Figure 2.

Filings by Category and Year

SY	Federal Question	Diversity	U.S. Plaintiff	U.S. Defendant
84	585	994	1,125	786
85	660	1,124	1,256	584
86	690	1,089	1,386	386
87	772	1,081	1,261	487
88	688	1,203	1,248	440
89	815	1,161	1,258	300
90	940	945	849	243
	970	1,445	973	268

SOURCE: Federal Judicial Center Supplemental Data (Letter dated 4/29/92) Exhibit 5 hereto.

See also full spreadsheet at Exhibit 5.

2. Pending cases

Pending cases fluctuated within a fairly narrow range from SY 1985 through SY 1990. See figure 3 below. A high of 2,990 cases in SY 1989 compared to a low of 2,750 in SY 1986 -- less than a ten percent (10%) difference. As with filings, the number of pending cases rose

[15] Only 278 of the cases filed in SY 1992 were L-Tryptophan cases. Clerk of Court, USDC DSC. These comprise only a part of the unusually large number and percentage of tort cases filed in SY 1992. See Judicial Workload Profiles for SY 1990 - 1992 at Exhibit 4 (Nature of Suit Classifications). No other identifiable group of cases appears likely to account for a substantial percentage of the high filing rate for tort cases. Further, no class of cases other than tort cases appears to account for a disproportionate share of the high filings. Therefore, it appears likely that the increased filing rates are not a one or two year anomaly.

substantially in SY 1991 to 3,740 and in SY 1992 to 4,145. Such increases would be expected from the increase in filings. By contrast, the pending caseload in SY 1990 (2,866) was actually several percentage points lower than the pending caseload for SY 1985 (2,960). This was likewise predictable from SY 1990's low filing rate. Initially, the heavy SY 1991 increase in filings and the corresponding increase in pending caseloads appeared to be anomalies caused by the two factors referenced above: Hurricane Hugo and the L-Tryptophan multidistrict litigation. Given the further increase in SY 1992, however, it appears more likely that this may foreshadow a long term change in the docket. Future monitoring is, therefore, necessary.

Figure 3.

Filings, Terminations and Pending Caseload for District of South Carolina

Statistical Year:	**85**	**86**	**87**	**88**	**89**	**90**	**91**	**92**
Filings	3813	3824	3875	3895	4004	3494	4238	4535
Terminations	3965	4034	3699	3841	3993	3643	3330	4035
Pending Cases	2960	2750	2927	2980	2990	2866	3740	4145

SOURCE: Judicial Workload Profiles attached at Exhibit 4.

3. Case terminations

Case terminations for the years SY 1985 through SY 1990 fluctuated as much as nine to ten percent (9-10%). See figure 3 above. Terminations did not, however, vary more than six percentage points from the SY 1985-90 mean of 3,862 terminations. The SY 1991 terminations figure, however, dropped significantly, to 3,330. This may be a reflection of the increased pretrial workload resulting from the heavy increase in filings prior to the filling of the ninth judgeship. Certainly, the figure has been impacted by the L-Tryptophan multidistrict litigation which came into the District in a lump of 650 cases for pretrial processing. If this is the case, the resulting "backlog" may be self-correcting. Such "self-correction" may have contributed to the significant increase in the terminations figure for SY 1992 to 4,035.

4. Ratio of pending cases to case terminations.

The Federal Judicial Center has suggested that one measure of a court's effectiveness in handling its caseload over time is the ratio of pending cases to case terminations. If this ratio decreases over time, it indicates that the court is improving on its overall disposition rate. See J. Shapard, *How Caseload Statistics Deceive* at 3 (August 9, 1991) (Exhibit 3 to this Report). The ratio also provides the basis for a good estimate of the average duration or lifespan of a case. This estimate is obtained by multiplying by twelve the ratio of pending cases to case terminations. The result is an approximation of average case lifespan expressed in months.

At the close of SY 1991, the ratio of pending cases to case terminations in the District of South Carolina was 3740/3330 or 1.12. For SY 1992, the ratio was 4145/4035 or 1.03. These figures represent increases from a ratio of .79 in SY 1990, .75 in SY 1989, .78 in SY 1988, .79 in 1987, .68 in 1986 and .74 in 1985. The pending to terminated ratios indicate that for six consecutive years (SY 1985-SY 1990), the district disposed of cases at a faster rate than they were filed. The figures also indicate an estimated case duration of less than nine and one half months. In the more recent statistical years, however, the ratio changed dramatically resulting in a disposition rate slower than the filing rate. This suggests an increase to an average duration between twelve and thirteen months. It also suggests that the court is "losing ground," though it is still maintaining a near even rate of pending cases to terminations.

The advisory group believes that the SY 1991 figure was most likely distorted by: (a) the heavy SY 1991 filing figures, particularly the filing of the L-Tryptophan litigation; and (b) the vacancy of an entire judicial position during SY 1991. The SY 1992 figure raises more concern, however, since it indicates some trend. Nonetheless, the SY 1992 figure is somewhat more favorable than SY 1991. Although the increase warrants further monitoring, it is notable that the SY 1991 and SY 1992 ratios indicate a disposition rate only slightly slower than the filing rate and an average duration at or slightly exceeding one year.

Given the district's laudable track record in maintaining a ratio consistently below .80 in prior years, the factors most likely causing the SY 1991 increase, and the positive movement in SY 1992, we are hopeful that earlier ratios might again be achieved. Our recommendations and analysis, however, reflect our perception that current trends may not be mere anomalies. Concrete but conservative measures may be required to insure continued timely progress of our civil dockets.

Similar estimated "life expectancy" data is available on a by-case-category basis. See Exhibit 5 (Spreadsheet and 4/29/92 Federal Judicial Center letter). For various reasons, however, this data shows significant year to year variations that make it a less reliable predictor of average case duration.

5. Time to disposition

Another conventional measure of timeliness is found in the median time from filing of a civil case to its disposition.[16] This figure has remained quite steady for the District of South Carolina from SY 1985 through SY 1991, fluctuating between seven and eight months.[17] This estimate is slightly better than but still in line with the rough estimate provided by the pending to terminated case ratio. See above § II.A.4..

The Federal Judicial Center suggests certain alternative means for measuring timeliness. One of these, Indexed Average Lifespan ("IAL"), permits comparison of the characteristic lifespan of one district's cases to that of all districts over the past decade. The IAL is indexed at a value of twelve which represents the national average for time to disposition, about twelve months. A value of twelve (12), therefore, represents an average speed to disposition. Lower numbers

[16] Although this figure can be misleading in certain circumstances, as where the court disposes of a disproportionate number of "older" cases, it is a fairly accurate measure when the figure remains relatively stable. Comments of J. Shapard, CJRA Seminar, April 6-7, 1991.

[17] See Exhibit 4 (*Guidance Memos* at 8-9). Civil median times exclude land condemnation, prisoner petitions, deportation reviews, all recovery of overpayment cases and enforcements of judgement cases. Inclusion of these cases would distort the figure downward. Id.

indicate a faster than average disposition rate. See Exhibit 4 (*Guidance Memos* at 14-15). The figures for the District of South Carolina for the past decade, shown in figure 4 below, indicate a faster than average disposition rate.[18]

Figure 4.

INDEXED AVERAGE LIFESPAN
FOR
DISTRICT OF SOUTH CAROLINA

Statistical Year:	**82**	**83**	**84**	**85**	**86**	**87**	**88**	**89**	**90**	**91**	
All Civil	13.1	11.1	10.5	10.7	9.2	9.7	9.6	9.8	10.9	10.0	
Type II Cases		12.0	9.5	9.4	9.0	7.6	8.4	8.5	8.7	9.4	9.5

SOURCE: Federal Judicial Center Supplemental Data (Letter dated 1/27/92) Exhibit 5 to this memo.

The stability of both measures of timeliness, median time and IAL, and the fact that both measures indicate average case duration of less than one year leads to the conclusion that the docket is in "good" shape. Comparison to the historic ratio of pending to terminated cases (Section II.A.4. above) reaffirms this conclusion, with the one caveat that recent increases warrant further monitoring.

6. Method of Disposition

In recent years, with the exception of SY 1991, more cases in the District of South Carolina seem to be requiring trial for ultimate resolution. Exhibit 4 (*Guidance Memos* at 8 & Judicial Workload Profile through SY 1991). The average of all "trials completed" per judgeship was thirty-nine (39) in both SY 1989 and SY 1990. This compares to twenty-eight (28) and

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[18] The table is broken down into "All Civil" and "Type II" categories. Type II cases make up 60% of the national civil filings and include such categories as contract actions (other than student loan, Veterans' benefits, and collection of judgement actions); personal injury (other than asbestos); non-prisoner civil rights cases; patent and copyright; ERISA, Labor, Tax, Securities, and other Federal Statute Cases. Exhibit 4 *Guidance Memos* at 10-11. These cases may be disposed of in a wide variety of ways. Type I cases make up the remaining 40% of "All Civil Cases." Id. Type I cases include categories which are generally handled in the same way within each category. These categories include student loan collection cases; veterans benefits overpayments; appeals of Social Security denials; state prisoner conditions of confinement cases; habeas corpus petitions; bankruptcy court appeals; land condemnation cases and asbestos product liability cases. Id. at 10.

twenty-seven (27) trials completed in SY 1986 and SY 1987 respectively. The SY 1989 and SY 1990 figures represent about a thirty percent (30%) increase over the two prior years. The low SY 1991 figure of twenty-five (25) trials completed may be an anomaly[19] resulting from a heavy increase in filings and pending caseload during SY 1991--particularly the addition of the L-Tryptophan multidistrict litigation. This is borne out by the SY 1992 increase to thirty-one (31) trials.

With the exception of SY 1991, the increase appears to result primarily from an increase in civil trials although increases in the number of criminal trials has contributed. See Exhibit 4 (Guidance Memos at 19). Criminal trials accounted for slightly less than twenty percent (20%) of all trials in SY 1985 through SY 1987, slightly more than twenty percent (20%) in both SY 1989 and SY 1990, approximately thirty-five percent (35%) of all trials in SY 1991 and approximately twenty-eight percent (28%) of all trials in SY 1992. In any case, the increasing necessity for trials is likely to result in increasing delays in the docket.

Another similar trend is the increasing percentage of cases with jury demands. From April 1, 1988 through August 13, 1991 the percentage of cases within the District demanding jury trials has risen steadily from just over thirty-one percent (31.33%) to forty-five percent (45%). Source: District of South Carolina Jury Demand Reports, Summarized at Exhibit 6. If an increased number of these cases also result in trials, even greater delays could result.[20] This

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[19] Possible causes include the vacancy of one judgeship and the impact of the "Operation Lost Trust" trials which occupied much of the Chief Judge's time in SY 1991 but accounted for only four (4) trials. The Chief Judge conducted a total of twelve (12) trials during SY 1991. J. Woodward, Office of the Clerk of Court, D.S.C. (4/21/92 teleconference).

[20] In SY 1991, sixty-four percent (64%) of the cases disposed of by trial verdict in the District of South Carolina were jury trials. This compares to a national average of fifty-one percent (51%). Of all cases reaching trial (but disposed of other than by verdict), 70% in this district were jury actions while only 51% of the nationwide total were jury actions. See Exhibit 5 (Shapard letter dated 11/19/91). Since the percentage of jury cases reaching trial exceeds the percentage of cases demanding a jury, it appears that cases with a jury demand are more likely to reach trial than are nonjury actions. The slightly lower percentage of jury cases actually resulting in a verdict implies that jury cases are somewhat more likely to settle during the trial

presumes that the "average" jury trial requires more judicial time than the average bench trial. Further, jury trials are necessarily more expensive, adding to the overall costs to the judicial branch. Currently, jury costs (civil and criminal) average $65,000 per month. With an average of twenty (20) jury trials per month, this translates to $3,250 per jury trial.[21] Some of these costs may be incurred even if the case is settled before trial, since a portion of the costs result from the jury selection process.

Federal statistics indicate that civil cases in South Carolina are more likely to reach trial than cases filed in other districts. Note that "reaching trial" includes cases disposed of after trial began by means other than a verdict. Figure 5 below compares the percentage of cases reaching trial by representative categories of cases.

Figure 5.

CASES REACHING TRIAL

Type of Case	SY 1991		SY 1990	
	National	South Carolina	National	South Carolina
Contract: Insurance	5.8%	7.3%	6.8%	11.5%
Contract: Other	4.6%	10.8%	4.6%	8.8%
Motor Vehicle Personal Injury	8.0%	8.9%	8.0%	11.5%
Other Personal Injury	9.4%	9.5%	9.2%	20.2%
Civil Rights: Employment	7.5%	19.6%	8.2%	14.8%
Civil Rights: Other	10.5%	12.8%	10.6%	15.7%
All Above	7.0%	10.7%	7.1%	12.6%

SOURCE: Federal Judicial Center Supplemental Data (Letter dated 1/27/92) Exhibit 5.

This does not, however, necessarily mean that judges in this district spend more time in trial than in other districts. Data suggests that South Carolina judges spend slightly fewer hours on the bench than does the "average" district judge. See figure 6 below. This contrasts with the higher average incidence of trials revealed above. The difference is explained in part by the

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or otherwise end short of a verdict. Id.

[21] Jury data as supplied by J. Woodward, Office of the Clerk of Court.

JS-10 data, which suggest that the average time taken by a civil jury trial nationally is about twenty-two (22) hours, but only about eleven (11) hours in South Carolina. Criminal jury trials average twenty-three (23) hours nationally, and eighteen (18) hours in the District of South Carolina.

Figure 6.[22]

SY 1991 TRIAL HOURS

	NATIONAL			SOUTH CAROLINA			SC AS % OF NATIONAL (8/645 jdgshps = 1.24%)		
	Crim.	**Civil**	**Total**	**Crim.**	**Civil**	**Total**	**Crim.**	**Civil**	**Total**
Total hrs	139,488	162,353	301,840	1,361	1,767	3,128	0.98%	1.09%	1.04%
Bench Trial	3,420	47,485	50,905	3	253	256	0.09%	0.53%	0.50%
Jury Trial	124,108	105,427	229,534	1,280	1,478	2,758	1.03%	1.40%	1.20%
Sentencing	4,335	0	4,335	54	0	54	1.25%		1.25%
Other	7,626	9,441	17,067	24	36	60	0.31%	0.38%	0.35%

SOURCE: Federal Judicial Center Supplemental Data (Letter dated 2/27/92) Exhibit 5 to this Report.

Regardless of the cause of any increases in the percentage of cases requiring trial and regardless of how this district's average trial time compares with that of other districts, the increase is an area of concern. Since the vast majority of all cases are resolved without trial, any increase in the percentage of cases requiring trial would likely result in substantial added burdens on the court. This would, necessarily, lead to future backlogs.

7. Percentage of Cases Three or More Years Old

The District of South Carolina has consistently had a very low percentage of pending civil cases which are three or more years old. The percentage from SY 1985 through SY 1992 fluctuated between a low of .8% (in SY 1985) to a high of 2.1% (in SY 1986 and 1989). The

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[22] The table below shows the total number of "trial" hours reported on the JS-10 form for statistical year 91, for the nation as a whole and for the district of South Carolina. The totals for bench (non-jury) and jury trials relates to real trials. The hours of "sentencing" pertain to "Evidentiary hearings involving disputed factors which relate to sentencing under the Sentencing Guidelines." The "Other" category includes all other contested hearings in which evidence is introduced. This table reports only time spent by Article III judges; time spent by magistrate judges is not reported on the JS-10 form. SOURCE: Federal Judicial Center letter dated January 27, 1992 (Exhibit 5).

SY 1992 figure of .9% was near the eight year low. See Exhibit 4 (Workload Profiles). See also SY 1991 Statistical Supplement at Chart 7 (of all cases terminated from SY 1989 through SY 1991 only 2.2% were 3 or more years old). The categories with the greatest percentage of "old" cases terminated within a given period are asbestos (14.7% of the asbestos cases terminated in SY 89-91 were three or more years old) and securities commodities cases (9.6% of the securities commodities cases terminated in SY 89-91 were three or more years old). Exhibit 4 (SY 1991 Statistical Supplement at chart 8). No other category of case included more than five percent (5%) of cases over three years old within the cases terminated in SY 89-91. Id. At this time, "very old" cases are not a major concern in this district.

8. Source of Cases

A substantial percentage of the civil cases in this district are removed from the state courts. Removed cases accounted for twenty percent (20%) of the total in SY 1991. See Shapard letter dated 11/19/91, Exhibit 5. This compares to a national average of twelve percent (12%). Id.

The increased percentage of removed cases in this district clearly signals a defense preference for the federal courts. This defense preference may be influenced by any one of a number of factors. The possible influences range from the traditional argument for diversity jurisdiction -- the protection of out-of-state litigants from possibly prejudiced state courts -- to seemingly mundane procedural differences.[23]

Whatever the reasons, however, the high removal rate is a trend to be watched. Further increases could cause significant backlogs. Nonetheless, in light of the policies behind removal,

[23] For instance, there are significant differences in jury pool composition between the state and federal courts. Most federal jury pools are pulled from one of three jury areas, each of which covers approximately one-third of the state. The remainder are pulled from a statewide jury pool (for more publicized cases). By contrast, state court juries are pulled only from the county in which the court sits. These differences may contribute to real or perceived "local" advantages for a plaintiff in state court.

particularly as to diversity cases, this group does not recommend any particular federal measure to stem the flow. As to federal question cases, we simply note that any additional federal legislation which creates federal remedies, even if jurisdiction is concurrent, will likely result in an even greater caseload for the district.

9. Survey Data

a. Attorney Survey Responses

The general conclusion reached from the statistical data is borne out by the attorney surveys. See Exhibit 7 for summary and analysis of the attorney surveys. Most attorneys whose responses revealed an opinion as to timeliness indicated that their cases reached trial or were otherwise disposed of in a reasonable time.[24] In fact, the single most common comment was that delay is not a problem in this district.[25] Nonetheless, a significant number, twenty-eight percent (28%), indicated that the particular cases surveyed should have been resolved sooner.

Those reporting delays or undue costs often cited to causes beyond the court's control such as bankruptcy of a party, Hurricane Hugo, interlocutory appeals, or delays in service. However, certain themes and suggestions were repeated with sufficient frequency to warrant the advisory group consideration.

In the order of frequency of response, the following were cited as causes of delay:

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[24] Only twenty-eight (28%) of the surveys indicated that the case took too long to resolve. A number of these indicated reasons beyond the court's control or delays of only two or three months. Forty-two percent (42%) indicated that the time was not excessive. Thirty percent (30%) did not give adequate information from which to determine the attorney's opinion of whether the time was appropriate. See Exhibit 7.

[25] Seventeen surveys specifically commented to this effect. In addition, five attorneys commented that the particular cases surveyed lasted longer than normal but that the greater time was necessary and appreciated. One even commented that cases coming up "too quickly" was more often a problem than was delay. See Exhibit 7.

Cause of delay	Number Reporting
Backlog of cases on court's calendar	20
Other (see comments: e.g. Bankruptcy, interlocutory appeal, Hugo)	11
Inadequate case management by court	9
Dilatory actions by counsel	7
Dilatory actions by litigants	7
Excessive case management by court	1
Court's failure to rule promptly on motions	1

Over half of the surveys, ninety-three surveys or sixty-two percent (62%), gave no response to this question. The question only sought a response if the responding attorneys believed "the case actually took longer than [they] believed reasonable." The limited response may, therefore, indicate a general view that delay is not a significant problem.

As to level of case management, twenty-four percent (24%) of the respondents felt case management by the court was "intensive" or "high". Another thirty-eight percent (38%) categorized the court's case management as moderate. Thirty-four percent (34%) categorized case management as "low", "minimal", or "none". The rest were unsure or did not respond.[26]

Those comments and suggestions from the survey which appeared with the greatest frequency are grouped below. They are set out in more detail in Section II to Exhibit 7.

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[26] For a detailed breakdown of the attorney's recollections of what particular means of case management were employed, refer to Exhibit 7 at question two. Disregarding the "not sures," "not applicables" and "no responses," the following represent the rough breakdowns: (1) roughly forty percent (40%) more attorneys felt the court held pretrial activities to a firm schedule than felt it did not (66 yes vs. 47 no); (2) sixty-two percent (62%) more believed the court set and enforced time limits on discovery than felt it did not (73 yes vs. 45 no); (3) thirty-two percent (32%) more felt the court did not narrow issues through conferences or other means than felt that it did (44 yes vs. 58 no); nearly three times as many (287%) reported that the court ruled promptly on motions than reported that it did not (69 yes vs. 24 no); almost thirty times as many reported no referral to alternative dispute resolution (ADR) as reported such referral (3 yes vs. 88 no); fifty-six percent (56%) more reported that the court did not set early and firm trial dates than that it did (41 yes vs. 64 no); over twice as many (218%) reported that the court did not conduct or facilitate settlement discussions as reported that it did (33 yes vs. 72 no); and nearly twice as many reported that the court exerted firm control over trials than reported the contrary (38 yes vs. 20 no). See Exhibit 7.

General comment	Number
Increase use of ADR/settlement conferences	6
Provide greater control of or limits on discovery	8
Provide more flexible (less expensive) means of discovery	4
Increase use of dispositive motions	5
Make greater use of magistrates	4
Modify jury selection procedures (reduce cost to attorneys)	3
Increase number of judges/courtrooms	5
Provide alternative case tracks	2

b. Litigant Survey Responses

In addition to the attorneys, we surveyed the litigants in our sampling of 159 cases. Responses, however, were only received from fifty-four (54) litigants[27] -- less than one sixth of those surveyed. Further, the responses were less than complete in many instances. In short, the survey results cannot be presumed to accurately reflect the views of the general litigant population. Nonetheless, the responses provide some insight into the views of those the system is designed to serve and will be briefly presented here. A copy of the litigant survey form and a more detailed discussion appears at Exhibit 15 to this report.

Almost two thirds, sixty-two percent (62%), of the litigants felt that their attorney received a fair fee. Sixteen percent (16%) felt that their attorney did not receive a fair fee and twenty percent (20%) said that they did not know. This compared with thirty percent (30%) who believed "costs" were much too high, twelve percent (12%) who thought they were slightly too high, and fifty percent (50%) who felt they were "about right."

The percentage believing "costs" were slightly or much too high (42%) is significantly higher than the percentage who felt their attorney did not receive a fair fee (16%). Because "costs" were not defined in the survey, this difference may indicate that, while a substantial

[27] Of those responding, twenty-two (22) were plaintiffs and thirty-two (32) were defendants. See Exhibit 15.

percentage felt their litigation was too expensive, they place the blame on something (or someone) other than their attorney.

Timeliness seemed a greater concern among the responding litigants. Well over half felt the matter took "much too long" (57%) or "slightly too long" (14%) to resolve. Slightly less than one third (29%) felt that the time to resolution was "about right."

Very few (14%) reported that either mediation or arbitration was tried. Several of those reporting use of such alternative means of dispute resolution apparently considered any settlement negotiations or conferences to be within these categories. The actual percentage using either mediation or arbitration, therefore, may be substantially less than fourteen percent (14%).

The remainder of the litigant survey responses are difficult to quantify or summarize. They range from general satisfaction to outright frustration with the system. Specific suggestions are similarly varied. A detailed summary of the litigant survey responses and suggestions is presented at Exhibit 15.

10. Judge Interviews

Interviews of the judges in this district revealed that most do not believe delay is a problem. See Exhibit 9 (Judge Interview Summary at question 9(a)). Eight of the ten judges interviewed indicated that delay was generally not a problem although one of these judges indicated that complicated cases do take too long. One of the two remaining judges felt that cases "may be" taking too long to come to trial. The remaining judge felt that "some" cases take too long to come to trial. In short, only one indicated a belief that cases generally take too long to come to trial while two other judges expressed the view that some cases or some categories of cases take too long to come to trial.

The judges were somewhat more likely to cite cost as a problem. Exhibit 9 at question 9(b). Two judges indicated that excessive cost was a problem. Both of these judges cited discovery as a primary contributor. One of these judges indicated effective use of Rule 11 of the

Federal Rules of Civil Procedure was necessary to discourage the filing of meaningless pleadings and motions. A third judge felt costs were sometimes excessive. He indicated that costs could be decreased by limiting discovery, early disposition of motions and moving the case quickly to trial.

Four judges felt that litigation costs in general were too high but that, relatively speaking, this district did not have a problem. Two other judges indicated that they did not perceive a problem with excessive costs. The tenth judge stated that he did not know the cost of litigating but believed costs could be decreased by curtailing discovery.

The following suggestions were repeated throughout the judicial interviews: (1) discovery is expensive, sometimes abused and may need both judicial control and self-imposed control by litigants (Exhibit 9 at 9(b), (c), (d) & (e)); (2) prompt disposition of motions contributes to early resolution of cases (Exhibit 9 at 9(b), (c), & (e)); and (3) establishing and enforcing deadlines and trial dates contributes to expeditious case processing (Exhibit 9 at 9(b), (c), (d), (e) & (f)).

11. Motions Docket

To say that most cases never reach trial is not to say that they don't require any judicial time. Most federal civil cases will require judicial resolution of one or more motions long before trial. Even if a motion is not dispositive, its resolution may have a major impact on moving the case along.[28] By contrast, it is common for the non-resolution of motions to stall both discovery and settlement negotiations. All of this is to say that expeditious resolution of motions is critical to good docket management.

As noted by a number of the judges, attorneys and litigants in their respective survey responses, delay in ruling on motions is seen as one cause of delay in resolution of cases. See above Sections II.A.9 & 10. Any delay in ruling on motions may well stall both the preparation

[28] See generally Exhibit 9 Judge Interview Summary at response to questions 9(c) & (e).

of a case for trial as well as any movement towards settlement. Because of the importance of the motions docket, this report separately considers its condition.

Tables A1 through A3 shown at Exhibit 11 reflect the number of pending motions by judge for the months of April, May and June of 1992.[29] The figures are broken down by the age of the motions. Tables shown at Exhibit 11 Tables B.1-3. reflect, by judge, the number of cases with pending motions in a given age category ("motions cases"). The latter table reflects, by percentage, the age distribution of each judge's motions cases. Table C to Exhibit 11 shows numbers of pending motions, by judge, as of April 2, 1993.

Note that as to all tables, no attempt was made to determine why any given motion was pending. It cannot, therefore, be assumed that the court has been remiss in deciding a motion simply because it appears in one of the "older" columns. For this and other reasons, these figures should be compared cautiously.

The overall percentage of motions cases over three months old was approximately fifty-nine percent (59%) in April, fifty-seven percent (57%) in May, and fifty-seven percent (57%) in June.[30] The individual judges' percentages of motions cases with motions over three months old ranged from eight percent (8%) to one-hundred percent (100%) in April. This extreme level of difference between judges may well relate to changes in the tracking methods after April since the May figures are far less disparate, ranging from thirty-nine percent (39%) to seventy-two percent (72%). The June figures ranged from thirty-five percent (35%) to sixty-nine percent (69%).

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[29] How these tables were prepared, what they may show, and the limits of their reliability are discussed more fully at Exhibit 11.

[30] Note that these are percentages of total cases with pending motions ("motions cases"), not of total cases pending before a given judge. Percentages were rounded to the nearest whole number resulting in minor inaccuracies in the percentages noted.

The overall percentage of motions cases with motions pending for over six months, was approximately forty percent (40%) in April, thirty-eight percent (38%) in May, and thirty-seven (37%) in June. Thus, for each month at least sixty percent (60%) of motions cases were under six months old. The differences between judges were, however, far more disparate. Individual judges ranged from five percent (5%) to seventy-four percent (74%) in April, eighteen percent (18%) to fifty-five percent (55%) in May, and sixteen percent (16%) to ninety-three percent (93%) in June.[31]

On the other end of the scale, motions cases over twelve (12) months old, the overall percentages were as follows: April thirteen percent (13%); May thirteen percent (13%); and June fourteen percent (14%). Individual judges ranged from one percent (1%) to twenty-five percent (25%) in April, from five percent (5%) to nineteen percent (19%) in May, and from six percent (6%) to twenty-two percent (22%) in June.

The April 1993 analysis was prepared using somewhat different breakdowns.[32] As of April 2, 1993, nine of eleven judges had at least thirty percent (30%) of their motions[33] in the under sixty-five (65) day age category (six of these nine had at least one-third in this grouping).

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[31] The individual judge percentages are, however, deceptive. This is particularly true for the April figures. For instance, the judge with 74% of his motions cases with pending motions over 6 months old (April), had only 11 such motions. The same judge in May had only 36% of motions cases in these categories but the number of cases had nearly tripled (to 30). This underscores the need to consider such statistical data with a critical eye and to consider all relevant factors: raw numbers; percentage changes in tracking methods; and the possible influencing factors such as specialized caseload.

[32] The April 1993 analysis was prepared as a base line against which to test progress towards a recommended goal of deciding motions within forty-five (45) days of completion of briefing. See Recommendations, Section V.B.. For this reason, the first bracket counts all motion under sixty-five (65) days from filing. The second is sixty-five (65) to 124 days. The third is 125-184 days. The last is over 185 days. These break down roughly into less than two months, two to four months, four to six months and over six months categories.

[33] For this analysis, all motions filed on the same day in the same case were treated as one motion.

The remaining two judges had twenty-seven percent (27%) and nine percent (9%) in the under sixty-five (65) day age category.

Ten of the eleven judges had at least one-half of their pending motions under a 125-day-from-filing age (roughly four months). Four of these had at least two-thirds under this age.

Percentages of motions over six months old ranged from twelve percent (12%) to sixty-seven percent (67%). Eight judges had less than thirty percent (30%) of their motions in this age category. Four judges (included in the seven) had less than 20% of their cases in this category.

Although the SY 1992 and SY 1993 figures are not directly comparable and although the analysis makes no attempt to determine the reason why any given motion has not been resolved, some conclusions can be drawn from this data. First, it is obvious that there are substantial variances between the judges. Second, there are clearly a significant number of motions which remain unresolved for four or more months from the filing date. Further, it seems likely that a significant number of these are not being held in abeyance for any particular reason. From the above data and the advisory group's common experience we believe the net effect of the current docket is to delay the progress of the district's cases. While the degree of delay appears only limited with some judges, it appears to be a serious problem with others. This advisory group recommends that some mechanism be established to monitor the state of the motions docket, to encourage progress towards a goal mutually agreed upon between the judges, and to facilitate resolving backlogs as they arise. See Recommendations Sections IV.B. & V.B..

12. Magistrate Judge Caseload

At the time of drafting this report, only limited information was available regarding magistrate judge civil caseload.[34] See Exhibit 19. The available data indicates a fairly even rate of assignment of civil caseloads and relatively even civil caseload distribution between the full-time magistrates. Rates of motions assignments and pending motions workload, however, vary widely.

While the current data is an insufficient basis for reaching any conclusion, regular preparation of data such as that shown at Exhibit 19 should facilitate better utilization of the District's magistrates. By referring to such data, the magistrates can better evaluate their own workload. Similarly, District Judges can better evaluate whether referral of a matter or motion will, in fact, expedite its handling.

13. Criminal Docket Status and Impact

As demonstrated by figure 8 below, time expended in criminal trials has more than quadrupled in the past four years. By contrast, time spent in civil trials has dropped to sixty-five percent (65%) of its SY 1988 level. As a result, criminal cases which took up less than ten percent (10%) of the trial time in SY 1988 now account for forty-three percent (43%) of the courts' trial time.

Figure 8.

Trial Hours by Civil vs. Criminal Breakdown

SY	Civil	Criminal	Total
88	2,696	290	2,985
89	2,582	783	3,364
90	2,289	830	3,118
91	1,767	1,361	3,128

SOURCE: Federal Judicial Center Supplemental Data (Letter dated 4/29/92), Exhibit 5 hereto.

[34] The available information does not reflect the full workload as it does not cover the criminal side.

Congressional and executive branch actions which relate to criminal prosecutions are believed to be largely responsible for the growing criminal docket and its consequential impact on the civil docket. See Exhibit 8 (E. Bart Daniel, The Impact of Criminal Cases on the Civil Docket); Judge Interview Summary Exhibit 9 at question 8(a). The two congressional actions most greatly impacting the docket were passage of the Speedy Trial Act and the Sentencing Reform Act of 1984. Executive branch actions impacting the docket include various stepped up enforcement moves.

The Speedy Trial Act (18 U.S.C. § 3161) requires trial of a criminal defendant within seventy (70) days of the defendant's initial appearance in the district. As a result, recently filed criminal actions take precedence over civil cases, regardless of the age of the civil case.

The Sentencing Reform Act of 1984 resulted in the creation of sentencing guidelines for federal criminal offenses. These guidelines limit a court's discretion in imposing a sentence and may, therefore, contribute to an increase in the percentage of cases requiring trial.[35] More significantly, these guidelines greatly increase the time required for sentencing hearings. The court's determination of the existence of any one of a number of factors may make a difference of years in the sentence. Therefore, defendants are likely to contest various assertions in the government's sentencing report.

The Speedy Trial Act and Sentencing Guidelines may have a significant negative impact on the civil docket without being evident in the readily available statistics. This is in part because they are added burdens not reflected in increased filings. The executive branch impact is, however, reflected in the statistical data. See figure 9 below.

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[35] Any such increase may, on the other hand, be explained by other statutes imposing minimum sentences since such statutes limit the ability to plea bargain. See e.g. 18 U.S.C. § 924(c) (imposing minimum five (5) year sentence for certain firearms offenses).

Figure 9.

Criminal Felony Filings for District of South Carolina

Statistical Year:	85	86	87	88	89	90	91
Filings (per authorized judgeship)	25	35	33	40	57	65	65
Median Time in Months (filing to disposition)	4.1	4.6	4.6	4.1	5.8	6.5	7.1

SOURCE: Judicial Workload Profiles attached at Exhibit 4 (Guidance to Advisory Groups Memo, Feb 28, 1991; and updated data through June 30, 1991).

In the most recent two and one half years, the number of assistant United States attorneys in the district increased by fifty percent (50%) from twenty-nine (29) to forty-two (42). It is believed that this staffing increase resulted in an increase in federal criminal prosecutions. See Figure 9 above (per judgeship criminal filings increased from forty (40) on SY 1988 to sixty-five (65) in SY 1991, representing a total filings from 320 to 585 in SY 1991, an over eighty percent increase); Report of E. Bart Daniel at Exhibit 8. Similarly, increases in the number of investigators in various federal agencies have increased the number of cases referred for prosecution. Finally, the cases prosecuted have become increasingly complex requiring greater court time.

14. Pro Se Filings

Pro se filings in this district have risen dramatically in recent years as shown below:

Figure 10.

	SY 1989	SY 1990	SY 1991
Prisoner	267	385	381
Non-Prisoner (exclusive of Landmark cases)	70	81	227
Landmark[36]	--	--	1,047

SOURCE: Clerk of Court, U.S. District Court for the District of South Carolina. See Exhibit 10.

[36] The "Landmark" cases are individual petitions filed as to one specific bankruptcy matter. They are counted separately to avoid distorting the statistics.

As demonstrated by these figures, non-prisoner pro se filings have more than tripled since SY 1989 while prisoner cases are up by more than forty percent (40%). This is even without taking into consideration the "Landmark" claims. See note 36.

Pro se cases present special difficulties and may place greater demands on the court. As a result, such matters may consume a disproportionate amount of the court's time and resources. The increase is, therefore, of particular concern.

The District of South Carolina has recently been authorized a pro se law clerk. This position is expected to have a significant impact in the expeditious handling of pro se matters.

B. Cost and Delay

As noted in the preceding discussion of the Condition of the Docket (Section II. A.), excessive cost and delay have not been major problems in this district. Certain recent trends must, however, be addressed to insure that problems do not develop in the future. Further, as in any system, improvements can be made to our current procedures.

The advisory group has identified the following as factors which contribute to unnecessary delay and, consequently, cost:

- Backlogs in the disposition of motions in some cases;
- Nonavailability of a more expeditious means for disposing of smaller or simpler cases;
- Failure to encourage and make available some form of alternative dispute resolution;
- Encroachment of the criminal docket;
- Increasing availability of a federal forum to resolve disputes of a type formerly the province of state courts (without corresponding increases in judicial resources).
- Lack of adequate courtroom and parking facilities in certain divisions.

RECOMMENDATIONS

III. OVERVIEW

Pursuant to the Civil Justice Reform Act, this advisory group was directed to consider the following principles:

(1) the systematic differential treatment of cases to provide for individualized and specific management according to each case's needs, complexity, duration and the available judicial resources;

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

(3) careful and deliberate monitoring of complex cases;

(4) encouragement of cost effective discovery;

(5) conservation of judicial resources by prohibiting consideration of discovery motions not accompanied by certification of consultation; and

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

See 28 U.S.C. § 473(a) (paraphrased). In considering these principals the group is directed to also consider the following specific techniques:

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

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

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

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

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

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

28 U.S.C. § 473(b).

In addition to the mandated areas of consideration, and as authorized by 28 U.S.C. § 473(b)(6), the advisory group also considered:

- Improvements in the availability of courtroom and parking facilities
- Means of decreasing the adverse impact of the criminal docket
- Recommendations to the administrative and legislative branches as to actions which impact the judicial branch
- Miscellaneous recommended modifications or clarifications to the district's local rules
- Variances from the Federal Rules of Civil Procedure
- Means of handling cases returning from multidistrict litigation consolidation
- General personnel needs of the district

While this report briefly discusses various proposals to the Federal Rules of Civil Procedure, it may not, in all cases, take into account the impact of the Federal Rule amendments on our proposals and current local rules. Full consideration of the proposed revisions was not given as the Federal Rule revisions were under discussion during the same period in which this advisory group was preparing its report.[37] The plan ultimately adopted for this district will need to resolve any conflicts between our recommendations and the amendments to the Federal Rules. Exhibit twenty-two (22) to this report outlines areas of potential conflict or concern.

These recommendations are reflected in the draft plan attached as Appendix C.

[37] Various versions of the proposed rules were under discussion throughout the period this group met. The United States Supreme Court issued its order adopting the ultimate version on April 22, 1993. These are published in 146 F.R.D. 404 (1993).

IV. SYSTEMATIC DIFFERENTIAL TREATMENT OF CASES AND MONITORING OF COMPLEX CASES

A. Analysis and Overview of Recommendations

The CJRA requires consideration of the "systematic differential treatment of cases." 28 U.S.C. § 473(1).[38] Systematic differential treatment means "individualized and specific management according to each case's needs, complexity, duration and probable litigation careers." Id. The CJRA also calls for careful and deliberate management of complex cases, particularly as to discovery.[39]

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[38] The Civil Justice Reform Act requires the district, in consultation with the advisory group to consider

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

28 U.S.C. § 473(a)(1). See also 28 U.S.C. § 473(b)(1) (joint presentation of discovery plan at pretrial conference); and (b)(2) (requirement of party signature on requests for extension).

[39] The Civil Justice Reform Act requires the District to consider the following principles and guidelines

> (3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer-
>
> (A) explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;
>
> (B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;
>
> (C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedure a district court may develop to;
>
> (i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and
>
> (ii) phase discovery into two or more stages; and
>
> (D) sets, at the earliest practicable time, deadlines for filing motions and a time frameworth for their disposition.

28 U.S.C. § 473(a)(3).

Our advisory group determined that current procedures in these areas are generally adequate given the nature of cases in this district and the state of the docket. Current local rule interrogatories require early input for from all non-exempt parties[40] as to the law and facts at issue as well as the amount of and anticipated time for discovery.[41] See Local Rules 7.05 and 7.06, DSC (discussed below § V.A.). These local rule provisions are specifically designed to implement Federal Rule 16(b). Local Rule 7.02, DSC. The courts routinely issue scheduling orders which take the requested time frames into account in setting discovery deadlines. These orders also set deadlines for joining parties, amending the pleadings, and filing motions. D.S.C. Local Rule 7.01.

The input obtained from the local rule interrogatories generally provides adequate information from which the court can determine the level of complexity. It also satisfies the CJRA's call for joint pretrial input into a discovery plan. 28 U.S.C. § 473(b)(1). The local rules also recognize that some cases may "require special treatment." Local Rule 7.02, DSC. A few of our judges regularly hold early consultation conferences and most will do so on request. See "Judge Interviews, Summarized Responses" at I.A.2.(a) and (b) (Exhibit 9). If the judges of this district, nonetheless, perceive lack of early notice of complexity to be a problem, an interrogatory directed towards level of complexity could be added to the local rule interrogatories. If the response led the court to conclude more intensive case management was needed, the court could then schedule appropriate conferences.

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[40] Certain classes of cases are exempted from these requirements. Local Rule 7.03., DSC.

[41] Standard interrogatories from the court ask each party to: "Outline in detail the discovery you anticipate you will pursue in this case and state the time you estimate it will take you to complete each item of same, along with an explanation of how you compute said times." Local Rule 7.05(g) and 7.06(h), DSC.

Most attorneys attempt to abide by the above referenced scheduling orders or seek modification through agreement (with judicial consent) or judicial intervention.[42] Such agreement or intervention allows modification of initial scheduling to take into account any increased complexity of the case. Judges vary in their willingness to relieve parties from missed deadlines (absent prior request for modification),[43] but generally attempt to strike a balance between enforcing the scheduling order and accommodating legitimate needs for extensions.

Current local rules governing automatic disclosure, scheduling and early judicial involvement, handle this district's complex case management needs well. See also "Judge Interviews, Summarized Responses," at Exhibit 9 hereto (Responses to A.5. (pretrial conferences and bifurcation)). Inadequate judicial involvement was cited as a problem in only nine (9) of the 141 responses to the Attorney Survey. The experience of this advisory group is, likewise, that this district's judges are willing to step in and provide increased control when requested and appropriate.

For these reasons, the advisory group does not believe that any other changes to present procedures regarding complex case management are required or advisable. To the extent this district's judges may, nonetheless, perceive complex case management to be a problem, such cases could be identified through the local rule interrogatories and targeted for increased management as envisioned by 28 U.S.C. § 473(a)(3).

This advisory group similarly does not perceive that it is necessary or appropriate to require parties to sign requests for extensions of discovery or other deadlines. See U.S.C. §

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[42] Pursuant to Local Rule 12.11, motions for proposed consent orders extending any deadlines must be accompanied by affidavit. Though not expressly stated, this rule confirms that mere agreement of counsel is not enough to extend a court imposed deadline. Our judges generally grant consensual extensions. See "Judge Interviews, Summarized Responses" at A.1.(b) (Exhibit [9]) to this Report). The judges vary in their willingness to grant nonconsensual extensions. Id.

[43] See "Judge Interviews, Summarized Responses" at A.1.(b) & (c) (Exhibit 9 to this Report).

473(b)(3). Extensions already require an affidavit or statement of counsel as to the reason for the extension. See Local Rule 12.11, DSC. Requiring the party's signature would add steps and require more time. To the extent there is any problem in this district with requests for extensions without client input, this group believes it is limited to requests for extension of the trial date. Therefore, when there have been multiple requests for extension of time for trial we encourage the court to require an affirmation of counsel, either that requesting counsel has consulted with and has the approval of the client, or a statement as to why the attorney has not done so.

Taken as a whole, the procedures contemplated by Local Rule 7 coupled with current practices discussed under the section of this report titled "Early Judicial Involvement" (Section V. below) are generally adequate to insure sufficiently individualized case management. The following areas were, however, identified as needing further attention:

- Motions docket tracking to facilitate earlier resolution of motions and related recommendations to deal with any backlogs (see Section V.B.) below;
- Use of judicial "swat teams" if motions become backlogged on a particular docket (see this section ¶ B below);
- Voluntary expedited docket for simple cases (see this section ¶ C below); and
- Use of settlement (mediation) week form of alternative dispute resolution (see Section VII.B.2.a. below).

With the exception of the "swat team" and "expedited docket," these suggestions are discussed in later sections of this report. Further, the first suggestion, to create a means of motions tracking, was already being implemented by the time of the completion of this report.[44]

[44] New software made available to the court enabled this tracking to be put in place. The present software is reportedly capable of generating a report showing the number of motions pending over a particular period of time. Such a report would be especially helpful in implementing the motions docket suggestions. See below § V.B..

B. Use of Judicial "Swat Teams"

The following section of this report (Section V.B.) addresses motions practices. It recommends a goal of resolution of most motions within forty-five (45) days of completion of briefing. To reduce backlogs when this goal is not met (by some substantial margin) the advisory group recommends use of a judicial "swat team."

Under the swat team approach, one or more additional judges (possibly senior judges or magistrates) would set aside a period of several days to hear and rule on motions on another judge's docket. This procedure would be implemented if a judge's docket became particularly backlogged, for example, if half or more of the motions remain unresolved sixty (60) days past completion of briefing.[45] The specific procedure would be as developed by the Chief Judge.[46]

C. Establishment of an Expedited Docket

The advisory group also recommends adoption of a voluntary expedited docket. This docket would be modeled on the recommendation of the Advisory Group for the Western District of Texas (excerpt attached at Exhibit 16):

> We thus recommend that the . . . District create a "rocket docket" and assign that rocket docket to the full time magistrate judges. For those attorneys and litigants who believe that practice in federal court is unduly burdensome because of judicial interference in pretrial preparations, the rocket docket should

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[45] Such a situation might arise for any one of a number of reasons including a particularly heavy or complex caseload, illness of a judge, or vacancy of a position. The cause of the backlog may have some impact on when to schedule the hearing dates and on the best means of dividing up the motions to be addressed.

[46] One possible procedure would be as follows. Prior to the motions hearings dates, the older pending motions would be divided between the swat team members according to their authority to resolve motions and any special circumstances making it more appropriate for a particular judge to hear a particular matter. For example, only nondispositive motions would be assigned to a magistrate participating in the team while those motions which require an increased knowledge of the underlying matter might be reserved for the judge whose docket is being addressed. Parties or their counsel should, however, be entitled to request hearing by the judge whose docket is being addressed. Such requests should set forth the reasons for the request (such as that the motion is closely tied to the merits or is an evidentiary issue which should be ruled on by the trial judge). Simpler motions for which a court reporter is waived might be heard by teleconference or in chambers, particularly if courtroom space is limited.

> offer several benefits. We recommend that no Rule 16 scheduling orders be issued in rocket docket cases. This would simply requiring amending Local Rule [7.03] to add rocket dockets cases as an additional exemption. . . . We also recommend that the Court excuse parties who consent to being placed on the rocket docket from filing pretrial orders. Instead, parties on the rocket docket would simply supply proposed findings and conclusions in nonjury cases and proposed instructions for a general charge in jury cases.
>
> For those attorneys and litigants who believe that motion practice in federal court often creates undue expense because of excessive briefing requirements, the rocket docket should offer the benefit of oral hearings with whatever limited briefing the parties agree to submit on nondispositive motions. . . . . [F]or those litigants and attorneys who want their dispute promptly resolved, the rocket docket should offer the guarantee of a trial within [six] months of consent. If the magistrate judge cannot guarantee a trial within [six] months, the magistrate judge should promptly notify the parties of the earliest available firm trial setting. Any party should be permitted to withdraw its consent to placement on the rocket docket at that point if the party so elects. The sole condition to being placed on the rocket docket and achieving these benefits should be that the parties consent to trial before a magistrate.

Report of the Advisory Group for the United States District Court for the Western District of Texas at 108-110.[47]

Local rules implementing this procedure would be modeled on the proposed rules form the Western District of Texas ("WDT") with the modifications discussed in the preceding notes. We do not anticipate that the availability of a rocket docket will create a sudden flood of cases for the magistrates. As the benefits become known to the legal community and litigants, however, we would anticipate a growing number of consents to referral.

Of course, if magistrates are not available to handle expedited cases, the benefit of the procedure will be lost.[48] Further, courtroom facilities and additional court reporters may be

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[47] Since we are not recommending mandatory alternative dispute resolution other than possible opt-out mediation (see § VII below), we have deleted the portion of the Western District of Texas Report relevant to exempting rocket docket cases from mandatory ADR. We have also modified their recommendation to reflect a six month rather than a four month maximum time to trial.

[48] The advisory group notes that magistrates are currently heavily utilized. As such, it may be appropriate to consider more limited assignment of motions to one or more magistrates during a pilot test of the rocket docket. Alternatively, the district might seek approval for a temporary magistrate to assist in handling current magistrate workload, plus the new Rocket Docket.

needed. These recommendations are, therefore, made subject to availability of magistrates and support.

V. EARLY JUDICIAL INVOLVEMENT[49]

A. Current Authority

Under the current local rules, this district has the authority for and procedures implementing early judicial involvement. See generally "Judge Interviews, Summarized Responses," Exhibit 9 hereto (Responses A.1-2); and Local Rule 7.14, DSC (expressly recognizing 16(b)'s directive for early judicial involvement). These rules provide for scheduling conferences to be held within 120 days after filing of the complaint. Local Rule 7.01, DSC.[50] The conferences may be held by a variety of means (including by telephone or through correspondence). Id. Our local rules, however, further envision that answers to standard court interrogatories will normally satisfy the scheduling conference requirement. Local Rule 7.02, DSC.

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[49] The Civil Justice Reform Act requires the District to consider the following principles and guidelines:

> (2) early and ongoing control of the pretrial process through involvement of a judicial officer in-
>
> (A) assessing and planning the progress of a case;
>
> (B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint, unless a judicial officer certifies that-
>
> (i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or
>
> (ii) the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases;
>
> (C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; and
>
> (D) setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition.

28 U.S.C. § 473(a)(2). See also 28 U.S.C. § 473(b)(1) (joint discovery plan) and (b)(2) (attorney present at pretrial conferences should have authority to bind).

[50] The scheduling conference provisions are intended to implement Rule 16(b) of the Federal Rules of Civil Procedure. Local Rule 7.02, DSC. Certain classes of cases are exempted. Local Rule 7.03, DSC.

Standard court interrogatories apply to both plaintiffs and defendants. They seek information as to: the factual basis of the complaint; the laws, legal principles, standards and customs applicable to the action; identification of lay witnesses who may be called and the issues to which their testimony relates; identification of expert witness and the subject matters and grounds for their opinions; the amount and method of calculating damages; identification of any subrogation interests or insurers; identification of other parties a defendant contends are liable; an outline of anticipated discovery; the manner of trial requested (jury or nonjury); identification of the responding party's partners or corporate affiliates if applicable (or defendant's proper identification if improperly identified in the complaint; and the basis for selecting the particular division or for objecting to it. Local Rules 7.05 and 7.06, DSC. These rules are self-executing. See Rules 7.07 through 7.13, DSC. The answers must be signed by counsel and the party. Local Rule 7.13(b), DSC.[51]

This advisory group believes that these local rules generally address the need for early judicial involvement adequately. Specifically, the information gathered through these requests is used to schedule discovery, amendment, and motions deadlines as well as to set a subject-to-trial date. See 28 U.S.C. § 473(a)(2) A, B, C & D. See also Section IV. above.

The CJRA's suggestion of setting early, firm trial dates, 28 U.S.C. § 473(a)(2) B, while appealing, does not appear workable given the impact of the criminal docket and general vagaries of docket planning. Some element of this technique is, however, present in the setting of a subject-to-trial date found in most (if not all) initial scheduling orders.

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[51] The CJRA suggests requiring the attorney who attends pretrial conferences to be authorized to bind the party on previously identified matters. 28 U.S.C. § 473(b)(2). To the extent local rule interrogatories satisfy pretrial conference needs, these signature requirements satisfy the CJRA's suggested requirement. This advisory group would further anticipate that the court would require the attorney attending any pretrial conference to have authority to bind the party on previously identified matters.

Although local rules and procedures as to early judicial involvement are generally adequate, the advisory group believes that some modifications may be helpful in the areas of motions practices, extensions of time to answer, and discovery procedures. Motions practices and extensions of time are discussed below. Discovery is addressed in Section VI.

B. Motions Practice

One form of common judicial pretrial involvement relates to the resolution of motions. This district already has procedures requiring prefiling consultation as to most motions. Local Rule 12.02, DSC. Local rules also adequately address the requirement for and content of supporting memorandum and time for filing. Local Rules 12.03-07, DSC. The time from filing to resolution of motions is, however, a growing area of concern. Any delay in resolution of a motion may well delay ultimate resolution of the action. See also Section IV.B. above.[52]

The advisory group recommends that a goal be established seeking resolution of all motions within forty-five (45) days of completion of briefing, absent specific reasons prohibiting such resolution. To aid the court in achieving this goal, local rules or standing orders should be adopted:

1) encouraging use of oral rulings and minute orders as to most motions; and

2) acknowledging that it is fully appropriate for a judge to request a draft order from counsel for the prevailing party[53] when the circumstances of the motion make it appropriate to include the court's rationale in the order; and

3) setting forth guidelines for the use of proposed orders.[54]

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[52] For the judicial view and discussion of motion practice in this district see Exhibit 9 hereto "Judge Interviews, Summarized Responses," (Responses to A.4.(a)-(g) & A.9.(e)).

[53] As noted below, the advisory group makes this recommendation with the expectation that opposing counsel will have an opportunity to examine and comment on the proposed order before it becomes the court's order.

[54] The United States Supreme Court and the Fourth Circuit have issued opinions acknowledging that it is not improper to solicit and adopt proposed findings if the court exercises independent judgment in adopting or revising the proposed findings. See Anderson v. Bessemer City, 470 U.S. 564, 571-73 (1985); and Aiken County v. BSP Division of Envirotech Corp., 866

In the latter case, counsel will be encouraged to provide the order by hard copy and on diskette (if their word processing system is compatible with the court's).

In those cases in which the court requests counsel to draft an order, the advisory group strongly recommends that the rules require that a copy of the proposed order be served on opposing counsel. Opposing counsel should then have a reasonable time in which to comment on the proposed order. The specific amount of time allowed as well as the scope and method of comment should be within the courts' discretion. For instance, comment might be by redlined draft or by letter. Comments might also be limited to matters which appear to differ from the court's oral ruling or drafting instructions in order to prevent rearguing.

Implementation of the suggested forty-five (45) day goal should be facilitated by current electronic motions docket capabilities. The Office of the Clerk of Court can request a report, by judge, listing all motions filed prior to any given date. The resulting list can be printed either in order of motion filing date or in case number order.[55] By reviewing this list, each judge can quickly and easily determine how many pending motions exceed any given age from data of filing. The judge can then eliminate any motions for which there is a reason not to decide the matter and focus on the remaining older pending motions. The available electronic motions docket should, at the least, provide a fairly simple means of tracking progress towards the forty-five (45) day goal.[56]

F.2d 661, 676-77 (4th Cir. 1989).

[55] Teleconference with J. Matras, Office of the Clerk of Court (February 24, 1993).

[56] Allowing the standard times for briefing (Local Rules 12.06 and 12.07), a motion should normally be fully briefed within twenty (20) days of filing. For purposes of tracking progress, therefore, the court could utilize sixty-five (65) days from filing as an approximation for forty-five (45) days from briefing.

C. Extensions of Time to Answer

Rule 6(b) of the Federal Rules of Civil Procedure contemplates that all extensions of time to do any act required by federal rule or court order require court approval. Our Local Rule 12.11 requires such extension requests to be made by motion with accompanying affidavit. Local Rule 7.14 states that in order to conform with the mandates of Rule 16 of the Federal Rules of Civil Procedure the court must be more restrained in granting extensions. This local rule further states that it applies equally to time to answer. Local Rule 7.14.

With the exception of extensions of time to answer, this advisory group takes no issue with current federal or local rules as to extensions of time. The requirement of judicial involvement to extend time to answer with the added affidavit requirement and indication of restrictive application, however, seems counterproductive. Considering that the federal rules require an answer within twenty (20) days of service, time lost while a complaint makes its way to the appropriate party within an organization and the common need to locate and hire counsel, extensions of time to answer are often needed. In practice, they are also frequently granted.[57]

This group, therefore, recommends this district adopt a local rule allowing a one-time extension of time to answer based on a consent order submitted by the parties. No affidavit would be required. Though not addressed to this district, we further recommend the Federal Rules of Civil Procedure be modified to set a thirty (30) day time to answer (or otherwise providing for extended time to answer)[58] and to allow a one-time extension of time to answer by written consent of the parties. See also Section VIII.D. and E. below.

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[57] Rule 16 of the Federal Rules of Civil Procedure does not appear to address extensions of time to answer. While it does state that scheduling orders, once established, should only be modified upon a show of good cause, the envisioned order does not address time to answer. In fact, it need not be established until well after the answer is due. Fed. R. Civ. P. 16(b) (scheduling order is to be issued no later than 120 days after the complaint is filed.).

[58] Federal rule modifications currently under consideration include provisions granting increased time to answer if service by mail is accepted. See Proposed Rule 12. Such an incentive would encourage cooperation and reduce litigation costs and is endorsed by this advisory group.

D. Discovery

Recommendations as to discovery are addressed in Section VI below.

VI. COST EFFECTIVE DISCOVERY[59]

The Act directs each advisory group to consider implementing the following principles:

(4) encouragement of cost effective discovery; [and]

(5) conservation of judicial resources by prohibiting consideration of discovery not accompanied by certification of consultation.

28 U.S.C. § 473.[60]

The latter recommendation is already covered by local rule in this district. Local Rule 12.02 D.S.C.[61] Discovery planning and scheduling is addressed above at Sections IV and V.

Current local rules also place limits on the quantity of discovery. Local Rule 9.00, DSC. Each party is limited to fifty (50) interrogatories (including subparts) and twenty (20) requests to admit. Id. Further requests require prior court approval and must be accompanied by affidavit "setting forth in detail the need for the extension." Id. Unnecessary requests or unwarranted opposition are subject to sanctions.

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[59] The Civil Justice Reform Act requires the District to consider the

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

28 U.S.C. § 473(a)(4) & (5). See also 28 U.S.C. § 473(b)(1) (joint discovery plan) & (b)(3) (requests for extension of, e.g., discovery deadlines should include party signature). For our recommendation as to the requirement of a party signature see section IV.A. above.

[60] Throughout the period during which this advisory group has discussed these discovery proposals, various federal rule changes relating to discovery have also been under consideration. While we have considered the substance of the proposals for federal rule changes, we have not directly addressed the possible impact of these proposals on our recommendations. Such an analysis can best be undertaken after the new federal rules are established.

[61] For the judicial view of how the discovery procedures are implemented in this district, see Exhibit 9 hereto, "Judge Interviews, Summarized Responses," (Responses to A.3.(a)-(f). Discovery and related motions were viewed by the Judges as a major contribution to the cost of litigation. Responses A.9.(b).

As noted above, motions directed at discovery must be accompanied by an affirmation of prior attempt to resolve or a statement why this could not be done. Local Rule 12.02, DSC. Motions to compel discovery must be filed within twenty (20) days after receipt of the objected to response or failure to respond (the latter running from the due date). Local Rule 12.10, DSC. If extensions of time for discovery are sought, the supporting affidavit must state that the parties have diligently pursued discovery during the original specified time. Local Rule 12.11, DSC (also stating such extension will only be granted in unusual cases).[62]

A. Impact of Discovery on Cost and Delay

The Federal Rules of Civil Procedure espouse a laudatory goal: "To secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Unfortunately, the experience of the federal system when viewed as a whole, has been that the rules sometime operate at cross purposes to this goal. Discovery is often cited as a root cause of the problem.

The legislative history to the CJRA states that "[p]erhaps the greatest driving force in litigation today is discovery. Discovery abuse is a principal cause of high litigation transaction costs." Judicial Improvements Act of 1990, Pub. L. No. 101-650, 1990 U.S. Code Congressional and Administrative News, at 6823. It further noted that,

> the Harris survey of more than one thousand participants in the civil justice system found that the most important cause of high transaction costs or delays that increased those costs is perceived to be lawyers who abuse the discovery process. (Harris Survey, at 21). . . . The most frequently cited types of lawyer abuse leading to transaction costs are lawyers who "over discover" cases rather than focus on controlling issues and lawyers and litigants who use discovery as an adversarial tool to raise the stakes for their opponents. . . . In the Harris survey a majority of each respondent group indicated that discovery costs constituted a higher percentage of total transaction costs than any other category of costs incurred. . . .

[62] These local rules appear to advance the goals set by the CJRA. Their enforcement is not, however, uniform. While we recognize the importance of judicial flexibility, more uniform enforcement of current local rules (with advance notice to the bar) should be considered by the Court.

> The same conclusions were reached in an earlier yet still survey of 200 Federal and 800 State judges. . . .

Id. at 6824.

With these concerns in mind, the Discovery Committee reviewed the recommendations of the Committee on Rules, Practice and Procedure of the United States Conference, the recommendations of the Civil Justice Reform Act Advisory Groups for numerous other districts and data on our district's workload. In addition, they interviewed approximately seventy-five (75) South Carolina lawyers with extensive civil practices before the United States District Court for the District of South Carolina.[63]

The recommendations of other Civil Justice Reform Act advisory groups generally include the following:

1. The automatic disclosure of certain so-called "core information."
2. Mandatory automatic exchange of all "relevant" documents.
3. Limitations on the number of interrogatories.
4. Limitations on the duration of depositions.
5. Mandatory joint discovery and case management plans.
6. Periodic pre-trial conferences.
7. Automatic stay of "merit discovery" pending resolution of jurisdictional disputes.

With respect to the recommendations of other advisory groups, this advisory group found as follows:

1. *The proposed automatic disclosure of certain so-called "core information."* The proposed automatic disclosure of all "relevant facts" upon which a claim or defense is based are

[63] The overwhelming response of the lawyers interviewed was that the existing Federal Rules of Civil Procedure together with this district's local rules work well and, if properly enforced, provide for fair, efficient and effective resolution of civil disputes. There was considerable concern that the recommendations presented by other advisory groups were unnecessary in South Carolina and might, in fact, be counterproductive.

presently adequately covered in Local Rule 7 and, any further requirements would tend to provide an undue advantage for those who currently evade existing discovery rules. Interpretation of words such as "significant" and "relevant" contained in many advisory group proposals would simply lead to an escalation of discovery disputes.

2. *Mandatory automatic exchange of all "relevant documents."* These requirements are adequately covered in existing Local Rule 7, except as set forth below (subsection B.1.).

3. *Limitations on the number of interrogatories.* There does not appear to be any widespread abuse of current discovery practice and no agitation for reform in this area. Limitations on the number of interrogatories beyond those set forth in current local rules would simply add to the required court involvement by increasing the number of motions seeking to propound additional interrogatories.

4. *Proposed limitations on the duration of depositions.* There does not appear to be any evidence of widespread abuse. We do not recommend any change in existing practices.

5. *Mandatory joint discovery and case management plans.* These proposals would simply add an additional level of red tape to pre-trial discovery and require additional attorneys' time. Existing procedures provide for joint input into pretrial orders and for resolution of discovery disputes or extension of time upon motion of either party.

6. *Periodic pre-trial conferences.* We find no need for amendment of existing procedures. The existing practice in the state court is perfunctory at best and adds little, if any, to the efficiency of pre-trial discovery.

7. *Proposed automatic stay of "merit discovery" pending resolution of jurisdictional disputes.* Automatic stays would simply encourage jurisdictional contests. Current procedures allow for limitation or stay of discovery upon the motion of either party.

Each of the above procedural suggestions was, as noted above, found to be largely unnecessary for this district. Procedural changes believed to be advantageous are set forth below.

B. Recommendations

1. Mandatory disclosure

Early mandatory disclosure of "core information" is a predominant feature of the proposed Judicial Conference amendments to the Federal Rules of Civil Procedure, as well as the recommendations from the President's Counsel on Competitiveness. In this area the District of South Carolina has exhibited prescience. Disclosure of core information by both parties is mandated by required answers to the court's interrogatories found at Local Rules 7.06 through 7.13. This self-executing discovery serves a dual function. It allows court management of litigation by requiring that the court be provided basic information concerning claims and defenses early on in the life of the case. It also supplies opposing litigants with basic information concerning the case without the necessity of initiating a request. The group endorses a continued use of court interrogatories. However, it feels that the following addition will improve their effectiveness.

A local rule should be promulgated requiring plaintiffs to make available for inspection and/or copying the following within thirty days of service of the Summons and Complaint: where a claim is bottomed on a contract theory, the document or documents which plaintiff will rely upon to establish the contract upon which the claim is made.

2. Unlimited Requests to Admit Genuineness

The group also recommends that Local Rule 9.00 be amended to allow parties an unlimited number of requests for admissions relating to the authentication of documents. This action is currently allowed by the South Carolina Rules of Civil Procedure.

Litigation has become increasingly document intensive. Justice requires legitimate advocacy over certain issues related to documents such as relevancy, reliability, trustworthiness, and conclusoriness. These matters may require the court's time and discretion. Neither the

court's time nor the litigant's pocketbook, however, are well served by requiring the court appearance of a witness simply to authenticate documents.

3. Automatic Disclosure of Expert Qualifications and Anticipated Testimony.

The group recommends adoption of automatic disclosure requirements for experts to include production of a curriculum vitae ("CV").

4. Prompt hearing and resolution of discovery disputes.

This is the most significant area where improvement is needed. This, of course, is a matter of judicial policy and would require no change in existing local discovery rules. See Sections IV.B. & V.B. above. (motions docket recommendations).

5. Limitations on Protective Orders.

Though not unanimous on the following provisions, a majority of those members of the advisory group present[64] adopted the following proposed limitation on protective orders. The supporting rationale and a dissenting discussion are presented at Exhibits 20 and 21 to this report.

> In all products liability actions in which the plaintiff seeks to recover for personal injury or property damage alleged to have resulted from a design or formulation defect in a mass production product, no confidentiality or protective order will be issued prohibiting or restricting the disclosure of information or documents obtained through the process of pretrial discovery unless the court finds as a fact specifically with respect to each such item of information or document as to which confidentiality or protection is sought:
>
> (a) That it contains a bona fide trade secret, the disclosure of which would cause serious competitive harm, or that it contains other confidential research, development, or commercial information within the meaning of Ffederal Rules of Civil Procedure 26(c)(7), and
>
> (b) That the need for confidentiality is not outweighed by the interest of other affected persons to free access to the truth of the matters contained therein, and

[64] The advisory group unanimously adopted all other matters and recommendations presented in this report. This proposal was adopted on a vote of 8 to 4 of those present at the April 16, 1993 meeting.

(c) That such order will not prevent the disclosure of information which is relevant to the protection of public health and safety, and

(d) That justice requires the issuance of such order to protect a party or person from annoyance, embarrassment, oppression, or other burden or expense within the meaning of F.R.C.P. Rule 26(c).

VII. UTILIZATION OF ALTERNATIVE DISPUTE RESOLUTION PROGRAMS[65]

The CJRA requires each advisory group to consider the utilization of alternative dispute resolution ("ADR") programs in appropriate cases. 28 U.S.C. § 473(a)(6). In considering the alternatives, this group has attempted to balance the desire for speedy resolution against the desire for just resolution. We are especially mindful of the importance of a litigant's right to a jury trial under the Seventh Amendment to the United States Constitution. See also Rule 38 of the Federal Rules of Civil Procedure. It is not intended for any proposal to be implemented in such a way that it impairs this important right.

A. Summary of Recommendations

The Alternative Dispute Resolutions Committee studied the Civil Justice Reform Act of 1990 (the "CJRA"), its legislative history, numerous reports from other advisory groups, general resources concerning ADR, and this district's judicial workload profile, in analyzing what, if any, ADR methods to recommend. Comments of our judges[66] and the results of local experimentation with ADR were also considered. The group concluded that the following methods are reasonably well suited for this district, at least under certain circumstances, and recommends their continued usage or adoption (on at least an experimental basis):

(1) **MEDIATION** (see below, this section ¶ B.2.a., recommending usage);

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[65] The Civil Justice Reform Act requires the district to consider

> (6) authorization to refer appropriate cases to alternative dispute resolution program that-
>
> (A) have been designated for use in a district court; or
>
> (B) the court may make available, including mediation, mini-trial, and summary jury trial.

28 U.S.C. § 473(a)(6). See also 28 U.S.C. § 473(b)(4) (suggesting neutral evaluation program to be made available early in litigation) & (b)(5) (authorizing court to require presence of party with authority to bind at any settlement conferences).

[66] See "Judge Interviews, Summarized Responses," Exhibit 9 to this Report (Responses A.5.(d)-(e) & A.7.)

(2) **SUMMARY JURY TRIALS**[67] (see below, this section ¶ B.2.b., recommending judicial consideration of this method in appropriate cases);

(3) **EARLY NEUTRAL EVALUATION** (see below, this section ¶ B.2.d., recommending experimental pilot project in selected cases); and

(4) **MANDATORY JUDICIAL SETTLEMENT CONFERENCES** (see below, this section ¶ B.2.e., recommending experimental usage of routinely scheduled conferences).

The advisory group is recommending against any systematic usage of court annexed arbitration (see below, this section ¶ B.2.f.).

In addition, the group is recommending publicizing the availability and potential benefits of alternative means of dispute resolution. See Section VIII.B.3. below. The advisory group will compile a modest library of resource materials to be housed in the federal courthouses in each division. The group recommends that a brochure describing the available means also be prepared in layman's language and be made available to the general public through the Clerk of Court's office and the local bar.

B. Discussion

1. Applicable Provisions of the CJRA

The CJRA provides, in relevant part:

> (a) A civil justice expense and delay reduction plan developed and implemented under this chapter shall include provisions applying the following principles and guidelines of litigation management and cost and delay reduction:
>
> * * *
>
> (3) (A) . . . [in appropriate cases, having the judicial officer] explore the parties' receptivity to, and the propriety of, settlement . . .
>
> * * *
>
> (6) Authorization to refer appropriate cases to alternative dispute resolution programs that --

[67] Mini trials are seen as similar in cost-benefit to summary jury trials and are acknowledged as available but are neither recommended nor discouraged. See below § VII. B.2.c.

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

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

(b) In formulating the provisions of its civil justice expense and delay reduction plan, each United States District Court, in consultation with an advisory group appointed under Section 478 of this title, shall consider adopting the following litigation management and cost and delay reduction techniques:

* * *

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

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

The CJRA does not require a district court to incorporate any ADR devices into its plan for reducing costs and delay. It simply requires that the advisory group and court consider incorporating ADR procedures, including mediation, mini-trial, summary jury trial, and early neutral evaluation.

2. Assessment of ADR Alternatives

a. Mediation

Mediation is negotiation among the parties, facilitated by a trained nonparty neutral. In the past five years, at least eight federal district courts have instituted mediation programs. In addition, mediation is the basic process used in state court settlement weeks, such as those recently held in Charleston and Richland Counties. These state court projects have had impressive results with both achieving essentially a fifty percent (50%) settlement rate.[68] Similar

[68] The Richland County settlement week was conducted September 30 - October 4, 1991. Statistics were as follows: 143 cases were scheduled for conferences; counsel for at least one party appeared in 117 cases; 30 of these settled during settlement week (26% of those mediated); 48 were settled or otherwise disposed of during the week (33% of the 143 cases scheduled and 41% of the 117 cases actually mediated). Five weeks after settlement week, sixty-five (65) cases

results were achieved in a smaller experiment by one of our district's judges[69] and in two larger (multijudge, single division) experiments.[70]

Ultimately, the vast majority of all cases will settle before trial. By facilitating this process, mediation hastens the settlement which reduces the cost to the litigants, the pretrial burden on the court system, and the average life expectancy of the court's caseload.

The mediator's role can take various forms. The mediator can identify and narrow issues; identify underlying interests and concerns; carry messages between the parties; explore bases for agreement and the consequences of not settling; and develop a cooperative, problem-solving

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had been settled or otherwise disposed of (45% of the cases scheduled and 56% of the cases mediated). The Charleston settlement week was held March 30 - April 3, 1992. As of May 8, 1992, 169 of the 290 cases (58%) docketed for settlement week had been settled. See Exhibit [13] for supporting settlement week data.

[69] One district judge in the Columbia Division recently tested voluntary mediation under the following format. Notices were sent to counsel in all pending cases advising of the planned mediation. See Exhibit 12. Opting in required agreement of all parties. Six cases opted in. Of these, five settled. Many of the cases that settled were procedurally in their early stages. Although the sample size is small, the results are promising. Of the six scheduled or heard, five were resolved. Given the opt in criteria (joint agreement) the cases might have been predisposed to such resolution. Nonetheless, the percentage resolved and the early stage of the cases resolved suggests that use of such procedures may contribute to reduction in average time to resolution.

[70] Two judges in the Florence Division jointly tested mediation using a mediation week format. Sixty-seven (67) cases were nominated for mediation with forty-four (44) actually participating. Results were as follows: five (5) cases settled before or without mediation; nine (9) settled during mediation week; five (5) more settled after mediation week. In summary, a total of nineteen (19) cases (twenty-eight percent (28%) of those nominated and forty-three percent (43%) of actual mediations) were resolved. In a four judge experiment in Charleston, using primarily an opt-out mediation week format, the following results were obtained: One hundred and fifty nine (159) cases were recommended for mediation with eighty-nine (89) actually mediated; twelve (12) cases settled before or without mediation; ten (10) cases settled during mediation week; thirteen (13) settled afterwards. In summary, a total of thirty-five (35) cases (twenty-two percent (22%) of those recommended and thirty-nine percent (39%) of those actually mediated), were resolved. For those cases settling before or after mediation (in both divisions), all attorneys reported that the scheduling or conduct of the mediation was a significant contributing factor. Even those attorneys whose cases did not settle reported substantial movement in the cases. In both divisions volunteer attorneys were used as mediators. Costs to the court were minimal. See letter dated April 12, 1993 from Jack Burns, Clerk to Judge Houck (at Exhibit [12] hereto).

approach. Learning the confidential concerns and positions of all parties, the mediator can often identify options beyond their perceptions.

In most federal mediation programs, lawyer-mediators receive modest or no compensation. In the recently held state court mediation weeks, the mediators served without compensation.[71] Case selection in federal court mediation is generally left to the presiding judge.[72] In most programs, the judge has the authority to order participation in at least one mediation session.[73]

This advisory group applauds our judges' demonstrated willingness to evaluate mediation and recommends the courts continue to utilize and evaluate mediation in this district. See Proposed Local Rules at Exhibit 14. Given the success of the recent state court settlement weeks and the better opportunity for tracking provided by such mass mediation, the group initially recommends use of a "mediation week" format. To refine the rules and insure successful implementation, mediation should be instituted initially in only one or two divisions. The procedures and overall success would then be evaluated before any district-wide implementation.[74]

Two methods of referral would be recommended. First, an "opt out" program, which would require some form of justification to be exempted, would be tested. Because of the significance of the right, it should be sufficient for a litigant to rely on the right to a jury trial

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[71] By working in conjunction with the state and local bar associations a program might be devised to give CLE and pro bono credit to volunteer mediators to reward (if not compensate) them for their commitment. By organizing mediation into a "mediation week," the disruption to the mediators (and court) could be minimized.

[72] The Eastern District of Pennsylvania, for instance, is experimenting with large-scale diversion of cases to mediators.

[73] In the federal district courts in Kansas and the District of Columbia, however, the parties' consent is required for referral to mediation.

[74] Proposed procedures for follow-up are discussed at Exhibit 17. Sample survey forms are included.

In the courts that have adopted ENE programs, case eligibility rules, evaluator qualifications, manditoriness, style and format vary widely. A session typically lasting a few hours is usually conducted on neutral territory before the parties have engaged in substantial discovery, but after they have had time to develop the basics of their case. Parties submit short briefs in advance. The hearing is attended by lawyers and settlement-authorized client representatives. The rules of evidence do not apply at the usually unrecorded sessions, and no direct or cross-examination of witnesses occurs.

A professor who studied the effectiveness of ENE contends that nearly eight percent (80%) of lawyers and seventy-four percent (74%) of clients reported "a high level of satisfaction" with the ENE program. D.I. Levine, "Northern District of California Adopts Early Neutral Evaluation to Expedite Dispute Resolution," 72 Judicature 235 (Dec-Jan 1989). Nonetheless, the advisory group questions whether this district needs an ADR program as elaborate as systemic ENE. Like court-annexed arbitration, a system-wide ENE program would be expensive. Moreover, the proposed mediation program may provide many of the same benefits if available early in a case's development. Instead of systemic use, the group advises experimenting with ENE on a pilot basis in selected cases.

e. Mandatory Judicial Settlement Conferences

The settlement conference conducted by a judge or magistrate is the most common form of ADR used in federal and state courts. Traditionally held on the eve of trial, judicial settlement conferences today occur throughout the litigation. Although the federal judge's role in settlement was formally ratified only in 1983 with the Amendments to Rule 16 of the Federal Rules of Civil Procedure, courts with multiple ADR options report that their settlement conference programs are the most widely used and best accepted of their ADR efforts.

These conferences are comfortable territory for most judges and practitioners. If structured around private, in-chambers meetings, the conference protects sensitive or proprietary

communications, as well as trial strategies. Unlike less familiar ADR techniques, such as ENE, the settlement conference is an inexpensive way for litigants to resolve their dispute.[78]

Casting a judicial officer as a settlement neutral seems to increase the likelihood of settlement. A judge or magistrate commands respect; his or her participation vests the process with weight. Importantly, a settlement conference initiated by the court relieves lawyers and parties of the stigma of being the first to express interest in settlement.

A number of federal courts have established varied programs to promote the use of the judicial settlement conferences.[79] Within this diversity, however, several innovative trends have developed. One is the growing preference for distancing the trial judge from the conference, and replacing that judge with a senior judge or magistrate. This prevents loss of judicial impartiality or its appearance.[80] Another trend is the channeling of settlement work to particular judges or magistrates.[81]

Although traditionally the judge's settlement role is mainly to referee a horse trade, today many judges act as mediators or facilitators, promoting communication, removing logical and

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[78] Mediation sessions, as recommended above, would provide some of the same benefits without the impact on judge's time.

[79] In the over twenty districts with local rules focusing on settlement conferences, approaches vary widely with respect to the mandatory or voluntary nature of the settlement conference; the assignment of the trial judge, nontrial judge or magistrate as host; the role of clients and insurers; and the confidentiality of the process.

[80] In the Eastern and Northern Districts of California, and the Northern and Western Districts of Oklahoma, for instance, a judge or magistrate other than the trial judge is assigned to host settlement conferences unless all parties specifically request otherwise.

[81] In many courts, such as the Eastern District of New York, the Northern District of California and the Middle District of Tennessee, magistrates conduct hundreds of settlement conferences a year and are quickly becoming settlement experts in the federal system. In others, such as the District of Connecticut and the District of Kansas, a judge or magistrate has been designated as the "settlement judge."

strategic barriers, holding one-on-one sessions, offering objective assessments of the case, and suggesting settlement options.[82]

This district may benefit from more systematic use of judicial settlement conferences. The advisory group recommends experimentation with the routine scheduling of settlement conferences. In cases where the positions are fairly clear before discovery, initial settlement conferences should be held before substantial discovery occurs. Upon notice by the court, a representative of the parties with authority to bind[83] them in settlement discussions would be required to be present or available by telephone during any settlement conference. The pilot program will be most effective if several senior district judges and magistrates are willing to hold settlement conferences assigned by other district judges. The program should be tried initially on a pilot program basis with sufficient tracking to evaluate the success of the program.

f. Court-Annexed Arbitration

Unlike private arbitration, court-annexed arbitration ("CAA") is neither voluntary nor binding. It is mandatory, but dissatisfied parties can reject the advisory arbitration award and insist on a regular trial.

CAA has spread in the past few decades to more than a dozen federal district courts, as well as to a number of courts in nearly half the states. In a typical federal CAA program, the court will target only minor, civil cases, usually those seeking no more than between $75,000 and $150,000. Other case-eligibility rules also vary from court to court, but most CAA programs usually include in their ambit routine contract, personal-injury and property damage cases.

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[82] One of this district's magistrate judges is experimenting with "settlement letters." Prior to a status conference, he requires parties to submit confidential letters, setting forth their respective positions regarding settlement. At the conference he explores opportunities for settlement. At times, he also requires plaintiff's counsel to make a written demand on defendant(s) prior to a status conference.

[83] See 28 U.S.C. § 473(b)(5) (suggesting requiring presence in person or by phone of party with authority to bind).

Arbitrations are conducted by one or three arbitrators, who are usually private local attorneys or retired judges. Many serve pro bono; some receive modest stipends. All are approved by the courts under varying prerequisites. In brief, relaxed and unrecorded hearings, usually lacking both live witnesses and formal rules of evidence, the arbitrator(s) hear case presentations and issue an award. Clients usually attend these hearings. The parties can accept the decision or request a trial de novo. In most CAA programs, a trial request carries a financial risk called the "trial disincentive." Under this technique, parties who reject the arbitrator's decision must fare better at trial than they would have by accepting the arbitrator's award. If not, they must pay a specified expense, such as any arbitrator fees.

Court-annexed arbitration is being adopted in districts whose caseloads are so burdensome that the courts feel compelled to adopt sophisticated, systemic measures to unclog their dockets. In districts with modest caseloads, such as the Eastern District of Virginia, the courts typically do not adopt court-annexed arbitration.[84] This group is recommending adoption of a similar position to the Eastern District of Virginia. The two district's judicial workload profiles are similar and we accept their analysis discussed in footnote 84 to this report. We believe that the

[84] The Advisory Group for the Eastern District of Virginia rejected court-annexed arbitration ("CAA"), as well as other court-annexed ADR measures, for three reasons. First, it concluded that there was no substantial evidence that the use of ADR decreases costs, improves disposition rates, or improves the quality of justice. Second, it found that ADR procedures do not, in most cases, have any impact on the time spent in discovery, which it felt was the principal cause of both expense and delay. Finally, that Advisory Group found that the availability of a firm and early trial date before an Article III Judge eliminated the need for an alternative adjudicatory procedure. It concluded that incorporating ADR procedures would likely increase costs and delays in the Eastern District of Virginia without offering any significant benefits to the court or to the litigants. Report of the CJRA Advisory Group for the E.D. Virginia at 62-63 (Sept. 19, 1991).

potential benefits of CAA do not, for this district, appear to outweigh its risks and costs.[85] The condition of this district's docket does not justify adoption of such an elaborate ADR device.

3. Publicizing Alternatives to Trial

Regardless of which, if any, ADR devices are adopted in this district's plan, it is recommended that a brochure be prepared and offered which explains available private ADR devices, as well as ADR devices already available under the rules. This information would serve to educate the judges, attorneys and litigants in this district about all available forms of ADR. Judges could emphasize the availability of the information to counsel and parties at any scheduling conferences. It might also be referenced along with the option of consenting to referral to a magistrate as contemplated by Local Rule 19.03.[86]

Even though this district may not need ADR today, the "multi door" courthouse is definitely the trend of the future. Therefore, we encourage education of the bench, bar and public about ADR. This could be accomplished both by preparing and distributing the referenced brochure on ADR and by developing and maintaining a modest ADR "library" of resources in the clerk's office for reference by interested judges, lawyers and litigants.

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[85] In an article written by Judge Thomas Eisele, senior judge for the Eastern District of Arkansas, he vigorously objected to court-annexed arbitration. Judge G.P. Eisele "No to Mandatory Court-Annexed ADR," Vol 18 No 1 Litigation 13 (Journal of the Litigation Section of the ABA) (Fall 1991). He argued that CAA impinges upon some litigants' right to a trial by jury by making it impossible for them to afford a trial after pursuing mandatory arbitration. Judge Eisele argued that arbitration, mediation, mini-trials, and any other ADR fail to approach the effectiveness of a properly conducted trial as a fact finding, truth determining and justice-producing device. He pointed out that while a properly conducted trial is specifically designated to get at the truth, ADR is designed to resolve disputes in a cost efficient manner. He, therefore, questions the philosophy behind ADR.

Judge Raymond J. Broderick, Senior District Judge for the Eastern District of Pennsylvania, recently responded to Judge Eisele's article with an article of his own favoring Mandatory ADR. Judge R. J. Broderick, "Yes to Mandatory Court-Annexed Arbitration," Vol. 18 No. 4 Litigation 3 (Journal of the Litigation Section of the ABA) (Summer 1992).

[86] It does not appear that the procedures set out in this local rule are regularly followed. The method could, however, prove useful in disseminating information regarding trial alternatives.

VIII. NONMANDATED AREAS[87]

In addition to those areas which the CJRA mandates each advisory group consider, this advisory group considered and makes recommendations as to the following:

A. Facilities

Lack of adequate courtroom facilities has been a problem in three divisions, Charleston, Columbia and Greenville. The problem is in the process of being remedied in the Charleston Division. In Columbia, an offer has been made to purchase appropriate property for later expansion of the court facilities.

Parking for jurors is also a major problem in the Columbia Division. It is a significant problem in Charleston.[88]

In addition to concerns based on courtroom availability, size and design of courtrooms is often a problem. Certain past renovations have not taken into account the space necessary for proper presentation of a case -- particularly when multiple parties or counsel are involved.

Various recommendations within this report, for instance, certain ADR suggestions, the expedited docket proposal, and speeding up the motions docket could easily be thwarted by inadequate courtroom facilities. Even current procedures are slowed when time is lost juggling schedules due to courtroom shortages or waiting on jurors still "circling the block." The advisory group urges appropriation of funding to insure adequate courtroom and parking facilities. We also recommend consultation with representations from the Bar to insure building or redesign takes into consideration the concerns expressed above.

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[87] The district is directed to consider various specific techniques as well as: "such other features as the district court considers appropriate after considering the recommendations of the advisory group." 28 U.S.C. § 473(b)(6).

[88] The GSA has acknowledged the existence of the parking problems.

B. Encroachment of the Criminal Docket

Recognizing that encroachment of the criminal docket is a substantial and growing obstacle to movement of the civil docket, this advisory group is recommending congressional consideration of several modifications to current legislation. Two key factors identified as contributing to added judicial workload in the criminal area are the sentencing procedures required by the Sentencing Guidelines and timetables set by the Speedy Trial Act. See Section II.A.13. above. Minor procedural changes may lessen the impact of the sentencing procedures and Speedy Trial requirements without major interference with the purposes behind these provisions.

First, time required for sentencing might be lessened by allowing affidavits in support of matters likely to be uncontested. To insure fairness to defendants, the prosecuting attorney could be required to provide any affidavits in advance of the sentencing hearing. Defense counsel would then be provided a short period of time to notify the court and prosecuting attorney that live cross examination was demanded. If live cross was demanded, the prosecuting attorney could present the direct testimony by affidavit and have an opportunity for rebuttal after live cross. This appears to be in the spirit of current standing orders regarding Sentencing Procedures. See S.C. Rules of Court, State and Federal at 1039-40 (West 1993).

As to the Speedy Trial Act, an "opt-in" requirement might alleviate some of the burden on the court.[89] The defendant would not be afforded the protections of the Act until it was specifically invoked. The time to trial would then run from the date of the defendant's demand. This would not, however, allow the defendant to control the docket. The United States Attorney would remain free to move the case to trial as quickly as allowed by law.

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[89] In addition to the impact the direct requirements of the Speedy Trial Act have on the docket, there are collateral burdens and delay created when the presiding judges are called on to grant extensions.

The administrative branch should also consider the federal court impact of stepped up criminal enforcement measures -- particularly when the matters could be prosecuted in state court. Aside from the political benefit of looking "tough on crime," there appears little benefit in moving prosecution of many of the lesser crimes into federal court at the expense of the civil docket. It would seem that federal and state enforcement officials could cooperate in investigating crimes, leaving the lesser (traditionally state) offenses to state court prosecution.[90]

C. Congressional and Administrative Action Which Impacts the Civil Docket

Over the past few decades, much federal legislation has been enacted which results in the creation of federal jurisdiction over matters which would formerly have been state court disputes.[91] In addition, some federal statutes have recognized rights and created causes of action that would not previously have been legally cognizable in either state or federal courts.[92] Regardless of whether one is strongly in favor of such legislation or vehemently opposed to it, one simple fact is clear. Such legislation creates an added burden on the federal judicial system.

When legislation is introduced, Congress should specifically consider and address the likely impact of the legislation on the judicial system. A judicial cost analysis should be undertaken with input from the judicial department if appropriate.[93] In addressing the true cost of the

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[90] Due to mandatory criminal side provisions such as the Speedy Trial Act, budget cuts and shortfalls seem necessarily to have an impact on the civil docket. For instance, criminal side shortages in the summer of 1992 caused cutoff of funding for Civil Justice Reform Act Advisory Groups. Similarly, funding shortages caused a halt to civil jury trials in the spring of 1993.

[91] For instance, the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq, shifted a host of formerly state court disputes as to health benefits coverage into the federal court system. In addition to the direct burden of handling these cases, the federal courts are required to develop the standards applicable to judicial review and a "federal common law" to fill gaps left by the statute.

[92] A number of employment discrimination and civil rights statutes fall partially or completely into this category. E.g. Title VII; The Civil Rights Act of 1991; and The Americans with Disabilities Act.

[93] Inquiry of the judicial branch as to the impact of legislation on the courts should not raise separation of powers concerns.

legislation, Congress would then consider the impact on the judicial branch and, hopefully, make appropriate funding adjustments.[94] Consideration of the judicial impact of legislation might also lead to developing other remedial alternatives.

Similar consideration should be given by the legislative branch when it issues edicts directly affecting the judicial branch. For instance, in enacting legislation such as the Speedy Trial Act, Congress should take into consideration the immediate and direct impact on the civil docket. The recent changes to the Federal Debt Collection Act, allowing defendant to demand a hearing within five days, may also have an adverse impact on scheduling and movement of the docket. See 28 U.S.C. §§ 3101(d) & 3202(d).[95] Congress should recognize that increasing the speed of one docket will slow the other unless additional resources are provided. If additional resources are not available, then Congress should consider whether the increase in the one docket is worth the delay created in the other.

We further recommend that the impact of new legislation be monitored nationally through the mechanism of the filing cover sheet. The cover sheets could be modified to list applicable statutes and the filing parties would check off all statutes under which a cause of action is asserted. It is presumed that the computer tracking program would need to be modified to accommodate the added tracking. Comparison over several years would facilitate understanding the impact of prior legislation and predicting the impact of new legislation.

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[94] It is this group's understanding that under the present system, additional judges are authorized for a district when caseload averages reach a certain number per authorized judgeship. Filling newly authorized judgeships must then await funding. Under such a system, impact on the judicial system is not necessarily considered until well after legislation is passed and then only indirectly.

[95] The garnishment and attachment provisions of the Federal Debt Collection Act create an opt in provision for a defendant to request hearing "within 5 days after the clerk receives your request, if you ask for it to take place that quickly, or as soon after that as possible." Although the ultimate impact is unknown, the UNited States Attorney's Office anticipates demands for hearings will be more common in the early stages of implementation and less frequent later. Teleconference with Henry Knight, Assistant U.S. Attorney.

As noted above in regard to the criminal docket, the administrative branch also needs to consider the impact of its action. Any stepped-up enforcement of law which is likely to create federal court litigation will necessarily impact the docket. What on the surface appears to benefit the public may, in fact, have an adverse impact. Each program of stepped-up enforcement may, by clogging the courts, slow enforcement of another program. It will certainly slow the civil docket.

D. **Local Rules**

As previously discussed, this group recommends modification of the local rules to allow extension of the time to answer a complaint via consent order. See Section V.C. above. The group also recommends modification or clarification of a number of local rules: Rules 12.06 and 16.00 require responses within a given number of days from filing of the matter to which responding. All other responses are due based on time from date of service or receipt. See Local Rules 7.07, 7.08, 7.12, 7.13, 10.03, 12.07 and 12.10, DSC. Rule 12.06 relates to time for filing a memoranda in opposition to a motion. Rule 16.00 relates to memoranda in opposition to a petition for attorneys fees. Since the date of service or receipt may vary substantially from the date of filing, we recommend that Rules 12.06 and 16.00 be modified to conform to the general practice of running times from date of service or receipt.

Rule 7.03 exempts all pro se litigants from the requirements of Rule 7.00. Rule 7.04, however, refers to unrepresented parties in its reference to Federal Rule 16(b)'s consultation requirement. The rule then states that this District will satisfy the 16(b) requirements through local rule interrogatories. Local Rule 7.04 should be clarified. It could delete the reference to unrepresented parties or state that the interrogatories apply only to represented parties not otherwise exempted by Rule 7.03. It might also state how consultations will be accomplished, if at all, as to the exempted parties (including unrepresented parties).

Local Rule 7.10 establishes the time in which a party against whom a cross-claim or counter-claim must answer local rule interrogatories to defendants. Answers are due "thirty (30) days after the time for answering expires." Local Rule 7.10, DSC. It is unclear if the "time for answering" is the initial defendant's time for answering or the time for the answer to the counter-claim. If the latter is the case, as we expect is intended, we recommend the rule be modified to require answers "within thirty (30) days after the time for answering the counter-claim or cross-claim expires" (recommended additional language is underlined).

Local Rule 20.01 is also confusing. The first and second sentences appear to be in direct contradiction. The rule should be clarified.

E. Variance from Federal Rules

The Federal Rules of Civil Procedure call for a twenty (20) day time to answer. Fed. R. Civ. P. 12(a). State court procedure in this state and many others allows for thirty (30) days. The shortened federal time frame does not appear to lead to any significant reduction of delay in the judicial system. Indeed, it may contribute to delay as defendants seek court approval of extensions of time to answer. See Fed. R. Civ. P. 6(b) (the court may for cause shown enlarge a period of time). It is at least implied under the federal rules, and expressly stated by this district's local rules that an extension of time to answer cannot be granted by the opposing party. Local Rule 12.11, DSC, requires a motion for enlargement accompanied by an affidavit.

This advisory group recommends that the Federal Rules of Civil Procedure be modified to allow thirty (30) days in which to answer and to allow a one time extension, not to exceed an additional thirty (30) days, to be granted by written consent of the opposing party. Pending (or in lieu of) such change to the federal rules and to the extent it may be permissible to do so, we recommend that the local rules be modified to allow a one time extension equal to the time stated in federal rule based on consent order of the parties.

F. Modification of Clerk Procedures

Recent modifications to Rule 5 of the Federal Rules of Civil Procedure are also causing some difficulties. Prior to the recent revisions, the Clerk of Court's office could reject improper filings. This allowed the Clerk of Court to insure compliance with both federal and local rules. Now all filings must be accepted with later review for non conformity by a judicial officer.

This adds to the judges' workload an extra task that was previously handled effectively by the Clerk of Court. It also prevents immediate correction of minor errors. By the time these errors are brought to counsel's attention, the minor error may have become a missed filing date.

This group recommends that a procedure be implemented through which the Clerk of Court's office issues a form noting that the filing is believed to be defective. The form would specify the defect and encourage voluntary correction. This would allow counsel to correct the perceived error expeditiously. If corrected, the court would have no need to rule on the initial filing.

G. Multidistrict Litigation

The District of South Carolina is concerned that Multi-District Litigation No. 875 has delayed the disposition of asbestos personal injury cases pending in this district. Prior to the MDL, the District of South Carolina was handling, in the normal course, its flow of asbestos cases. Disposition was approximately eighteen (18) to twenty-four (24) months from the date of filing. Since the order establishing MDL No. 875 was issued, those cases have continued to accumulate with no cases being settled except those few malignant mesothelioma cases remanded to this district. The remanded cases were quickly set for trial and settled. There are a substantial number of mesothelioma, cancer, disability, and death cases which this district could handle in the normal course of its caseload. Thus, it is the recommendation of the advisory group that twenty percent (20%) of the consolidated asbestos cases from this district be remanded annually for disposition. By taking this step at this time, we can prevent a large

backlog of asbestos personal injury cases from developing, and these cases may be disposed of in a rational and regular fashion.

H. Personnel Needs and Follow-up

Various suggestions in this report may require some added personnel or shifting in duties. The expedited docket, for instance, might necessitate added assistance from courtroom support personnel. Similarly, the mediation week concept requires some level of coordination even if volunteer mediators are used. Follow up to determine progress towards established goals will also require some personnel time.

These duties may well be distributed among existing personnel or, in some cases, shared with bar association volunteers. The personnel requirements should, nonetheless, be addressed in determining whether and how to adopt these recommendations as this district's plan.

We also note that recent budget cuts will ultimately result in the loss of fourteen positions in the Clerk of Court's Office. This is over twenty percent (20%) of the present staff of sixty-eight (68). Given such cuts, it will be impossible to serve even at current levels, let alone have flexibility to implement new programs to expedite case handling. The advisory group, therefore, emphasizes the need for 100% staffing.

Just as noted above as to impact on the judges' caseloads, new projects and programs, as well as stepped up civil and criminal enforcement of existing laws, place additional burdens on the Clerk of Court. The sponsors or backers of such projects, programs or stepped up enforcement need to insure that sufficient funding is made available to the courts, <u>including the Clerk of Court</u>, to guarantee the proper implementation of these programs without adverse effect on existing programs and duties.

Appendix A

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Appendix B

CIVIL JUSTICE REFORM ACT ADVISORY GROUP
DISTRICT OF SOUTH CAROLINA

COMMITTEE ASSIGNMENTS

September 19, 1991

Alternative Dispute Resolution Committee

Chairman - J. Mark Jones

Members - Keith M. Babcock
Saunders M. Bridges

Case Study Committee

Chairman - Wade H. Logan, III

Members - Robert R. Carpenter
Elizabeth Van Doren Gray
J. Haigler Behling
Ann A. Birch - unofficial member
Marvin D. Infinger - unofficial member

Criminal Docket Impact Committee

E. Bart Daniel

Ann A. Birch - unofficial member

Discovery Committee

Chairman - Julian W. Dority

Members - Barney O. Smith, Jr.
J. Kendall Few

Judge Interview Committees

Ad hoc committees; task complete.

Oversight Committee

Chairman - Marvin D. Infinger

Members - Charles E. Kennerty
Julianne Farnsworth
Ann A. Birch - unofficial member

Tracking Committee

Chairman - Terry E. Richardson, Jr.

Members - A. Parker Barnes, Jr.
Samuel L. Svalina

COMMITTEE ASSIGNMENTS WITH BRIEF DESCRIPTION
For September 19, 1991 Meeting

I. Existing Committees

A. Judge Interview

As indicated at the Inaugural meeting, judge interview committees were formed as *ad hoc* committees to gather information from a most meaningful source, the practicing judges. These committees have completed their tasks and have provided a valuable service in the discovery phase of the development of the District's plan.

B. Oversight

The oversight committee is a standing committee, and shall remain active at least through the development of the plan and the report filed therewith.

C. Case Study

The case study committee is well on its way in analyzing randomly selected cases and is in the process of contacting attorneys and litigants in those cases to get a handle on cost and delay problems from the unique prospective of the litigants. This committee will be in existence at least through the discovery phase scheduled to be completed by the year's end.

D. Criminal Case Impact

The committee of one, in the person of E. Bart Daniel, will continue in existence at least through the discovery phase and will assist this group in understanding and advising on

strategies to lessen the impact of the federal criminal justice system upon the administration of civil justice.

II. New Committees

There are certain matters which the Civil Justice Reform Act mandates each group to look into including:

A. Tracking

The CJRA requires an investigation regarding the tracking of cases or differential case management. The idea is that cases of different complexity may be placed on different time tracks or schedules for disposition. Approaches have apparently varied from categorizing cases based on type (*i.e.*, anti-trust, tort, contract), or based on relative degrees of complexity. In the latter case, for example, cases have been categorized into three categories, a fast track category for routine, non-complex litigation requiring very little judicial intervention or case management with the expectation that these cases should be tried in a relatively short period. The second category may be described as cases on an intermediate track, with the expectation that these cases should require some judicial intervention, requiring perhaps scheduling deadlines and strategically placed status, discovery, or pre-trial conferences. These cases should be tried within a certain period of months (not to exceed say, 12 months) after periods of regulated discovery and motion practice. A third category would be the cases of great complexity placed on a

slower track to disposition. These cases would be subject to a more detailed case management and the ultimate disposition of the case would be somewhat longer than the other categories.

The legislative history of the act indicates that tracking techniques where employed have had a very beneficial effect on reducing delay and probably costs. Thus, it is necessary to have a committee investigate different methods of tracking cases and to recommend whether tracking would be desirable in this District and if so, what form it should take

B. Discovery

The legislative history of the Act, and I am sure our own personal experiences, indicate that discovery in cases has gotten out of hand causing an increase in both costs and delay incident to federal court litigation. As such, our plan needs to take a critical look at controlling or modifying discovery. Control or modification of discovery may lend itself nicely to the tracking of cases, if same is deemed desirable, in this District, as described above. One can envision acceptable discovery limitations in non-complex fast track cases that would not be acceptable in extremely complex multi-party litigation. Such issues as requiring reimbursement for costs and expenses involved in complying with burdensome discovery requests is encouraged as a topic of inquiry.

C. Alternative Dispute Resolutions

Investigation into voluntarily and court ordered, and binding and non-binding ADR is encouraged by the Act to be explored. The list of alternative dispute resolution techniques are fairly well known and include summary trials, mediation, arbitration, binding references to magistrates and other judicial offices, etc. Questions arise as to whether certain types of cases lend themselves better to these techniques. For instance, a large portion of the court's docket are non-jury matters. In non-jury cases, neither of the parties has the opportunity, or the right or, the apparent desire to play on the heart strings of juries made up almost exclusively of lay persons. As these cases are less likely to be won on flavor, do they lend themselves to mediation or arbitration more readily than jury trials? Without Seventh Amendment implications, does the court have the power or authority to force ADR in non-jury matters that perhaps it does not possess with respect to jury matters? Can the court at appropriate stages of the case, say during discovery disputes appoint mediators to hear the disputes and report with a recommendation to the court? These inquiries are simply by way of example. Suffice it to say, that it is necessary that a committee be appointed to determine whether or not ADR is possible or advisable within this District, and if so, what

sort of ADR techniques are to be employed and to make a recommendation to this group on same.

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APPENDIX C

PROPOSED PLAN

for the

DISTRICT OF SOUTH CAROLINA

prepared as required by the

CIVIL JUSTICE REFORM ACT

Revised: August 6, 1993

PROPOSED PLAN
FOR THE
DISTRICT OF SOUTH CAROLINA
(CIVIL JUSTICE REFORM ACT)

INTRODUCTION AND OVERVIEW

The Civil Justice Reform Act ("CJRA"), 28 U.S.C. §§ 471-482, requires each district to develop a civil justice expense and delay reduction plan. To aid in the development of those plans, the CJRA directs the appointment of an advisory group for each district to study the condition of the docket and to make recommendations to the court. This plan was prepared by the judges of the District of South Carolina after reviewing the Advisory Group Report ("Report") and makes various references to that Report.

The advisory group's analysis of the "State of the Docket" in South Carolina demonstrates that, overall, our district disposes of cases expeditiously. On average, cases are disposed of in less than one year. Recent trends, however, indicate growing caseload burdens and lengthening times to disposition. Report Section II (Summarized at Appendix A to this Plan).

To address these recent trends and various areas identified by the advisory group and the judges of the district as subject to improvement, we **[adopt]** the changes set forth herein. Most of these can be implemented by internal district procedure or local rule. Some, however, are directed at other branches of government.[1] We also recommend continuation of a numerous local rule procedures which further the purposes of the CJRA.

[1] Congress invited the districts to identify significant contributions that might be made by "the litigants, the litigants' attorneys, and by the Congress and the executive branch." 104 STAT 5089 § 102(3) (1990) (Congressional Statement of Findings) (reprinted at 28 U.S.C.A. § 471, Legislative History).

STATE OF THE DOCKET

I. DESCRIPTION OF THE COURT AND DISTRICT

The District of South Carolina is divided into eleven divisions which cover the entire state. The district is currently authorized one temporary plus nine permanent district judges. The temporary position is new and, as yet, unfunded. We also have two active senior district judges, four full time magistrate judges and two part time magistrate judges. See App. A. Section I.A&B.

Cases are generally assigned to and remain with one judge throughout the life of the case although the district judges may refer certain proceedings to a magistrate. Distribution of cases between the judges is handled in a manner that insures relatively even weighted case distribution. See App. A. Section I.C.

II. ASSESSMENT OF CONDITIONS IN THE DISTRICT

Case filings and weighted case filings in the district increased slowly but steadily from statistical year ("SY") 1985 through SY 1989. After a brief decrease in SY 1990, there were significant increases in both SY 1991 and SY 1992. See App. A. Section II.A.1. These increases reflect significant growth in both diversity cases and federal question cases.

Various measures of the condition of the docket reflect that the district has generally remained current but is beginning to experience some problems as a result of the growth in caseload. For instance, pending cases, which fluctuated within a narrow range for the six preceding years, rose substantially in SY 1991 and SY 1992. See App. Section II.A.2. Terminations, by contrast, dipped in SY 1990 and SY 1991 although they did rise again (substantially) in SY 1992. See App. A. Section II.A.3.

The ratio of pending to terminated cases similarly remained low and steady for the six years preceding SY 1991. The rate for these six years indicated that cases were being disposed of faster than they were being filed and that the average case duration was less than nine and one half months. The ratios for the following two years (SY 1991 and SY 1992) indicate that

filings now exceed terminations by a small percentage and average case duration is now at or slightly over one year. See App. A. Section II.A.4. Other measures of timeliness available for SY 1985 through SY 1991 indicate cases were generally disposed of in less than one year. See App. A. Section II.A.5. The district has very few cases more than three years old. See App. A. Section II.A.7.

In recent years, the district has had an increasing number of cases requiring trial for resolution. The district's percentage of cases requiring trial also exceeds national averages. Jury demands are also becoming more frequent in this district. See App. A. Section II.A.6. The district also has a substantially greater percentage of removed cases than the national average. See App. A. Section II.A.8.

All of the above data led to the conclusion by the advisory group and the judges of this district that the district has been and is generally disposing of cases on an expeditious basis. We do, however, appear to be facing new challenges, including substantial growth in filing rates and decreases in the percentage of cases resolved without trial. These new challenges need to be addressed to insure we maintain a current docket. At present, however, the condition of the docket does not call for drastic measures.

Specific areas for improvement identified by the advisory group or/and the judges of the district include:

- Backlogs in the resolution of motions in some cases;
- Nonavailability of a more expeditious means for disposing of smaller or simpler cases;
- Failure to encourage and make available some form of alternative dispute resolution;
- Encroachment of the criminal docket;
- Increasing availability of a federal forum to resolve disputes of a type formerly the province of state courts (without corresponding increases in judicial resources);
- Lack of adequate courtroom and parking facilities in certain divisions.

[OTHERS AS IDENTIFIED BY THE JUDGES OF THE DISTRICT]

See App. A. Section II.B.

RECOMMENDATIONS

[NOTE TO JUDGES: THESE RECOMMENDATIONS NEED TO BE RECONCILED WITH THE REVISIONS TO THE FEDERAL RULES OF CIVIL PROCEDURE. SEE REPORT AT EXHIBIT 22.]

III. OVERVIEW

Pursuant to the Civil Justice Reform Act, the district has considered the following principles:

(1) the systematic differential treatment of cases to provide for individualized and specific management according to each case's needs, complexity, duration and the available judicial resources;

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

(3) careful and deliberate monitoring of complex cases;

(4) encouragement of cost effective discovery;

(5) conservation of judicial resources by prohibiting consideration of discovery motions not accompanied by certification of consultation; and

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

See 28 U.S.C. § 473(a) (paraphrased). In considering these principals the group is directed to also consider the following specific techniques:

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

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

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

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

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

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

28 U.S.C. § 473(b).

In addition to the mandated areas of consideration, and as authorized by 28 U.S.C. § 473(b)(6), this district also considered the following areas suggested by the advisory group:

- Improvements in the availability of courtroom and parking facilities;
- Means of decreasing the adverse impact of the criminal docket;
- Recommendations to the administrative and legislative branches as to actions which impact the judicial branch;
- Miscellaneous recommended modifications or clarifications to the district's local rules;
- Variances from the Federal Rules of Civil Procedure;
- Means of handling cases returning from multidistrict litigation consolidation;
- General personnel needs of the district.

IV. SYSTEMATIC DIFFERENTIAL TREATMENT OF CASES AND MONITORING OF COMPLEX CASES

A. Analysis and Overview of Recommendations

The CJRA requires consideration of the "systematic differential treatment of cases." 28 U.S.C. § 473(1).[2] Systematic differential treatment means "individualized and specific management

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[2] The Civil Justice Reform Act requires the district, in consultation with the advisory group to consider

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

according to each case's needs, complexity, duration and probable litigation careers. " Id. The CJRA also calls for careful and deliberate management of complex cases, particularly as to discovery.[3]

Our district finds that current procedures in these areas are generally adequate given the nature of cases in the district and the state of the docket. Except as specifically noted, we find that firm but equitable enforcement of the current local rules discussed below is the best means for providing systematic differential treatment of cases and proper monitoring and management of complex cases.

Current local rule interrogatories require early input for from all non-exempt parties as to the law and facts at issue, the witnesses involved, and the amount of and anticipated time for

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the case; . . . .
28 U.S.C. § 473(a)(1). See also 28 U.S.C. § 473(b)(1) (joint presentation of discovery plan at pretrial conference); and (b)(2) (requirement of party signature on requests for extension).

[3] The Civil Justice Reform Act requires the District to consider the following principles and guidelines

> (3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer-
>
> (A) explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;
>
> (B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;
>
> (C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedure a district court may develop to;
>
> (i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and
>
> (ii) phase discovery into two or more stages; and
>
> (D) sets, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition.

28 U.S.C. § 473(a)(3).

discovery. See Local Rules 7.05 and 7.06, DSC. The courts routinely issue scheduling orders which take the requested time frames into account in setting discovery and other deadlines. Local Rule 7.01, DSC.

Answers to local rule interrogatories generally provide adequate information as to the level of case complexity[4] -- and, therefore, the need for any "differential treatment." They also satisfy the CJRA's call for joint pretrial input into a discovery plan. 28 U.S.C. § 473(b)(1). Where a judge finds it necessary or helpful to do so, he or she may also hold pretrial or status conferences to narrow issues and explore settlement possibilities. See Local Rule 7.02, DSC (recognizing that some cases may "require special treatment").

Most attorneys attempt to abide by the scheduling orders issued by the court. Where necessary, they may seek modification through agreement (with judicial consent) or judicial intervention.[5] Such agreement or intervention allows modification of initial scheduling to take into account any increased complexity of the case. Judges retain discretion to modify the limits upon request but should be cautions in relieving parties from deadlines they have merely ignored.

In the district, requests for extensions of discovery or other deadlines must contain an affidavit or statement of counsel as to the reason for the extension. See Local Rule 12.11, DSC, **[and note [5] above]** We do not find it is necessary or appropriate to require that parties also sign such requests. See 28 U.S.C. § 473(b)(3).

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[4] Lack of early notice of complexity is not presently a problem. If, in the future, it becomes a problem, we will consider the advisory group's proposed alternative that an inquiry directed towards level of complexity be added to the local rule interrogatories.

[5] Pursuant to Local Rule 12.11, motions for proposed consent orders extending any deadlines must be accompanied by affidavit. Though not expressly stated, this rule confirms that mere agreement of counsel is not enough to extend a court imposed deadline. Our judges generally grant consensual extensions. See "Judge Interviews, Summarized Responses" at A.1.(b) (Exhibit **[9]**) to this Report). The judges vary in their willingness to grant nonconsensual extensions. Id.

To the extent there is any problem in the district with requests for extensions without client input, it is limited to extension of the trial date. Therefore, when there have been multiple requests for extension of time for trial the court may, in its discretion, require an affirmation of counsel, either that he or she has consulted with and has the approval of the client, or a statement as to why the attorney has not done so.

Taken as a whole, the procedures contemplated by Local Rule 7 (discussed above) coupled with current practices discussed in this section and under the section of this plan titled "Early Judicial Involvement" (Section [V.] below) are generally adequate to insure sufficiently individualized pretrial case management. We [agree] with advisory group, however, that the following additional procedures or techniques should be implemented in the district:

- Establish a voluntary expedited docket for simple cases (see Section [IV.C.] below); and
- Increase availability and encourage use of alternative forms of dispute resolution (see Section [VII] below).
- Establish regular motions docket tracking and a timeliness goal for resolution of motions (see Section [V.B.] below);
- Use judicial "swat teams" if motions become backlogged (see Section [IV.B.] below);

With the exception of the "swat team" and "expedited docket," these suggestions are discussed in later sections of this plan. The suggestion to create a means of motions tracking is already being implemented.[6]

[6] New software made available to the court enabled this tracking to be put in place. The present software is capable of generating a report showing the number of motions which have been pending over a particular period of time. Such a report would be especially helpful in implementing the motions docket suggestions. See below [Section V.B.].

B. Use of Judicial "Swat Teams"

The following section of this plan [(Section V.B.)] addresses motions practices. It adopts a goal of resolution of most motions within [forty-five (45)] days of completion of briefing. To reduce backlogs when this goal is not met the judges of the district [concur] in the recommendation to utilize a judicial "swat team."

Under the swat team approach, one or more additional judges (possibly senior judges, visiting judges or magistrates) will set aside a period of several days to hear and rule on motions on another judge's docket. This procedure will be implemented if a judge's docket becomes particularly backlogged, for example, if half or more of the motions remain unresolved [sixty (60)] days past completion of briefing. The procedure will be set in motion by request of the judge whose docket is being addressed with concurrence of the Chief Judge or upon the recommendation of the Chief Judge. The specific procedure will be as developed by the Chief Judge.[7]

C. Establishment of an Expedited Docket

The district also adopts a voluntary expedited docket. This docket will be modeled on the recommendation of the Advisory Group for the Western District of Texas (excerpt attached at Exhibit [16][8] to Plan):

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[7] [TO BE ESTABLISHED BY CHIEF JUDGE] One possible procedure would be as follows. Prior to the motions hearings dates, the older pending motions would be divided between the swat team members according to their authority to resolve motions and any special circumstances making it more appropriate for a particular judge to hear a particular matter. For example, only nondispositive motions would be assigned to a magistrate participating in the team while those motions which require an increased knowledge of the underlying matter might be reserved for the judge whose docket is being addressed. Parties or their counsel should, however, be entitled to request hearing by the judge whose docket is being addressed. Such requests should set forth the reasons for the request (such as that the motion is closely tied to the merits or is an evidentiary issue which should be ruled on by the trial judge). Simpler motions for which a court reporter is waived might be heard by teleconference or in chambers, particularly if courtroom space is limited.

[8] NOTE TO JUDGES: BRACKETED EXHIBIT NUMBERS IN THIS PLAN ARE TO ADVISORY GROUP REPORT EXHIBITS. NUMBERS FOR FINAL VERSION OF PLAN WILL PROBABLY DIFFER.

> We thus recommend that the . . . District create a "rocket docket" and assign that rocket docket to the full time magistrate judges. For those attorneys and litigants who believe that practice in federal court is unduly burdensome because of judicial interference in pretrial preparations, the rocket docket should offer several benefits. We recommend that no Rule 16 scheduling orders be issued in rocket docket cases. This would simply require amending Local Rule [7.03] to add rocket dockets cases as an additional exemption. . . . We also recommend that the Court excuse parties who consent to being placed on the rocket docket from filing pretrial orders. Instead, parties on the rocket docket would simply supply proposed findings and conclusions in nonjury cases and proposed instructions for a general charge in jury cases.
>
> For those attorneys and litigants who believe that motion practice in federal court often creates undue expense because of excessive briefing requirements, the rocket docket should offer the benefit of oral hearings with whatever limited briefing the parties agree to submit on nondispositive motions. . . . . [F]or those litigants and attorneys who want their dispute promptly resolved, the rocket docket should offer the guarantee of a trial within [six] months of consent. If the magistrate judge cannot guarantee a trial within [six] months, the magistrate judge should promptly notify the parties of the earliest available firm trial setting. Any party should be permitted to withdraw its consent to placement on the rocket docket at that point if the party so elects. The sole condition to being placed on the rocket docket and achieving these benefits should be that the parties consent to trial before a magistrate.

Report of the Advisory Group for the United States District Court for the Western District of Texas at 108-110.[9]

Local rules implementing this procedure will be modeled on the proposed rules form the Western District of Texas ("WDT") with the modifications shown in note **[9]** above and Exhibit **[16]** hereto. This procedure is subject to availability of magistrates and support including courtroom facilities and reporters.

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[9] Since we are not adopting mandatory alternative dispute resolution other than opt-out mediation (see **[§ VII]** below), we have deleted the portion of the Western District of Texas Report relevant to exempting rocket docket cases from mandatory ADR. We have also modified their recommendation to reflect a six month rather than a four month maximum time to trial.

V. EARLY JUDICIAL INVOLVEMENT

A. Current Authority

Under the current local rules, the district has the authority for and procedures implementing early judicial involvement.[10] See generally Local Rule 7.14, DSC (expressly recognizing 16(b)'s directive for early judicial involvement). These rules provide for scheduling conferences to be held within 120 days after filing of the complaint. Local Rule 7.01, DSC. Our local rules envision that answers to standard court interrogatories will normally satisfy the scheduling conference requirement. Local Rule 7.02, DSC. The information gathered through these interrogatories is used to schedule discovery, amendment, and motions deadlines as well as to set a subject-to-trial date. See 28 U.S.C. § 473(a)(2) A, B, C & D. See also Section [IV] above.

The CJRA's suggestion of setting early, firm trial dates, 28 U.S.C. § 473(a)(2) B, while appealing, does not appear workable given the impact of the criminal docket and general vagaries

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[10] The Civil Justice Reform Act requires the District to consider the following principles and guidelines:

> (2) early and ongoing control of the pretrial process through involvement of a judicial officer in-
>
> (A) assessing and planning the progress of a case;
>
> (B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint, unless a judicial officer certifies that-
>
> (i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or
>
> (ii) the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases;
>
> (C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; and
>
> (D) setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition.

28 U.S.C. § 473(a)(2). See also 28 U.S.C. § 473(b)(1) (joint discovery plan) and (b)(2) (attorney present at pretrial conferences should have authority to bind).

of docket planning. Some element of this technique is, however, present in the setting of a subject-to-trial date found in most (if not all) initial scheduling orders.

Although local rules and procedures as to early judicial involvement are generally adequate, some modifications may be helpful in the areas of motions practices, extensions of time to answer, and discovery procedures. Motions practices and extensions of time are discussed below. Discovery is addressed in Section [VI].

B. Motions Practice

The district already has procedures requiring prefiling consultation as to most motions. Local Rule 12.02, DSC. Local Rules also adequately address the requirement for and content of supporting memorandum and time for filing. Local Rules 12.03-07, DSC. The time from filing to resolution of motions is, however, a growing area of concern.

The district **[adopts]** a goal of resolving all motions within **[forty-five (45) days]** of completion of briefing, absent specific reasons precluding such resolution. To aid the court in achieving this goal, local rules or standing orders will be adopted:

1) encouraging use of oral rulings and minute orders as to most motions;

2) acknowledging that it is fully appropriate to request a draft order from counsel for the prevailing party when the circumstances of the motion make it appropriate to include the court's rationale in the order; and

3) setting forth guidelines for the use of proposed orders.[11]

When proposed orders are requested, counsel will be encouraged to provide the order by hard copy and on diskette (if their word processing system is compatible with the court's).

When counsel drafts a proposed order, the rules will require that a copy be served on opposing counsel. Opposing counsel shall then have a reasonable time in which to comment.

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[11] The United States Supreme Court and the Fourth Circuit have issued opinions acknowledging that it is not improper to solicit and adopt proposed findings if the court exercises independent judgment in adopting or revising the proposed findings. See Anderson v. Bessemer City, 470 U.S. 564, 571-73 (1985); and Aiken County v. BSP Division of Envirotech Corp., 866 F.2d 661, 676-77 (4th Cir. 1989).

The time allowed as well as the scope and method of comment shall be within the courts' discretion.[12]

Implementation of the suggested **[forty-five (45)]** day goal will be facilitated by current electronic motions docket capabilities. On a **[monthly/quarterly]** basis, the Office of the Clerk of Court will request a report, by judge, listing all motions filed more than **[sixty-five (65)]** days prior to the date when the request is entered.[13] The resulting list will be printed in order of motion filing date for review by the judge whose docket is listed. The list will also be utilized to track progress towards the **[forty-five (45)]** day goal.

C. **Extensions of Time to Answer**

Rule 6(b) of the Federal Rules of Civil Procedure contemplates that all extensions of time to do any act required by Federal Rule or court order shall require court approval. Local Rule 12.11 requires that extension requests be made by motion with accompanying affidavit. Local Rule 7.14 states that the courts must be restrained in granting extensions including extensions of time to answer.

The requirement of judicial involvement to extend time to answer with the added affidavit requirement and indication of restrictive application has proved counterproductive. Considering that the Federal Rules of Civil Procedure require an answer within twenty (20) days of service, that time is lost while a complaint makes its way to the appropriate person, and that clients often need to locate and hire counsel, extensions of time to answer are often needed. In practice, extensions are also frequently granted.

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[12] For instance, comment might be by redlined draft or by letter. Comments might also, in the judge's discretion, be limited to matters which appear to differ from the court's oral ruling or drafting instructions in order to prevent rearguing.

[13] Allowing the standard times for briefing (Local Rules 12.06 and 12.07), a motion should normally be fully briefed within 20 days of filing. For purposes of tracking progress, therefore, the court could utilize 65 days from filing as an approximation for 45 days of briefing.

The district will, therefore, **[adopt]** a local rule allowing a one-time extension of time to answer based on a consent order submitted by the parties. No affidavit shall be required. We further **[concur]** in the advisory group recommendation that the Federal Rules of Civil Procedure be modified to set a thirty (30) day time to answer (or otherwise providing for extended time to answer)[14] and to allow a one-time extension of time to answer by written consent of the parties.

VI. COST EFFECTIVE DISCOVERY

The CJRA Act directs each advisory group to consider implementing the following principles:

> (4) encouragement of cost effective discovery; [and]
>
> (5) conservation of judicial resources by prohibiting consideration of discovery not accompanied by certification of consultation.

28 U.S.C. § 473.[15]

> **[NOTE TO JUDGES: THE REPORT DOES NOT ADDRESS HOW TO RECONCILE ANY DIFFERENCES BETWEEN THE PROPOSED CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THESE CJRA PROPOSALS. THIS WAS, IN PART, DUE TO THE CHANGING NATURE OF THE FEDERAL RULE PROPOSALS. THE PLAN SHOULD ADDRESS HOW TO RECONCILE ANY DIFFERENCES (IF THE RULES ARE IN PLACE BY THAT TIME) OR AT LEAST ACKNOWLEDGE THE POTENTIAL FOR CONFLICT. SEE REPORT SECTION [VII] AT NOTE [59]; REPORT AT EXHIBIT 22; AND CARL TOBIAS, COLLISION COURSE IN FEDERAL CIVIL DISCOVERY, 145 F.R.D. 139 (1993).]**

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[14] Federal rule modifications currently under consideration include provisions granting increased time to answer if service by mail is accepted. See Proposed Rule 12. Such an incentive would encourage cooperation and reduce litigation costs and is endorsed by the judges of this district as well as by our advisory group.

[15] The Civil Justice Reform Act requires the District to consider the

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

28 U.S.C. § 473(a)(4) & (5). See also 28 U.S.C. § 473(b)(1) (joint discovery plan) & (b)(3) (requests for extension of, e.g., discovery deadlines should include party signature). For our recommendation as to the requirement of a party signature see section IV.A. above.

The latter recommendation is already covered by local rule in the district. Local Rule 12.02, DSC. Discovery planning and scheduling is addressed above at Sections **[IV]** and **[V]**.

Current local rules also place limits on the quantity of discovery. See Local Rule 9.00, DSC. (limiting numbers of interrogatories and requests to admit). Further requests require prior court approval and must be accompanied by affidavit "setting forth in detail the need for the extension." Id. Unnecessary requests or unwarranted opposition are subject to sanctions.

In the district, motions to compel discovery must be filed within twenty (20) days after receipt of the objected to response or failure to respond (the latter running from the due date). Local Rule 12.10, DSC. If extensions of time for discovery are sought, the supporting affidavit must state that the parties have diligently pursued discovery during the original specified time. Local Rule 12.11, DSC. Uniform, though not inflexible, enforcement of these existing local rules is the district's best tool to avoid discovery abuse and unnecessary cost and to encourage cost effective discovery.

A. Techniques Considered

With respect to the recommendations addressed by our advisory group, this district makes the following determinations:

1. *The proposed automatic disclosure of "core information."* The proposed automatic disclosure of all "relevant facts" upon which a claim or defense is based are presently adequately covered in Local Rule 7.

2. *Mandatory automatic exchange of all "relevant documents."* We adopt only a very limited requirement in this area. See below (subsection B.1.).

3. *Limitations on the number of interrogatories.* Limitations already in place and are adequate.

4. *Proposed limitations on the duration of depositions.* We do not adopt any change in existing practices which place no limits on depositions.

5. *Mandatory joint discovery and case management plans.* Existing procedures addressed above (Plan Sections [IV. & V.]) are adequate.

6. *Periodic pre-trial conferences.* Current procedures leaving such conferences to judicial discretion are adequate.

7. *Proposed automatic stay of "merit discovery" pending resolution of jurisdictional disputes.* We reject automatic stays as they would encourage jurisdictional contests. Current procedures allow for limitation or stay of discovery upon the motion of either party.

Each of the above procedural suggestions was, as noted above, found to be largely unnecessary for this district or was currently covered by local rule. Procedural changes to be adopted are set forth below.

B. Recommendations

1. Mandatory disclosure

The District of South Carolina currently requires disclosure of certain core information by both parties in response to the court's interrogatories. Local Rules 7.06 through 7.13, DSC. Current practices will be continued with the addition of a requirement that, where a claim is bottomed on a contract theory, plaintiffs will, within thirty (30) days of service of the summons and complaint, make available for inspection and copying the documents which plaintiff will rely upon to establish the contract upon which the claim is made.

2. Unlimited Requests to Admit Genuineness

Local Rule 9.00 will be amended to allow an unlimited number of requests to admit genuineness of documents. This action is currently allowed by the South Carolina Rules of Civil Procedure. It should reduce the number of in-court appearances of witnesses simply to authenticate documents.

3. Automatic Disclosure of Expert Qualifications and Anticipated Testimony.

Local rule interrogatories will be amended to require automatic disclosure of a curriculum vitae ("CV") for all named experts who may testify.

4. Prompt hearing and resolution of discovery disputes.

This is the most significant area where improvement is needed. It is addressed in the preceding sections. See Sections [IV.B. & V.B.]

5. Limitations on Protective Orders.

[NOTE TO DISTRICT JUDGES: THIS IS THE SOLE PORTION OF THE ADVISORY GROUP REPORT ON WHICH UNANIMITY WAS NOT ACHIEVED. THE PROPOSAL WAS ADOPTED BY AN 8 TO 4 VOTE AT A MEETING AT WHICH THE MAJORITY OF THE ADVISORY GROUP WAS PRESENT. LATER INPUT FROM MEMBERS NOT PRESENT AT THE MEETING RESULTED IN 8 IN FAVOR OF AND 9 OPPOSED TO THE PROPOSAL. THE RATIONALE OFFERED BY THE PROPONENTS IS SHOWN AT EXHIBIT 20 TO THE REPORT. THE DISSENT IS FOUND AT EXHIBIT 21.]

This district [adopts] the following proposal as a local rule.

In all products liability actions in which the plaintiff seeks to recover for personal injury or property damage alleged to have resulted from a design or formulation defect in a mass production product, no confidentiality or protective order will be issued prohibiting or restricting the disclosure of information or documents obtained through the process of pretrial discovery unless the court finds as a fact specifically with respect to each such item of information or document as to which confidentiality or protection is sought:

(a) That it contains a bona fide trade secret, the disclosure of which would cause serious competitive harm, or that it contains other confidential research, development, or commercial information within the meaning of Federal Rules of Civil Procedure 26(c)(7), and

(b) That the need for confidentiality is not outweighed by the interest of other affected persons to free access to the truth of the matters contained therein, and

(c) That such order will not prevent the disclosure of information which is relevant to the protection of public health and safety, and

(d) That justice requires the issuance of such order to protect a party or person from annoyance, embarrassment, oppression, or other burden or expense within the meaning of Federal Rules of Civil Procedure 26(c).

VII. UTILIZATION OF ALTERNATIVE DISPUTE RESOLUTION PROGRAMS

A. Summary of Recommendations

The act requires each district to consider the utilization of alternative dispute resolution programs in appropriate cases.[16] 28 U.S.C. § 473(a)(6). The District of South Carolina **[concludes]** that the following methods of alternative dispute resolution ("ADR") are reasonably well suited for this district, at least under certain circumstances, and adopts their usage.

(1) MEDIATION;

(2) SUMMARY JURY TRIALS; [17]

(3) EARLY NEUTRAL EVALUATION; and

(4) MANDATORY JUDICIAL SETTLEMENT CONFERENCES.

Of the four techniques listed above, mediation is expected to provide the leading form of ADR. Summary trials will be available within the judges discretion but are expected to be utilized fairly rarely due to their cost and complexity. Early neutral evaluation and routine usage of mandatory settlement conferences will be tested on a pilot project basis and compared to the mediation program. The techniques adopted are discussed in greater detail below. We **[decline to adopt]** any systematic usage of court annexed arbitration.

In addition, we **[adopt/endorse]** procedures publicizing the availability and potential benefits of alternative means of dispute resolution. See Section VII.B.3. below. The **[advisory**

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[16] The Civil Justice Reform Act requires the district to consider

> (6) authorization to refer appropriate cases to alternative dispute resolution program that-
>
> (A) have been designated for use in a district court; or
>
> (B) the court may make available, including mediation, mini-trial, and summary jury trial.

28 U.S.C. § 473(a)(6). See also 28 U.S.C. § 473(b)(4) (suggesting neutral evaluation program to be made available early in litigation) & (b)(5) (authorizing court to require presence of party with authority to bind at any settlement conferences).

[17] Mini trials are seen as similar in cost-benefit to summary jury trials and are acknowledged as available but are neither recommended nor discouraged. See below § **[VII. B.2.]**.

group] is directed to compile a modest library of resource materials to be housed in the federal courthouse in each division. [It] is also to obtain or develop a brochure describing, in layman's language, the available means of ADR. The latter shall be made available to the general public through the clerk's office and, if agreeable, through the local bar.

B. Assessment of ADR Alternatives

1. Mediation

Mediation is negotiation among the parties, facilitated by a trained nonparty neutral. Ultimately, the vast majority of all cases will settle before trial. By facilitating the negotiation process, mediation hastens the settlement which reduces the cost to the litigants, the pretrial burden on the court system, and the average life expectancy of the court's caseload.

In most federal mediation programs, lawyer-mediators receive modest or no compensation. Case selection in federal court mediation is generally left to the presiding judge. In most programs, the judge has the authority to order participation in at least one mediation session.

In the past five years, at least eight federal district courts have instituted mediation programs. In addition, mediation has been successfully utilized in state court settlement weeks in this state, and by various of our district's judges. See Report Section [VII.B.1.]

Because of the minimal cost of mediation, its proven success in the district and its applicability at various stages of a case, we anticipate that this ADR program will be the district's leading ADR program. Its viability is, however, dependent upon continued availability of skilled, no-cost or low-cost mediators or appropriate funding.[18]

The district [will] implement a mediation program as set forth in the proposed Local Rules. See Proposed Local Rules at plan Exhibit [14]. Given the success of the recent state and federal court settlement weeks in the district and the better opportunity for tracking provided by

[18] By working in conjunction with the State and local Bar Associations a program might be devised to give CLE or pro bono credit to volunteer mediators to reward (if not compensate) them for their commitment.

such mass mediation, a "mediation week" format is the preferred method. By organizing mediation into a "mediation week," the disruption to the mediators (and the court) is minimized. Judges will, however, be free to utilize other formats if more suitable to them.[19]

Two methods of referral will be utilized. First, an "opt out" program, which would require some form of justification to be exempted, will be tested. Because of the significance of the right, it should be sufficient for a litigant to rely on the right to a jury trial as justification for opting out. Affirmation by counsel that mediation would serve no useful purpose will also be adequate justification. In the opt out program, the presiding judge will decide whether to grant the opt out based on input from the parties. Initially, either party could nominate a case for consideration or the judge could designate a case without party request.

Alternatively, an "opt in" program should be evaluated. "Opting in" would require agreement of all parties before the case is referred to mediation.

Survey and settlement results will be compared between the opt in and opt out programs as well as between mediation week and other formats. These results will be compared to each other and to results of other ADR programs to determine which forms of ADR are most effective in this District.

To ensure that mediation is a means of moving cases towards some form of resolution, referral to mediation will not constitute a reason for delaying the progress of a case. Neither the court nor the litigants shall rely on the pendency of mediation as a basis for any delay in discovery, resolution of motions or scheduling for trial.

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[19] Compilation and comparison of results will be dependent on availability of personnel. The forms should, however, be completed as mediation programs are implemented. Procedures for follow-up are discussed at Exhibit [17]. Sample survey forms are included.

2. Summary Jury Trial

A summary jury trial is a nonbinding, informal settlement process in which real jurors hear abbreviated case presentations. A judge presides. There are no witnesses. Party representatives authorized to settle the case attend. After the "trial," the jurors hand down an advisory verdict, which becomes the starting point for settlement negotiations. The presiding judge may participate in negotiations. If no settlement is reached, the parties proceed to trial.

Summary jury trial is an elaborate ADR device that requires the attention of a judge and a jury. It is best-suited to large, complex cases that would take weeks or months to try. Such cases are not routine in the district.

Summary jury trials are an ADR alternative already available in the district. Given their apparently limited usefulness here, such procedures are anticipated to be rarely utilized but their appropriateness is left to the individual judge.[20]

3. Early Neutral Evaluation[21]

In early neutral evaluation ("ENE"), a neutral evaluator, holds a brief, confidential, nonbinding, session early in the litigation. Afterwards, the evaluator identifies the main issues, explores settlement, and assesses the merits. When settlement seems unlikely, the evaluator assesses each side's case for liability and damages and issues a nonbinding decision. The evaluator may also recommend a discovery or motion plan and follow-up meetings. Parties do not lose the right to trial.

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[20] The mini-trial is a nonbinding settlement process primarily used out of court. Like the summary jury trial, the court mini-trial is a relatively elaborate ADR method, which uses a neutral advisor, lawyers, settlement-authorized clients, and a structured, but flexible procedure. Therefore, like the summary jury trial, courts generally reserve it for large disputes. The district's determination as to the mini-trial is essentially the same as to summary jury trials. We do not advocate its use but acknowledge its availability.

[21] This group is required to consider this technique by 28 U.S.C. § 473(b)(4).

An ADR program as elaborate as systemic ENE does not seem appropriate for the district. Like court-annexed arbitration, a system-wide ENE program would be expensive. It is unlikely qualified volunteers would be available for this time consuming process. Moreover, the proposed mediation program may provide many of the same benefits, if available early in a case's development. Nonetheless, the district will experiment with ENE on a pilot basis in selected groups of cases after implementation of the mediation program. The results and costs will be compared to those of the mediation program and mandatory judicial settlement conference pilot program.

4. Mandatory Judicial Settlement Conferences

The settlement conference conducted by a judge or magistrate is the most common form of ADR currently used. Traditionally held on the eve of trial, judicial settlement conferences may be held throughout the litigation. Courts with multiple ADR options report that their settlement conference programs are the most widely used and best accepted of their ADR efforts.

Unlike less familiar ADR techniques, such as ENE, the settlement conference is an inexpensive way for litigants to resolve their dispute.[22] Casting a judicial officer as a settlement neutral seems to increase the likelihood of settlement. Settlement conference programs may distance the trial judge from the conference to prevent loss of judicial impartiality or its appearance. Programs may, alternatively, channel settlement work to particular judges or magistrates.

The district may benefit from more systematic use of judicial settlement conferences. We adopt a pilot program to test routine scheduling of settlement conferences. This program will be compared to the mediation program and ENE costs and results to determine the best utilization of each.

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[22] Mediation sessions, as recommended above, would provide some of the same benefits without the impact on judge's time.

Our program will require that upon notice by the court, a representative of the parties with authority to bind[23] will be present or available by telephone during any settlement conference. If scheduling can be arranged, the pilot program will utilize several senior district judges, visiting judges, or magistrates to hold settlement conferences in cases assigned to other district judges.

5. Court-Annexed Arbitration

Based on the discussion and analysis in the Advisory Group Report, the judges of the district conclude that the potential benefits of court annexed arbitration do not, for this district, outweigh its risks and costs. See Report Section [VII.B.2.] The condition of this district's docket does not justify adoption of such an elaborate ADR device.

6. Publicizing Alternatives to Trial

If funding permits a brochure will be prepared and offered which explains available private ADR devices, as well as ADR devices already available under the rules. Similarly, material on ADR techniques will be made available through the court if funding permits. This information will serve to educate the judges, attorneys and litigants in this district about available forms of ADR. Judges will emphasize the availability of the information to counsel and parties at any scheduling conferences. It will also be referenced along with the option of consenting to referral to a magistrate as contemplated by Local Rule 19.03.

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[23] See 28 U.S.C. § 473(b)(5) (suggesting requiring presence in person or by phone of party with authority to bind).

VIII. NONMANDATED AREAS[24]

A. Facilities

Lack of adequate courtroom facilities has been a problem in three divisions: Charleston, Columbia, and Greenville. The problem is in the process of being remedied in the Charleston Division. In Columbia, an offer has been made to purchase appropriate property for later expansion of the court facilities.

Parking for jurors is also a major problem in the Columbia Division. It is a significant problem in Charleston.[25]

The judges of the district **[urge]** appropriation of funding to insure adequate courtroom and parking facilities. We also **[recommend]** consultation with representations from the bar to insure that building or redesign takes into consideration the concerns expressed in the Advisory Group Report. Report Section **[IX.A.]**

B. Encroachment of the Criminal Docket

[NOTE TO JUDGES: MUST DETERMINE IF THIS IS APPROPRIATE FOR PLAN]

Recognizing that encroachment of the criminal docket is a substantial and growing obstacle to movement of the civil docket, we **[concur]** in the advisory group's recommendations regarding modification of the sentencing procedures required by the sentencing guidelines and timetables set by the Speedy Trial Act. See Report Section **[VIII.B.]** The later recommendation was to require an opt-in before the specified time commences to run.

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[24] The district is directed to consider various specific techniques as well as: "such other features as the district court considers appropriate after considering the recommendations of the advisory group." 28 U.S.C. § 473(b)(6). The advisory group recommendations appear at Section **[VIII]** to the Report.

[25] The GSA has acknowledged the existence of the parking problems.

We **[agree]** that the administrative branch should also consider the federal court impact of stepped up criminal enforcement measures. We **[encourage]** caution particularly when the matters at issue could be prosecuted in state court.

C. **Congressional and Administrative Action Which Impacts the Civil Docket**

[NOTE TO JUDGES: MUST DETERMINE IF THIS IS APPROPRIATE FOR PLAN]

The judges of the district **[also concur]** with the advisory group's recommendation that the legislative and administrative branches give increased consideration of the impact on the judicial system of new legislation or stepped up enforcement. After consideration, they should appropriate or authorize funding increases to meet the increased demands.

D. **Local Rules**

The advisory group recommended various modifications to local rules. To the extent adopted, all modifications of local rules will be accomplished in consultation with the Local Rules Committee.

We **[concur]** with the advisory group recommendation to modify the local rules to allow extension of the time to answer a complaint via consent order. See also Plan Section **[V.C.]** above and Report Section **[IX.D.]** We **[agree]** that the following other local rule modifications should be made. Rules 12.06 and 16.00 require responses within a given number of days from filing of the matter to which responding. These two rules should be modified to indicate that time runs from date of service or receipt.

Rule 7.03 exempts all pro se litigants from the requirements of Rule 7.00. Rule 7.04, however, refers to unrepresented parties in its reference to Federal Rule 16(b)'s consultation requirement. We **[agree]** that Local Rule 7.04 should be clarified to state that the interrogatories apply only to represented parties not otherwise exempted by Rule 7.03. **[The Local Rules Committee will be asked to propose rules as to how consultations will be accomplished, if at all,**

as to the exempted parties (including unrepresented parties) and to further clarify the rule in this regard.]

Local Rule 7.10 establishes the time in which a party against whom a cross-claim or counter-claim must answer local rule interrogatories to defendants. Answers are due "thirty (30) days after the time for answering expires." Local Rule 7.10, DSC. The rule should be clarified to require answers "within thirty (30) days after the time for answering the counter-claim or cross-claim expires" (additional language is underlined).

Local Rule 20.01 is also confusing. The first and second sentences appear to be in direct contradiction. The rule should be clarified.

E. Variance from Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure call for a twenty (20) day time to answer. Fed. R. Civ. P. 12(a). State court procedure in this state and many others allows for thirty (30) days. The shortened federal time frame does not appear to lead to any significant reduction of delay in the judicial system. Indeed, it may contribute to delay as defendants seek court approval of extensions of time to answer. See Fed. R. Civ. P. 6(b) (the court may for cause shown enlarge a period of time). It is at least implied under the federal rules, and expressly stated by this district's local rules that an extension of time to answer cannot be granted by the opposing party. See Local Rule 12.11, DSC.

We **[concur]** with the recommendation that the Federal Rules of Civil Procedure be modified to allow a greater time to answer. If currently pending proposals related to extensions based on acceptance of service are not adopted, we would encourage adoption of a standard thirty (30) days in which to answer. We would also recommend that a one time extension, not to exceed an additional thirty (30) days, be permitted with written consent of the opposing party. Pending (or in lieu of) such change to the Federal Rules of Civil Procedure and to the extent it may be permissible to do so, we recommend that the local rule be modified to allow a one time

extension equal to the time stated in the federal rules based on consent order submitted by the parties. See also Plan Sections [V.C.] & [VIII.D] above.

F. **Modification of Clerk Procedures**

Recent modifications to Rule 5 of the Federal Rules of Civil Procedure are also causing some difficulties. Prior to the recent revisions, the Clerk of Court's Office could reject improper filings. This allowed the Clerk of Court to insure compliance with both federal and local rules. Now all filings must be accepted with later review for non conformity by a judicial officer.

The district **[concurs]** with the advisory group recommendation that a procedure be implemented through which the Clerk of Court's office issues a form noting when a filing is believed to be defective. The form would specify the defect and encourage voluntary correction. If corrected expeditiously, the court will have no need to rule on the initial filing.

G. **Multidistrict Litigation**

The District of South Carolina is concerned that Multi-District Litigation No. 875 has delayed the disposition of asbestos personal injury cases pending in the district. Prior to the MDL, the District of South Carolina was handling, in the normal course, its flow of asbestos cases. Since the order establishing MDL No. 875 was issued, those cases have continued to accumulate with very few cases being resolved. The few cases remanded to the district have been quickly set for trial and settled. There are a substantial number of such cases which the district could handle in the normal course of its caseload. It is, therefore, the district's recommendation that twenty percent (20%) of the consolidated asbestos cases from this district be remanded annually for disposition.

H. **Personnel Needs and Follow-up**

Various suggestions in this plan may require some added personnel or shifting in duties. The expedited docket, for instance, might necessitate added assistance from courtroom support personnel. Similarly, the mediation week concept requires some level of coordination even if

volunteer mediators are used. Follow up to determine progress towards established goals will also require some personnel time.

These duties may well be distributed among existing personnel or, in some cases, shared with bar association volunteers. The personnel requirements must, nonetheless, be addressed in determining whether and how to implement certain phases of the district's plan.

This concern is a critical concern in light of recent budget cuts which will ultimately result in the loss of fourteen (14) positions in the Clerk of Court's Office. This represents over twenty percent (20%) of the present staff of sixty-eight (68). Given such cuts, it will be impossible to serve even at current levels, let alone have flexibility to implement new programs to expedite case handling. The judges of this district, therefore, emphasize the need for 100% staffing.

Just as noted above as to impact on the judges' caseloads, new projects and programs, as well as stepped up civil and criminal enforcement of existing laws, place additional burdens on the Clerk of Court. The sponsors or backers of such projects, programs or stepped up enforcement need to insure that sufficient funding is made available to the courts, including the Clerk of Court, to guarantee the proper implementation of these programs without adverse effect on existing programs and duties.

IX. IMPLEMENTATION AND MONITORING

A. Responsibility

Responsibility for implementation of this plan including coordination with the Local Rules Committee, advisory group, and court personnel is placed upon **[RESPONSIBLE ENTITY/PERSON]**.

B. Funding

[TO BE ADDRESSED BY JUDGES/CLERK]

C. Statistical Evaluation & Monitoring

Those statistical measures identified in **[Appendix B]** to this Plan will be prepared by **[Responsible Entity/Position]** and presented to the Chief Judge of the District at the time interval

specified IN **[Appendix B]**. The Chief Judge, in conjunction with the other district judges and magistrate judges will utilize these figures to evaluate the benefits of those programs and techniques outlined in the plan. They will also be used to evaluate the need for other measures to improve the administration of the district and to reduce any unnecessary costs and delays.