United States District Court
Northern District of West Virginia
Post Office Box 1275
Elkins, West Virginia 26241

Robert E. Maxwell
Chief Judge

September 3, 1991

Honorable William W. Schwartzer
Director, Federal Judicial Center
1520 H Street, N.W.
Washington, D.C. 20005

Dear Judge Schwartzer:

As a follow-up to my earlier correspondence with regard to our implementation in the Northern District of West Virginia of the provisions of the Civil Justice Reform Act of 1990, enclosed please find our fifty-seven page preliminary draft, with several Exhibits. This draft, which will be referred to as the August 30, 1991 draft, is being submitted to the expanded Executive Committee of our Advisory Group. It is our understanding that the Chairman will call a meeting of the expanded Executive Committee on or about September 11. The views of this group will then be presented to Magistrate Judge John W. Fisher, II, our lead Reporter and will be incorporated in a proposed final draft. The final draft will be submitted to the membership of the entire Advisory Board for their review. Shortly after this final submission we will have a meeting of the Advisory Group, hopefully to adopt a plan for the Northern District of West Virginia.

This August 30, 1991 draft, together with the August 5, 1991 draft, a copy of which is enclosed herewith for your convenience,

when considered together represents the overall scope of our Alternative Dispute Resolution program.

As a demonstration district under the statute, and hopefully an early implementation district, your thoughts, suggestions and recommendations will be greatly appreciated by Magistrate Judge Fisher, our Advisory Group membership, and myself.

With warm good wishes, I remain

Sincerely,

Robert E. Maxwell
United States District Judge

REM/lef

Enclosures

CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN RECOMMENDED BY THE ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

I

BACKGROUND AND INTRODUCTION

On December 1, 1990, the President signed into law the Civil Justice Reform Act of 1990. The purpose of the Act is to reduce cost and delay of civil litigation in the United States District Courts. The Act contemplates a community effort and significant contribution not only by the courts, the Congress, and the Executive branch, but also by litigants and attorneys.

The primary means for reduction of civil justice expense and delay is to be the prompt implementation of an expense and delay reduction plan recommended by the district courts after significant input from litigants and attorneys. Ultimate approval must come from the United States Judicial Conference after review by the Fourth Circuit Judicial Council, all chief district judges in the Fourth Circuit, and the Administrative Office of the United States Courts.

On February 9, 1991, as required by the Act, the United States District Court for the Northern District of West Virginia appointed an advisory group consisting of litigants, lawyers, academics, state bar officials, representatives of the United States Attorney's office, individuals experienced in alternative dispute resolution, public defenders, and a representative of the West Virginia Attorney General's office. On April 12, 1991, the advisory group conducted its first meeting and undertook the tasks

of conducting a prompt assessment of the court's workload and preparing a report recommending the specific measures, rules, and programs for adoption by the district court as its civil justice expense and delay reduction plan.

This judicial district has been designated by Congress as a "demonstration district" which must experiment with various methods of reducing costs and delay, including alternative dispute resolution procedures (28 U.S.C. §104). The judicial district also has the option to become an "early implementation district." However, in order to be designated by the Judicial Conference as an early implementation district, this district must develop and implement its plan by December 31, 1991 [28 U.S.C. § 103(c)]. After careful study and due deliberation, it is the recommendation of the advisory group that this judicial district implement its plan by December 31, 1991, and seek to be designated by the Judicial Conference as an early implementation district. Further, if so designated, it is the recommendation of this advisory group that additional technological and personnel support resources be sought to assist in the implementation of this court's plan designed to reduce expense and delay associated with civil cases.

The recommended expense and delay reduction plan submitted by the advisory group is the product of significant research, study, and analysis. The advisory group initially conducted an assessment of the court's civil and criminal dockets and identified what appeared to be the principal causes of cost and delay in civil litigation within this judicial district. The advisory group also

examined the impact of recent criminal and civil legislation upon the civil docket and administration of the civil justice system. Finally, based upon its findings, the advisory group has submitted its report containing recommendations that the district court develop its own plan responsive to the particular needs and circumstances of this judicial district and the litigants and attorneys within this judicial district.

II.

ASSESSMENT OF THE CIVIL AND CRIMINAL DOCKETS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

The advisory group began its work by conducting an assessment of the civil and criminal dockets of this judicial district, as required by the Act [28 U.S.C. § 472(c)]. In conducting this assessment, the members of the advisory group have reviewed work loads and case processing statistics maintained by the Administrative Office of the U.S. Courts. Members of the group have studied a report prepared by the National Judicial Center based on these data and entitled Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990. (February 1991). The advisory group also considered the six-page "Status Report from the Clerk of the Court" prepared by and submitted to the group on April 12, 1991. Finally, the group obtained additional information on a pre-existing mediation program known as "Settlement Week," other alternative dispute resolution experiments, and the civil and criminal dockets generally. Finally

group members have reviewed the existing literature on delay reduction including:

1. Report of the Federal Courts Study Committee (April 2, 1990).

2. Defeating Delay: Developing and Implementing a Court Delay Reduction Program (Based upon the American Bar Association Court Delay Reduction Standards) (ABA, 1986).

3. M. Selvin & P. Ebener: Managing the Unmanageable: A History of Civil Delay in the Los angeles Superior Court (Band, 1984).

4. Protracted Civil Trials: Views From the Bench & the Bar (Federal Judicial Center, 1981).

5. M. Solomon & D. Somerlet Caseflow Management in the Trial Court: How and For the Future, Task Force on Reduction of Litigation Cost and Delay (ABA, 1984).

6. Case Management and Court Management in United States District Courts (Federal Judicial Center, 1977).

7. Justice for All: Reducing Costs & Delay in Civil Litigation (The Brookings Institution, 1989).

A. Analysis and Determination of the Condition of the Civil and Criminal Dockets.

Based upon a review and analysis of the foregoing information, the advisory group makes the following assessments of the civil and criminal dockets of this judicial district.

1. The statistics, graphs, and charts set forth as pages 7 through 19 of the "Guidance to Advisory Groups Memo" dated February 28, 1991, are consistent with the general impressions formed by

members of the advisory group with respect to the condition and status of the criminal and civil dockets of this judicial district.

2. Magistrate judges have been instrumental in the resolution of civil discovery disputes but have not presided over any significant number of civil trials. Thus, while the magistrate judges do function effectively to reduce delay in the discovery process, they do not function significantly in the trial of civil cases.

3. During the past five years this judicial district has had a reasonably large number of visiting judges, who have heard both civil and criminal matters. The case termination figures for this judicial district reflect the assistance of the visiting judges. However, the advisory group does not perceive that, even with the assistance of visiting judges, there has been a perceptible reduction of delay in the termination of civil cases. Furthermore, because visiting judges are available only on a limited basis, as a matter of necessity counsel and litigants frequently receive short notice of trial dates and other deadlines, are required to try cases away from the normal point of holding court, and are occasionally "stacked up" in order to maximize dispositions within a narrow time frame. As a result, the expense to litigants is frequently higher when civil cases are handled by visiting judges.

4. The "judicial workload profile" reflects that during the past five years the overall number of yearly civil and criminal filings in this judicial district has ranged between the high 700's to somewhat in excess of 1,000 cases. During this same five-year

period, the pending per judge caseload in this judicial district has ranged from nearly 500 up to approximately 750 cases per judge. Also, during this same five-year period, the terminations per judge have been approximately 400 to 550 cases per year. These termination figures reflect not only the assistance of a large number of visiting judges, but also the successes of "Settlement Week."

5. The number of civil cases filed in this judicial district has remained almost constant for the last four years (1987-1990). During 1985 and 1986, however, the number of civil cases filed was significantly higher. (The weighted filings were essentially constant). During the corresponding time period (1985-1990), the number of criminal felony cases filed per year has almost doubled.

6. The latest statistical report presented to this judicial district by the Administrative Office indicates that of the 94 judicial districts, this judicial district ranks 9th in the nation in the number of criminal filings per judgeship. More specifically, the current report reflects 118 criminal felony filings per judgeship, as compared to the national average of 58. By contrast, this judicial district ranks 78th of the 94 judicial districts in the number of civil filings per judgeship per year (275 civil filings per judgeship for fiscal year (1990)).

7. On average over the last four statistical years, the criminal caseload has made up slightly less than 27% of the entire caseload in this judicial district; however, the rate of disposition for criminal felony cases has been significantly

quicker than the rate of disposition for civil cases -- undoubtedly due to the mandates of the Speedy Trial Act, which effectively assigns criminal cases a higher priority than civil cases. The effect of the priority assigned criminal cases coupled with the high rate of criminal filings per judgeship has been to retard the disposition of civil cases which go to trial in this district markedly when compared with national figures. During the period in question here the national average time from joinder of issues to trial in a civil case was consistently 14 months. By contrast in this district the average period for such development is 24 months or fully 10 months longer than the national average. That figure results in a ranking of this district of 81st out of the 94 district courts studied.

8. Statistical analysis of the civil caseload mix during statistical years 1988 through 1990 reflects that six case types account for approximately 75% of the civil filings in this judicial district. Those case types are: (1) prisoner civil rights (19%); (2) contract (17%); (3) personal injury (14%); (4) social security (13%); (5) labor (6%); and (6) non-prisoner civil rights (6%). Because different types of cases tend to move through the courts in different ways, it is important to consider the typical path to disposition for these six types of civil cases which make up 75% of the civil caseload of this judicial district. According to the "Guidance to Advisory Groups Memo" issued February 28, 1991, most social security cases and condition of confinement civil rights cases brought by state prisoners are disposed of by summary

judgment. These two types of cases constitute approximately 33% of the civil case filings in this judicial district. Conversely, contract actions, personal injury cases, non-prisoner civil rights cases, and labor law cases tend to be disposed of by a greater variety of methods and follow more varied paths to disposition. These types of cases constitute approximately 42% of the civil filings for this judicial district over the last three statistical years.

Not only are these six (6) case types the most frequently filed in this district, they also take up the bulk of judicial resources. Guidance at page 13 shows the burden imposed by various types of civil cases on those resources. Under the analysis the same six (6) civil case types are the most demanding in this district. Within this group of six civil case types, however, there are several statistical comparisons which may be of significance to the development of the courts civil justice expense and delay reduction plan. For example, although prisoner civil rights cases constitute 19% of the civil case filings, the judges have been required to devote slightly less than 8% of their time to these cases. Similarly, while non-prisoner civil rights cases constitute 6% of the civil filings, such cases have required almost 14% of the judge time allocated to civil cases.

Significantly, this judicial district does not have a high percentage of case type filings which fall into the "highly complex" category, e.g., securities and commodities, civil RICO, copyright, patent and trademark, ERISA, tax, and bank failures.

Civil case mix trends for the last ten statistical years have not varied significantly, suggesting that any plan for the future could reasonably assume continuation of the same civil case mix.

9. Analysis of the criminal docket also is assisted by statistics contained in the "Guidance to Advisory Groups Memo" dated February 28, 1991. Between 1981 and 1984, the number of criminal filings increased steadily; between 1984 and 1986 the number of criminal filings dropped off somewhat; and between 1986 and 1990 the number of criminal filings increased sharply. From 1982 through 1987, drug cases constituted between 40% to 45% of the total criminal case filings. However, in 1988 drug cases accounted for approximately 58% of the criminal filings, and in statistical year 1989 drug cases accounted for approximately 65% of total criminal filings. Drug filings data apparently is not yet available from the Administrative office for statistical year 1990 for this judicial district. The impact of the Speedy Trial Act and increased criminal filings has been a substantial demand on the resources of this judicial district for criminal trials. According to the data contained in the "Guidance to Advisory Groups Memo" for the statistical year 1985 through 1990, criminal trials have steadily increased as a percentage of total trials since 1986. More specifically, in 1986 criminal trials constituted approximately 42% of all trials; in 1987 criminal trials constituted approximately 69% of all trials; in 1988 criminal trials constituted approximately 88% of all trials; in 1989 criminal trials constituted approximately 78% of all trials; and in

1990 criminal trials constituted approximately 91% of all trials. The Advisory Group believes this significant increase in criminal trials is attributable to both the increased criminal filings and the sentencing guidelines.

10. The "Judicial Workload Profile" contained in the "Guidance to Advisory Groups Memo" classifies 1990 criminal filings in this judicial district into twelve categories (immigration, embezzlement, weapons and firearms, escape, burglary and larceny, marijuana and controlled substances, narcotics, forgery and counterfeiting, fraud, homicide and assaults, robbery, and "all other"). Of the 235 total 1990 criminal felony filings for this judicial district, 107 (46%) are either "narcotics" or "marijuana and controlled substances" and 67 (29%) are "fraud." These three offense categories constitute 75% of all 1990 criminal felony filings in this judicial district.

11. Statistics provided by the clerk of this judicial district in his six-page report presented to the advisory group on April 12, 1991, suggest that the 1990 narcotics/marijuana and controlled substances filings for 1990 are consistent with the historical picture over the last three statistical years (narcotics cases account for 49% of the total criminal felony filings). However, the number of fraud cases filed in 1990 represents a significant increase in that fraud cases accounted for only 16% of the total criminal felony filings during the past three statistical years but 29% of the total criminal felony filings in 1990.

12. Also contained in the clerk's report to the advisory

group is a summary of cocaine prosecutions within this judicial district during statistical years 1988 through 1990. According to the clerk, the purpose of this analysis was to consider the recommendation of the Report of the Federal Courts Study Committee (April 2, 1990) to limit federal prosecutions to charges that cannot or should not be prosecuted in the state courts. In particular, the clerk's analysis was conducted to determine whether cases involving minimal amounts of drugs, with no interstate or international connections, could have been referred for state prosecution. In order to determine the quantity of cocaine involved, the clerk relied upon language of the plea agreements, indictments, and informations filed. Unfortunately, in many instances, these resources were silent as to quantity (reading, for example, that the defendant was charged with distribution of a "quantity of cocaine"). Nevertheless, where the clerk was able to accurately determine the quantity of cocaine involved, it was determined that, in calendar year 1988, 44% of the individual defendants were held accountable for less than two grams of cocaine or crack (in one instance the amount involved was .01 of a gram). Of these 1988 cases, 24% of the individuals charged with cocaine offenses were held responsible for more than two grams of cocaine, and 32% of the individuals were convicted of cocaine offenses for which no specific quantity of cocaine was charged.

13. Based upon an analysis of calendar year 1989 closed cases available at the Elkins point of holding court, the clerk determined in his six-page report that 96 defendants were charged

with cocaine offenses; 29% of these cases involved less than two grams of cocaine; 29% involved over two grams of cocaine; and 40% involved offenses for which no quantity was specified. The same analysis was performed for calendar year 1990. According to the clerk, an incomplete docket reflects 23 defendants charged with cocaine offenses. The clerk acknowledges that some of these cases have not yet been ended but concludes that most have progressed to the point where the quantity of cocaine involved can be ascertained. In those instances, the clerk determined that 26% of the cases involved less than two grams and 48% involved more than two grams.

14. Based upon the foregoing study and analysis of recent drug prosecution in this judicial district, and in apparent reliance upon the Federal Court Study Committee (April 2, 1990) conclusion that "federal prosecutors must resist the urge to dedicate scarce resources of the federal judicial system to problems that can be dealt with effectively at the state and local level," (Report of the Federal Court Study Committee at page 37) the clerk concludes that the United States Attorney's office for this judicial district should limit its drug prosecutions to charges that cannot or should not be prosecuted in the state courts. In particular, the clerk recommends that the U.S. Attorney's office refer to state prosecutors thoses cases involving minimal amounts of drugs with no interstate or international connections.

15. Also contained in the six-page report of the clerk to the

advisory group is a summary and analysis of criminal fraud prosecutions in this judicial district. As previously noted, fraud cases constitute the second largest category of criminal felony filings in this judicial district, and appear to be on the increase during statistical year 1990. According to the clerk, the vast majority of fraud filings during the past three statistical years involve "student loan fraud." With respect to these student loan fraud cases, the clerk observes that although most of the student-defendants accept responsibility for their student loan default and agree to make restitution, each case nevertheless requires a hearing for consideration of the plea and a subsequent hearing for sentencing. The clerk suggests that student loan fraud cases, but for the allegation that the defendant commited fraud in the student loan application process and thereafter misappropriated the federally insured loan proceeds, are more in the nature of civil collection proceedings which could be efficiently handled administratively on the civil docket. By handling the cases on the civil docket, the burdensome mandates of the Speedy Trial Act would become inapplicable to a substantial number of cases, according to the clerk's report.

B. Identification of Trends in the Demands Placed Upon the Court's Resources.

Based upon its study and analysis of the civil and criminal dockets of this judicial district, the advisory group has identified certain trends in the demands placed upon the Court's resources, including not only the judicial officers but also

supporting personnel, buildings, and facilities.

1. A. Judicial Officers. The number of civil filings per judgeship over the last four (4) years has remained fairly constant (ranging between 271 to 284). However, there has been a steady and marked increase in the number of criminal filings over the last five (5) years (51 in 1986 to 118 in 1990). Although there was a drop in the civil filing from 350 in 1986 to 271 in 1987, the weighted filings per judgeship increased for those same years from 341 in 1986 to 359 in 1987. The weighted filings reached a five (5) year high of 385 in 1990.

The economy in West Virginia bottomed out approximately two years ago and has shown steady improvements since that time. The improvements in the economy reflect a diversification of the economic base beyond the one heavily dependent on coal which existed two decades ago. The state is enjoying a marked increase in tourism. Some increase in diversity tort litigation is likely as a result. High technology job opportunities have resulted from the development of "Software Valley." Copyright and patent litigation is likely to follow this development. The relocation of the Federal Bureau of Investigations Fingerprint Division to Harrison County will continue this diversity and provide additional economic stimulation. In addition, the resumption of work on corridor H which will span the eastern portion of the Northern District of West Virginia by connecting Interstate 79 and Interstate 81 will stimulate additional growth. All these developments bode well for the continued economic growth in the

Northern District of West Virginia. With this increase in economic activity, the federal district court can anticipate a commensurate increase in related business and governmental litigation. In addition, it is anticipated that a variety of federally funded projects in the Northern District such as the improvement on the locks and dams on the Monongahela River will increase the number of land condemnation cases similar to that experienced in the early 1980s with the construction of the Stonewall Jackson Dam and Lake Project. The Advisory Committee, therefore, concludes that the Northern District of West Virginia should experience an increase in civil filings at a rate greater than experienced in most other federal districts in the decade ahead.

The increase in criminal filings over the past five years has placed an extremely heavy burden upon the Article III judges. As noted previously, the federal district ranks nineth in the nation in the number of criminal filings per judgeship with 118 per judgeship in 1990 as compared with the national average of 58. Thus judges in this district carry more than twice the number of criminal filings as does the average federal judge. Given the priority in the scheduling of criminal cases mandated in the Speedy Trial Act of 1974, the impact of increased criminal filings extends beyond the increased caseload for the court. Under the Speedy Trial Act, the "ordinary" criminal case must be set for trial not less than thirty (30), not more than seventy (70) days from filing of the information or the indictment. Therefore, civil cases must be scheduled around the criminal docket. The chart contained in

the "The Guidance to the Advisory Group Memo" setting forth the number of criminal trials and criminal trials as a percentage of total trials (Chart 10) reflects that since 1987, criminal trials have represented at least one-half of all trials. The fact that many criminal cases are disposed of by plea agreements, frequently on the "eve" of trial, does not free up the court's time for civil trials because there is insufficient time to schedule civil cases, i.e., the party litigants must provide witnesses sufficient notice of the trial dates so that necessary arrangements can be made for the witnesses as well as the parties to attend the trial.

The referral of narcotics and controlled substance cases of small quantities with no interstate or international connections from federal courts to state courts would provide the court a window of opportunity to work on the civil docket before the criminal case load return to its present level under the new federal legislation discussed hereafter. In addition, the Advisory Group anticipates that even without small quantities of narcotic and controlled substance case of an intrastate nature, the criminal case load will continue to experience a steady increase because of the economic activities discussed above and the propensity for criminal activities to follow such economic growth.

Although the participation of visiting judges has been of significant assistance in managing both criminal and civil dockets, it is clear that civil cases continue to receive less judicial attention and to proceed to trial much more slowly than litigants deserve. For the past three reporting years, 1988 to 1990, median

time in months from issue to trial for civil cases has ranged from 20 to 28 while the national average for this interval is 14 months. Although Congress has created a third judgeship for this judicial district, the Advisory Group is concerned that the gains to be realized upon the arrival of the third judge will be substantially offset by reduced participation of visiting judges, leaving the civil docket without any significant improvements.

1. B. Magistrate Judges. The Northern District of West Virginia is served by a full time magistrate judge sitting in Elkins and part time magistrate judges in Wheeling and Morgantown. Like Article III judges, magistrate judges have substantial responsibilities in criminal cases, with those responsibilities constituting a significant portion of their case load. In addition, magistrate judges, particularly the full time magistrate judge in Elkins and the part time magistrate judge in Morgantown, are involved with duties pursuant to 28 U.S.C. §636 (b) for Type I[1] civil cases. The full time magistrate judge and, to a lesser extent, the part time magistrate judges have been involved in handling Type II[2] civil cases with their principle involvement in

---

[1] Type I cases include the following: student loan collection cases; cases seeking recovery of overpayment of veteran's benefits; appeals of Social Security Administration benefit denials; Condition-of-Confinement cases brought by state prisoners; habeas corpus petition; appeals from bankruptcy court decisions; land condemnation cases; asbestos product liability cases. The designation originates with the Guidance to Advisory Committee.

[2] Type II cases include the following: Contract actions other than student loan, veteran's benefit and collection of judgment cases; personal injury cases other than asbestos; non-prisoner civil rights cases; patent and copyright cases; ERISA

such cases being the resolution of discovery matters rather than conducting the trial in such civil cases.

The plan set forth below contemplates fixed deadlines for the completion of discovery after the answers are filed. In order for this plan to succeed, discovery disputes between the party litigants will have to be resolved promptly. It is anticipated that the magistrate judges' involvement with the discovery related issues will, therefore, increase. It is also anticipated that when the new judgeship created in the Civil Justice Reform Act of 1990 is filled, there will be an increase in the referrals of matters to the magistrate judges persuant to 28 U.S.C. § 636(b). Finally, it is anticipated there will be an involvement for the magistrate judges in assisting with alternative dispute resolutions for those cases not referred to "settlement week."

2. Supporting Personnel.

A. Clerk's Office.

There are four statutory locations for holding court in the Northern District of West Virginia - Clarksburg, Elkins, Martinsburg, and Wheeling. Chief Judge Robert E. Maxwell and the principal clerk's office is located in Elkins. Clerk's offices are also staffed in Wheeling where Judge Frederick P. Stamp, Jr., has his headquarters and in Clarksburg where Senior Judge William M. Kidd is located. The Clerk's office in Martinsburg in not staffed on a regular basis, but is staffed by a deputy clerk from one of

---

cases; labor law cases; tax cases; securities cases; and other actions under federal stututes, e.g. ROIA, RICO and banking laws.

the other clerk's office when a judge sits there. However, based on the projected economic growth and population increases in the eastern panhandle of West Virginia, it is anticipated that within the next five (5) years full time staffing of the Clerk's office in Martinsburg will be needed.

An additional district judge for the Northern District of West Virginia was authorized in the Civil Justice Reform Act of 1990. It is assumed that before the end of the calendar year an individual will be appointed to fill this judgship. While recognizing the decision of where the new judge will have his or her headquarter may have some additional impact on both supporting personnel and facilities needs, the advisory committee believes at this time it is safe to project certain personnel needs for the clerk's office.

The reestablishing of Wheeling as the headquarters for a sitting judge has resulted in an increase in court activity. It is anticipated the new judge will have a similar effect at his or her headquarters location. Also as noted in Section IV of this report, new criminal statutes are projected to significantly increase the criminal case load in this district as well as most other districts. In addition the advisory group's recommendation presented to the court as a part of this plan will increase the case management and monitoring responsibilities of the clerk's office for a significant number of additional civil cases. Finally, the increased litigation anticipated as a result of economic development projected for this district will all combine

to produce a need for an additional five (5) positions in the clerk's office within the next five (5) years. The increased need for personnel assumes the current automation underway within the clerk's office comes on line as anticipated.

(b) Probation/Pretrial Services Department.

The information presented in response to this category not only addresses this specific question but also illustrates the impact of the criminal docket upon the court's entire docket. The time frame for all calculations in this subsection is June 1987 to June 1991.

Personnel.

The Northern District of West Virginia has one Chief Probation Officer, nine Probation Officers, one PC System Administrator, and a clerical staff of eight. There are currently seven (7) Probation/Pretrial Services Officer vacancies in the Northern District of West Virginia.

The Chief Probation Officer, one Probation Officer, and one PC System Administrator are located in the headquarters office at Elkins. Approximately ninety percent (90%) of the arraignments and bail hearings are conducted in Elkins. Four Probation Officers are in Wheeling, which is located approximately one hundred forty miles northwest of the headquarters office; three Probation Officers are located in Clarksburg, which is fifty miles west of the headquarters; and one Probation Officer is located in Martinsburg, which is approximately one hundred sixty miles northeast of the headquarters office.

The clerical personnel consist of one Chief Probation Clerk and one Probation Clerk in Elkins; one Clerk-in-Charge and one Probation Clerk in Clarksburg; three Probation Clerks in Wheeling; and one Clerk-in-Charge in Martinsburg.

During the past five (5) years one employee has taken disability retirement and one employee has retired.

This District is currently understaffed for Probation/Pretrial Services Officers by seventy-seven (77) percent. The new work measurement study conducted by the Administrative Office for the United States Courts indicated that a twenty-two (22) percent deficiency in the total staffing existed in every district in the United States. Therefore, this District is understaffed by one hundred seventeen (117) percent. The survey was conducted to determine the amount of extra work involved in preparing the guideline presentence reports. Also considered is the amount of time spent by the probation officers in researching objections received from both the Government and defense counsel in relation to the guideline presentence reports.

Caseload Per Officer.

As of June 30, 1987, three probation officers were supervising two hundred fifty-eight probation/parole cases. This averaged eighty-six offenders per officer.

As of June 30, 1988, three probation officers were supervising three hundred eight probation/parole cases. This averaged one hundred and three offenders per officer.

As of June 30, 1989, five probation officers were supervising

three hundred thirty probation/parole cases. This averaged sixty-six offenders per officer.

As of June 30, 1990, seven probation officers were supervising four hundred forty-nine probation/parole cases. This averaged sixty-four offenders per officer.

As of June 30, 1991, nine probation officers were supervising four hundred ninety-six probation/parole cases. This averaged fifty-five offenders per officer.

Ratio of Officers to Criminal Filings (By Defendants).

As of June 30, 1987, the ratio of officers to criminal filings was seventy-nine per office.

As of June 30, 1988, the ratio of officers to criminal filings was eighty-two per office.

As of June 30, 1989, the ratio of officers to criminal filings was sixty-four per officer.

As of June 30, 1990, the ratio of officers to criminal filings was forty-nine per officer.

As of June 30, 1991, the ratio of officers to criminal filings was twenty-four per officer.

Other Relevant Information

On July 1, 1991, this District implemented Enhanced Supervision on all newly released cases. This is mandated by Title 18, United States Code, Section 3603. The parameters of monitoring, controlling, and influencing the activities of offenders are specified in the conditions of supervision established by the court and the Parole commission. Mandatory and

standard conditions are behavioral requirements for all offenders. Special conditions provide the probation officer with supplemental authority to administer additional sanctions and to provide for correctional treatment.

The authority for imposing conditions of supervision is delineated in statutes pertaining to probation, supervised release, and parole. The court's authority to impose conditions of probation supervision is contained in Title 18, United States Code, Section 3563 and for supervised release in Title 18, United States Code, Section 3583. The Parole Commission's authority is derived from Title 18, United States Code, Section 4209.

To accomplish these objectives, the probation officer has the following specific responsibilities as outlined in Title 18, United States Code, Section 3603:

1. Protect the community
2. Address relevant problems of the offenders

The Chief Probation Officer is responsible for implementing, monitoring, and maintaining supervision standards. The United States Probation Officer executes the sentence through risk control, supervision, and correctional treatment. The officer obtains knowledge of the offense, enforces conditions of supervision, and reports violations according to the established standards and procedures.

As to other relevant information, the Probation Division of the United States Courts has entered into an arrangement with the Bureau of Prisons to supervise, by electronic monitoring and home

confinement, individuals who are now serving prison sentences.

The first home confinement seminar was held July 22 - 25, 1991. Three other seminars are planned in the next few months. Both Pretrial Services and Probation Officers are taking advantage of the home confinement and electronic monitoring training.

Those officers attending the seminar are instructed to prepare a district implementation plan to be presented to their respective chiefs. The two probation officers from the Northern District of West Virginia have submitted to headquarters proposed contracts with various electronic monitoring agencies.

Currently, the Administrative Office and the Bureau of Prisons have established fourteen pilot districts for electronic monitoring and home confinement. This program is called "Community Control Program." It has been agreed between the Administrative Office, the Bureau of Prisons, and the Parole Commission to expand the pilot program to twelve additional districts. The Bureau of Prisons has agreed to fund the expanded program until such time as the Administrative Office receives and allocates the congressional appropriations.

Currently, this district has a Drug/Alcohol Treatment Specialist with a budget of $120,000.

As to the Guidelines, the Sentencing Reform Act of 1984 provides little guidance in reference to sentencing procedures. Under Guideline sentencing, the judge is required to find relevant facts, select the rules that apply to those facts, and to explain the rationale of the sentencing decision, which is subject to

appellate review. The sentencing process has become more adversarial with counsel pursuing legal issues much as they do at trial. Careful management is required to comply with the new requirements without undue expenditure of judicial time.

Since the charges plead to largely determine the sentence, it has changed the nature of plea bargaining. In comparison pre-guideline pleas were relevantly simple. Under the guidelines the plea bargains have become more complicated and must be analyzed more closely. The guidelines here significantly increased the work load of the probation offices.

Attached as Appendix 2 is a copy of the organizational chart, the Model Local Rule, a copy of the twelve month period of criminal findings, a table of individuals under supervision, and reports for the twelve month period ending June for the years 1987, 1988, 1989, 1990, and 1991.

3. Building and Facilities

As stated above, there are four statutory points of holding court in the Northern District of West Virginia. The newest of these court's facilities is in Elkins, the headquarters for Chief Judge Maxwell and the Clerk of the court. This facility was completed in 19__ and is designed to permit expansion. The oldest court facility is located in Wheeling which is the headquarters for Judge Stamp. Renovation to the court facilites in Wheeling is necessary in order to accommodate the needs of a sitting judge. Additional space is needed for the court's support staff. Other federal agencies housed in the Wheeling facility

expanded into space adjacent to the courtroom during the period of time when Wheeling did not serve as headquarters for a sitting judge.

The activities in the clerk's office in wheeling and the number of files maintained there has significantly increased since it was reestablished as a headquarter for a district court judge. In addition to needing more space the fact that the jury room is located on a different floor from the courtroom and is not handicap accessible creates problems which need to be addressed. Therefore, additional space and alteration of existing space is necessary in Wheeling to meet the needs of the court.

The court's facilities in Clarksburg and Martinsburg are adequate for current needs. It is noted, however, that if the new judge is headquartered in Clarksburg that arrangements will need to be made to accommodate both the new judge and the senior judge currently housed there. Other than in Wheeling the jury facilites at the other points of holding court are adequate for current and anticipated future needs.

There currently exists adequate temporary holding facilities for prisoners in each of the locations of holding court. Prisoners kept overnight are housed in state jail facilities pursuant to an agreement between the federal government and local authorities.

While the library space in Elkins, Clarksburg, and Martinsburg is adequate for current needs and for the immediate future the library facilities in Wheeling are insufficient for the

court's current needs.

The automation of the judges chambers and the libraries is viewed as a positive step and will increase the access of research resources available to the court with a minimum impact upon space needs.

While the advisory group believes that these observations concerning facilities and space are valid, it recognizes a more precise analysis of building and facilities needs must await the appointment of the new judge and the selection of the new judge's headquarters location.

4. Automation and Other Technical Support.

The district court is currently proceeding with plans for automation. The hardware necessary for the new CIVIL system is now being installed. While the new system will not significantly speed up the process of docketing of cases, it will enable the clerk's office to maintain statistical data and information needed both for administrative purposes and by counsel and litigants. In addition, the time necessary to retrieve the information should be significantly reduced while at the same time increasing the amount of information and data available. Finally, automation of the clerk's office is an important component for the case management which will be needed to implement the advisory group's recommendations set forth in this plan.

Courtroom reporting services in this district is currently handled by two full time court reporters and a part time contract reporter. The current courtroom reporting is adequate for current

needs but additional courtroom reporting services will be necessary when the new judge is appointed.

III.
IDENTIFYING THE PRINCIPAL CAUSES OF COST AND DELAY IN CIVIL LITIGATION IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

OVERVIEW

The advisory group has attempted to identify the primary causes of avoidable cost and delay associated with civil litigation in this judicial district. In reaching its conclusions, the advisory group has analyzed a number of possible causes of cost and delay, focusing not only on court procedures but also the way in which litigants and attorneys approach and conduct litigation, the special problems relating to pro se litigation, and the special problems relating to criminal and civil practices of the United States Government.

The advisory group recognizes that the term "court procedures" may be construed to refer either to court-wide procedures (such as those followed by the court as a whole, whether by rule, order, or custom) or to the procedures or practices followed by individual judges. The following "problem identification" is made after consideration of numerous "court procedures," both generic and individual. Additionally, the advisory group has carefully reviewed and considered not only the suggested considerations set forth at pages 24 through 28 of "Guidance to Advisory Groups Memorandum," but also the presence, absence, or the application of

other procedures and practices which may cause avoidable cost and delay in civil litigation.

The advisory group believes that key to reducing delay and the accompanying avoidable cost of civil litigation in the Northern District of West Virginia is regaining control of its civil docket. The court must exert that control as it did before the advent of the Speedy Trial Act of 1974. This is not to imply that the Speedy Trial Act of 1974 is the sole cause of the current problem. Rather, it is a statement the the Speedy Trial Act and numerous other developments, including increased filing, over the past two decades have lead to the current circumstances which are at the heart of the problems which creates the cost and delay which this study seeks to address.

The Brookings Institution's Task Force Report on Justice for All Reducing Cost and Delay in Civil Litigation, (The Brookings Institution, 1989) makes the following observation as its introduction to the section on Recommendations for Procedural Reforms

> More than fifty years have passed since the Federal Rules of Civil Procedure (FRCP) were drafted and adopted. As expressed in 1938, the core objectives of the rules are threefold: "the just, speedy and inexpensive determination of every action." With the passage of five decades, these objectives - set forth in Rule 1, a symbol of their importance that is all too often forgotten or ignored - have not changed. They are, and should be,

fundamentally important and enduring. Our civil justice system should continue to strive for their delivery in every case.

What has changed during the past fifty years is not the objectives of the rules but the civil justice system itself - the number and kinds of cases, the litigants, and the lawyers. The civil rules, in other words, apply to a dramatically different system than that which existed at the time of their drafting. To some degree, the rules that follow Rule 1 have sought to keep pace with the changes in the system. The amendment process has been used on several occasions, most recently in 1980 and 1983, when changes were in large part directed at correcting abuses in the discovery process and increasing the involvement of judges in case management.

To a significant degree, however, the reform efforts of years past have been stopgaps designed to address narrow problems rather than to effect fundamental changes that would dramatically improve the system (Rosenberg, 1984). The rising costs and delays involved in litigation demand now a more far-reaching approach. Indeed, Justice Lewis Powell's dissent from the adoption of the 1980 amendments has been prophetic:

> I doubt that many judges or lawyers familiar with the proposed amendments believe they will have an appreciable effect on the acute

> problems ... The Court's adoption of these inadequate changes could postpone effective reform for another decade ... I do not dissent because the modest amendments recommended by the Judicial conference are undesirable. I simply believe that Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms (Powell, 1980, pp. 522-23; emphasis added). Brookings reports pages 8-9.

The task force believes that time has proven Justice Powell's 1980 prediction to be entirely correct. Although well intentioned, past changes in the rules failed to alleviate the dual problems of litigation costs and delays. Accordingly, we have concluded that reform efforts must look beyond "tinkering changes," in Justice Powell's words, and must instead search for more systemic solutions.

As a demonstration project under the Civil Justice Reform Act of 1990, the Northern District of West Virginia will attempt the broad based implementation of a form of alternative dispute resolution which has proved very successful on a more limited basis over the past two years. In 1987, United States District Court for the Northern District of West Virginia in cooperation with the West Virginia State Bar instituted a mediation process for selected

civil cases known as "settlement week." The initial experience with "settlement week" proved very promising and its continued acceptance by the attorneys and the party litigants suggest that it has an important role in helping to reduce cost and delay in civil litigation in this district. The plan set forth below builds upon the success and the acceptance of "settlement week" in this district as a solution to the problems of the civil docket.

Taken individually, the committee has identified no significant problems with the various stages in the civil litigation process in the Northern District of West Virginia. The difficulty has been in maintaining an overall schedule of the various procedural steps which move the case from its initial filing to a resolution either through settlement or by trial. The advisory committee believes that the underlying problem for the civil docket has been the inability to provide the party litigants with reasonable certainty in the pretrial process and firm trial dates. Without assured closure, dates or deadlines set for the completion of discovery or for the filing of pretrial motions and for pretrial conferences tend to lose their significance. The proposed plan calls for fixed discovery periods, prompt use of dispute resolution, and firm trial dates.

Consistent with the Brookings report and the suggestions of the Civil Justice Reform Act, the plan set forth herein will provide for case tracking or differential case management. The

plan will provide for two tracks for Type II[3] civil cases and a third track for Type I[4] civil cases. Type I cases will continue to be managed by the clerk's office in the same manner as currently provided. These cases are managed by the clerk's office from the time they are filed until they are ready for disposition at which time they are brought to the judges's attention. This case management proceeds at a reasonable pace and without unreasonably imposing upon judicial time.

Type II cases will be divided into two tracks, one for complex cases and the other for all other or standard cases. For complex cases, within forty-five (45) days of the filing of the answer, there will be a scheduling conference with the judge assigned the case to tailor the discovery and pretrial activities to meet the particular needs of each case. These cases will require active judicial management from their start.

Case management for all other Type II civil cases will be by the clerk's office. The plan contemplates the monitoring of the standard cases by the clerk's office and requires court approval for good cause for an extension of the discovery deadlines. Discovery disputes will have to be resolved promptly in order to keep the discovery process in these standard cases moving forward.

The plan set forth herein will provide that at the conclusion

---

[3] See infra note 2

[4] See infra note 1

of discovery there is presumption that all Type II[5] cases will be set for settlement week. The submission of the case for mediation, with trained mediators, is consistent with the fact that most civil cases nationally and in this district settle before trial. The purpose of the mediation "settlement week" is to facilitate the settlement discussion and process. A structured mediation proceeding will serve the needs of litigants whose cases are settled by helping to reduce delay and cost but will also conserve the court's time for those cases which require the services of a judge and jury to resolve the issues in conflict. Therefore, the goal of the proposed plan is to provide an incentive to focus discovery (a reasonable yet firm cut off date for discovery) and a linkage between the completion of discovery and the referral of the case for alternative dispute resolution. If the settlment efforts prove unsuccessful, a firm trial date will be established at the conclusion of the settlement discussions.

For complex cases, Rule 16 will continue to apply in a manner consistent with present practice to provide the vehicle for judicial management. For the standard cases, the pretrial order/pretrial conference will follow "settlement week." Because of the analysis of the case and the discussion which is inherent in settlement discussions the court and the parties should be able to prepare a pretrial order which focuses upon the issues for trial and should, in many cases, enable the trial to proceed more

---

[5] See infra note 2

efficiently to conclusion then if formal settlement discussions had not been held.

Other than the changes outlined above, the advisory group does not perceive any systemic problems which need to be addressed in the local rules which were revised effective November 12, 1987, and are well suited to the needs of both the party litigants and the court and are well accepted by the attorneys. In addition, the jury selection plan has worked well both for those citizens called to serve on the jury and for the court in admininstering its plan.

A. Analysis of Court Procedures to Identify Problems of Cost and Delay

1. Assignment procedures

A memorandum from the three judges to the Clerk of Court, dated July 30, 1990, dictates the procedures currently used for the assignment of cases. Pursuant to this memorandum, the deputy clerks manually assign civil and criminal actions in the following manner:

a) All civil actions filed at the Wheeling point of holding court are placed upon the docket of Judge Stamp.

b) All civil actions filed at the Elkins point of holding court are placed upon the docket of Judge Maxwell.

c) Except for those pending civil actions on the Clarksburg docket which Judge Kidd retained on his docket, all civil actions filed at the Clarksburg and Martinsburg points of holding court are placed, in alternative fashion, upon the dockets of Judges Maxwell and Stamp on a one-for-one basis.

d) State prisoner cases brought pursuant to 42 U.S.C. § 1983 or 28 U.S.C. § 2254 are divided between the dockets of Judge Stamp and Judge Maxwell on a one-for-one basis regardless of the physical location of the state prisoner bringing such actions.

e) All criminal actions are initially docketed at the Elkins point of holding court and are then divided on a one-for-one basis between Judge Maxwell and Judge Stamp.

f) In the event conflicts or unusual circumstances arise with respect to any civil or criminal matter assigned to either Judge Maxwell or Judge Stamp, the judges upon consultation and conference determine the appropriate Judge's docket upon which the matter should be placed and the Clerk's Office is advised accordingly.

When the Northern District of West Virginia is fully automated, the assignment of civil cases will no longer be manually performed by the deputy clerks. The computer shall assign cases consistent with the formula described above.

2. Time Limits

The deputy clerks and the judges' law clerks now work together to manually monitor the time limits for service of process and answers, as well as enforcing time limits and extensions. Because of the lack of automation to date and the magnitude of the criminal and civil docket, this is not always an efficient system. However, as reflected in the discussion covering automation, this District will soon be "on-line" with an automated civil case management system. The computer will monitor time limits and the Court can efficiently be advised of matters requiring attention.

Historically, the Court has accommodated requests by counsel for extensions of time, particularly when the extension is stipulated to by all counsel in the case. The proposed plan would restrict responses to these requests so as to streamline the development of cases.

3. Rule 16 Conferences

Local Court Rule 2.13(f) exempts certain cases from the mandatory scheduling requirements of Rule 16. The Court has, however, consistently required scheduling deadlines in these cases to ensure prompt disposition.

With regard to the format of the Rule 16 conference, the pressures of the Speedy Trial Act and the magnitude of the criminal docket have obliged the Court to virtually eliminate the scheduling of Court-supervised Rule 16 conferences. In all but a few cases, counsel are asked to meet independently of the Court and develop a proposed Rule 16 Order which addresses the scheduling deadlines anticipated by Rule 16. This method has worked to some degree, mostly out of necessity, but it must be recognized that this practice diminishes early judicial intervention.

Counsel are now typically notified to meet and prepare a Rule 16 Order within 60-120 days from the filing of the complaint, unless service of process has not been returned or an answer has not been filed.

When a scheduling conference is conducted by the Court, the topics of discussion include scheduling, the scope of discovery, alternative dispute resolution, and the narrowing of issues.

Magistrate judges are used extensively in the District to resolve discovery disputes and to conduct Rule 26 discovery conferences when necessary. In most instances, when confronted with a discovery dispute, that motion as well as all non-dispositive pre-trial motions are referred to the Magistrate Judge, which eliminates the need to prepare another reference order if further disputes should arise and also gives the Magistrate Judge the ability to schedule a discovery conference if he deems the same to be appropriate. In other words, this method gives the magistrate judge the ability to control the entire scope of civil discovery. The proposed plan would alter the timing of many pre-trial conferences and would provide more self-executing structure to the discovery process.

4. Discovery Procedures

Cut-off dates are presently established in the Rule 16 Order which is usually entered within 120 days from the filing of the complaint. However, because of the Court's inability to provide the parties with a firm trial date, cut-off dates for discovery are typically extended, often by agreement of the parties. It is not unusual for the Court to receive a proposed pre-trial order which reflects that the parties are still in the process of taking depositions.

As mentioned, control of the scope and volume of discovery is typically delegated to a magistrate judge, but usually only upon receipt of a motion to compel or other pre-trial motion. Local Court Rule 2.08(f) requires counsel for movant to certify that he

has conferred with opposing counsel and made a good faith effort to resolve the dispute. The Magistrate Judge then proceeds to resolve the dispute.

Discovery procedures in this judicial district are perceived by members of the advisory group as generally fair, workable, and only infrequently subject to abuse. The present limitation on the number of interrogatories permitted in civil cases should be continued. When discovery disputes arise, counsel should be required to attempt, in good faith, to resolve such disputes informally, and as a condition of filing a motion to compel, the moving party should be required to state specifically what good faith attempts were made to resolve the discovery issues. Counsel opposing a motion to compel discovery similarly should be required to state specifically what good faith attempts have been to informally resolve the disputes. Except in extraordinary situations, magistrate judges should continue to be utilized to resolve discovery disputes. Prompt resolution of discovery disputes is imperative; otherwise, discovery disputes will disrupt the management and scheduling of the civil action and undue delay will result. Although sanctions should be imposed when attorneys or litigants clearly abuse the discovery process, the advisory group feels that imposition of sanctions should be the exception rather than the rule. The group believes that the proposed scheduling rules in tandum with the local rules already in use, will insure that discovery delays do not retard the progress of cases.

5. Motion Practice

Once again, the pressures of the Speedy Trial Act and the magnitude of the criminal docket now infringe upon the Court's ability to schedule oral argument on pending motions. Motions are routinely ruled upon from the record without opportunity for oral argument. When oral argument is requested by counsel or when the Court deems oral argument essential, an attempt is first made to schedule the same for argument by telephone conference. This has worked with a great deal of success and counsel seem to appreciate the opportunity to present argument without traveling substantial distances.

As with most civil case management at this time, motions are monitored manually by law clerks and deputy clerks. When the motion is mature for disposition, the motion is brought to the judge's attention for review. The plan contemplates no significant revision of current practice here.

B. Analysis of Litigant and Attorney Practices - Privately Represented Litigants.

1. Pre-Filing Practices - Screening Cases.

It is the Advisory Committee's assessment that essentially all cases brought in the federal courts in this district have been appropriately investigated both as to law and facts, that when needed there has been sufficient consultation with expert witnesses and in most cases there has been some discussion of possible settlement with the opposing party prior to instituting the law suit. While at the present time there are no widespread

discussions of alternative dispute resolution options prior to filing suit in this district, it was not until the "settlement week" started in the Northern District of West Virginia in 1987 that there was any significant use of alternate dispute resolutions to the broad spectrum of civil cases. It is, therefore, anticipated or at least hoped that with the advent of the plan set forth herein that in the future there will be increased consideration of ADR by party litigants and their counsel prior to the institution of lawsuits.

2. Pleading Practices.

As a general statement, party litigants have taken full advantage of the opportunities to plead multiple counts and inconsistent theories in complaints and in answers. It appears to be the common and accepted practice that if in doubt, the attorney should include all possible theories of the case in the complaint with the expectation that the adversary/judicial system will cull out those counts or theories not well founded in fact and/or law.

3. Discovery Practices.

As noted above, the discovery procedure in this judicial district is perceived by members of the Advisory Committee as generally fair, workable, and only infrequently subject to abuse. The present limitation on the number of interrogatories permitted in civil cases by local rule has worked well and its continuation is supported by the Advisory Committee. In many cases, there is a commendable amount of voluntary exchange of information. Frequently the parties are able to enter into stipulation or

admissions which significantly limits the cost and delay involved in pretrial discovery. The proposed plan builds on these current exchanges.

Local Rule 2.08(f) requires counsel for the movant in all discovery motions to certify he or she has conferred with counsel for the opposing party in a good faith effort to resolve by agreement the issue raised by the motion. It is assumed by the Advisory Committee that all parties adhere to this rule in good faith and only those issues which the parties are unable to resolve through such conferences are brought to the court's attention in the form of a discovery related motion. Following a decision by the court on discovery motion the parties in essentially all cases comply with the ruling. The committee favors the policy and practice that sanctions should be imposed only when the attorneys or litigants have clearly abused the discovery process or motion practice.

4. Motion Practice.

The Advisory Committee does not believe there is an abuse of motion practice within the district and that the vast majority of 12(b) motions and discovery related motions are filed in the belief that there is a good faith basis for such motion as opposed to being filed for dilatory purposes. With respect to such motions, the Advisory Committee recommends that the motions be brought to the court's attention promptly for decision. The time period for the opposing and reply memorandum set forth in local rules are reasonable and workable. With respect to hearings, it is

the group's concensus that most dispositive motions can be resolved on brief and do not require oral argument and that dispositive motions should be ruled upon as soon as possible. The advisory group recognizes that a decision on such motions may be one of the most important way for the parties to avoid expenses associated with trial preparation. As to such motions, the Advisory Committee's recommendation is essentially that the current practices for the consideration of such motions on brief as opposed to oral arguments continue to be the rule.

5. Trial Practice.

The pretrial conference/order has worked reasonably well in this district in narrowing the issues for trial, providing the forum to resolve a significant number of issues pertaining to exhibits and their admissibility at trial and for the stipulation of facts and in general, providing a framework which leads to a reasonably efficient conduct of the trial. In general, there is reasonable cooperation among members of the bar as to the stipulation of non controversial facts and agreement on the admissibility of routine documents not in controversy. The trial of most civil cases is conducted in a reasonable period of time by lawyers who are well prepared to address the issues.

It is recognized that the court handles a large number of civil cases and necessarily must set these cases for trial as the criminal docket allows. The Advisory Committee, nevertheless, suggests that date certain for trial be established whenever possible. While recognizing the efficiency for the court of

setting several civil trials for the same date, attorneys have expressed concern for the expense to litigants who are in the "back up" position and the increased inconvenience if the trials are set for points of holding court other than those near the cities in which their offices are located.

6. Sanctioning Practice.

The Advisory Committee believes the courts have used sanctions in appropriate manner, i.e., that the sanctions are an exception rather than the rule and have been used to deal with fairly clear cut abuses.

7. Private Attorney Fees.

It is the Advisory Committee's belief that there is no significant abuse by the attorneys churning of cases in order to increase billable hours or that there are unreasonable and excessive fee being charged by the plaintiff's attorneys.

8. Court Awarded Attorney Fees.

Attorney fees ordered pursuant to the Civil Justice Act and other statutory provisions are monitored for reasonableness in the hours charged and the hourly rate approved is consistent with the provisions of the law.

9., 10. Settlement Practices/Use of Alternative Dispute Resolution Methods.

In 1987, in cooperation with the West Virginia State Bar, the Court for the Northern District of West Virginia conducted its first "settlement week" conferences. Volunteer lawyers were

trained as mediators and cases from the courts docket were selected for the "settlement week" experiment. Of the 139 cases included in the first "settlement week" conferences, 49 (35%) were settled. Since the initial "settlement week" in October of 1987, there have been four other "settlement weeks" (April 1988, October 1988, May 1989, and August 1990). Of the 382 cases referred for mediation during the first four settlement weeks, 134 (35%) were settled[6]. In addition, at least 6 other cases settled after "settlement week" because of the progress made during the mediation sessions and the continued work of the mediators.

Of equal importance to the success rate is the fact that these "settlement week" conferences have been very well received and accepted by the attorneys and the party litigants and very gratifying and rewarding to the lawyers who have served as the volunteer mediators.

In May of 1990 Mr. Thomas O. Patrick, who serves as the coordinator of "settlement week," prepared a report and presentation on "settlement week" in the Northern District of West Virginia. In conjunction with that report, he prepared several charts summarizing certain data on the four settlement weeks which had been held. These charts are attached hereto as Appendix 1.

11. Compliance with Time Limits and Local Rules at All Stages

---

[6]. The statistics for the July-August 1990 settlement week were not included in Mr. Patrick's report in May of 1990 which are attached as appendix 1. In July-August of 1990, of the thirty (30) cases assigned for settlement week, seven (7) cases were allowed to withdraw before settlement week. Of the remaining twenty-three (23) cases, seven (7) cases settled with mediation.

of Litigation.

As has been noted in several other portions of this report, one of the difficulties encountered in this district is the inability to control the civil docket which in a large measure is because of the criminal case load and the requirements of the Speedy Trial Act. This inability to provide with reasonable certainty trial dates for civil cases has made it difficult for the attorneys to accept deadlines established in pretrial orders or by the local rules as firm deadlines. Therefore, it is not uncommon for pretrial activities to extend beyond the established dates. As is evident from the material set forth hereinafter, one of the primary proposal for the plan recommended is that firm dates should be established which will be deviated from only for good cause shown.

12. Appeal Practices.

There does not appear to be any systemic problem in this jurisdiction in regards to interlocutory appeals or appeals on the merits which contribute significantly to the cost and/or delay of civil litigation.

13. Client Participation in Litigation Events and Decision Making.

Clients with decision making authority are required, absent extenuating circumstances, to attend "settlement week" conferences. Consistent with sound mediation principles, the clients presence at the "settlement week" conference is important, if not indispensable. Settlement opportunities are significantly

increased when the client comes to understand the strengths and weekness of the respective cases and as they learn of the interest and concerns of the opposing party. As a general statement, the clients are actively involved and participate in the decision making process in this district. It is anticipated that with the referral of essentially all cases for alternative dispute resolution, clients will continue to be involved in decision at all stages of the litigation.

C. Analysis of Special Problems Relating to Pro Se Litigation

Pro se litigation is reviewed as soon as possible by a judicial officer and dismissed when appropriate pursuant to 28 U.S.C. § 1915(d), which authorizes the dismissal of actions if the Court is satisfied that the action is frivolous or malicious. Quite frequently, a case received from a pro se litigant is filed and assigned a docket number, but process not issued, until the plaintiff can particularize his claim. When completed, a second review by the Court is conducted.

In considering affidavits to proceed in forma pauperis, the IFP form is reviewed by a deputy clerk. Presently, at the Elkins and Wheeling points-of-holding court, an attorney is employed as a deputy clerk, a portion of whose responsibilities include functioning as a pro se law clerk. The deputy clerk makes the appropriate calculation and prepares a proposed order for review by the judge. Quite often, challenges to the assessment by the pro se litigant delay the litigation.

The deputy clerk is responsible for daily management of all

pro se litigation. Since the responsibilities for the case management of pro se litigation were first transferred to this position, the case management of pro se litigation has improved substantially. The deputy clerk plays a significant role in screening pro se filings and assisting the judge in controlling repeated filings. Controlling repeated filings is quite difficult because orders to refrain from such filings are commonly ignored by pro se litigants, particularly incarcerated individuals, and also because appellate courts are hesitant to block access to the courts, with the exception of the most serious offenders.

The full-time Magistrate Judge in Elkins is used extensively for the referral of pro se litigation, most particularly once the case has proceeded through the initial screening phases and is ready for trial or summary disposition.

Currently, there are no special procedures for the appointment of counsel in civil pro se litigation. Appointment of counsel in such matters is rarely done. It is hoped that a program can one day be initiated, perhaps with the assistance of the State Bar and the WVU College of Law, which might provide a pool of law students and lawyers to represent the interests of civil pro se litigants.

Succinctly stated, there are quite a few special problems relating to pro se litigation. Although the Court now has in place an efficient method of tracking and screening frivolous filings, such filings are many and are quite time consuming for the district judges. Since pro se litigants are in most instances unable, or perhaps unwilling, to articulate their claims, a great deal of time

is spent deciphering the true cause of action.

In addition, because of the unfamiliarity with the rules of civil procedure and local rules, pro se litigation suffers from substantial delay resulting from interlocutory appeals, mandamus proceedings, and judicial complaints. Pro se litigants often flood the Court with papers, whether relevant or not to the litigation, and the Court must sort through the documents to ascertain their importance.

A significant problem is presented in pro se litigation for accomplishing discovery. Often, the individual is incarcerated which presents obvious problems and in most instances the pro se litigant is insufficiently versed in the law to know or understand the appropriate methods of discovery. This problem is obviously compounded by the inadequate system for providing legal assistance. Finally, as with civil cases in general, the pressures of the criminal docket prevent the Court from providing pro se litigants with firm trial dates, which results in the delays previously discussed.

D. Analysis of Special Problems Relating to Criminal and Civil Litigation Involving the United States

1. Criminal Practices

As previously noted, the charging practices of the United States Attorney appear to encompass using the grand jury and other federal judicial resources to prosecute criminal matters, particularly drug offenses, which could be prosecuted in state

courts. These prosecutions usually involve numerous defendants involved in minimal amounts of narcotics. Most of these cases are investigated by the state police or the joint narcotics task force and easily lend themselves to state prosecution.

In addition, the decision to charge a significant number of individuals with mail fraud and misapplication of student loan funds seriously taxed the resources of the court in the last three years. In the final analysis, it appeared that many of these cases could have proceeded by pre-trial diversion or civil actions for enforcement of a legal obligation.

Along these same lines, the decision of the United States Attorney to restrict the use of pre-trial diversion results in the squandering of precious judicial resources for trifling matters.

The plea negotiation practices of the United States Attorney, when coupled with his discovery practices, also tend to delay the processing of criminal cases in the District. Since there is no consistent open file policy, defense lawyers must guess whether the evidence is as represented, which complicates and delays plea decisions. Once a plea agreement is executed, further delay is experienced because often the plea agreement fails to include a statement of facts which support a stipulation, as required by Guideline § 6B1.4 of the United States Sentencing Guidelines.

Special problems in criminal litigation brought by the United States include the rotation of assistants assigned to handle particular cases, resulting unfamiliarity with the case, inadequate responses to motions, etc.... In addition, criminal forfeiture

matters are left to languish on the docket.

One of the most time consuming problems is the review of orders prepared by the United States following a Rule 11 or sentencing hearing. Often, the Government is asked to make revisions two or three times before the Order accurately reflects the proceedings.

2. Civil practices

Once again, forfeiture is a significant problem. Civil forfeiture cases are filed but not efficiently prosecuted. It is not uncommon for these cases to languish on the docket for many years essentially in an inactive state. Proposed orders of publication which are submitted in forfeiture matters are often deficient, which require review by the Court to determine the appropriate language to provide proper notice to interested parties.

In general litigation involving the Department of Labor, the Department of Interior, the Environmental Protection Agency, the Secretary of Health and Human Services, the Internal Revenue Service, and other federal agencies, the Court routinely receives motions for extension of time to file answers, motions, responsive briefs, etc.... It is not uncommon for six months to pass before a 12(b)(6) motion is mature for disposition. Additionally, the United States consistently seeks leave to amend complaints, file motions, and join parties after the Rule 16 deadline for filing the same has passed. Many times no effort is made to show good cause why the deadlines were not met.

E. Analysis of Special Problems Relating to State and Local Government Litigation

Inattentiveness is the primary cause of delay in prisoner litigation from the perspective of the State. After receiving an Answer, which customarily includes inappropriate and insufficient defenses, many cases do not receive sufficient monitoring by the State.

As with litigation involving the United States, these cases are often handled by many different deputy attorney generals during its course. Likewise, extensions of time are common practice.

It is acknowledged that the State encounters difficulties in completing discovery and preparing pre-trial orders because of the pro se status, and incarcerated status, of many of its opponents. As the Court has problems sorting through the deluge of documents often filed by these litigants, so must the State.

IV.

ADVISORY GROUP EXAMINATION AND ASSESSMENT OF THE IMPACT OF RECENT LEGISLATION (OR LACK OF LEGISLATION) IMPACTING COST AND DELAY IN THE FEDERAL CIVIL LITIGATION PROCESS

A. Criminal Legislation

1. Guideline Sentencing

Without much hesitation, it can be said that the advent of the Sentencing Reform Act of 1984 and the sentencing guidelines now established by the United States Sentencing Commission have increased the time expended by the district judges in preparation

for sentencing. Much more time is spent reviewing presentence reports and objections thereto, and sentencing hearings also take longer. In addition, because all relevant conduct must be considered, not just the count of conviction, there is less incentive to plead guilty, and more criminal trials have resulted. Additionally, as Judge William Schwarzer, Director of the Federal Judicial Center, recently noted, requiring judges to take into account relevant uncharged conduct creates the need for collateral proceedings to determine guilt outside the regular criminal trial.

The Sentencing Guidelines also have resulted in more appeals in cases where the only issue is the application of the guidelines, which in turn has resulted in more frequent appellate orders requiring resentencing by the district courts.

2. Mandatory minimum sentencing

Because of the sentencing guidelines, mandatory minimum sentencing has not greatly impacted cost and delay in the federal civil litigation process.

3. New statutory drug and gun offenses

The Senate-passed Violent Crime Control Act and other related crime bills, currently being debated in Congress, could perhaps close the door for civil litigants in federal courts. An amendment to the Senate-passed Violent Crime Control Act provides for federal prosecution of cases in which a firearm was used to commit a homicide, provided that at some point the firearm crossed either state or foreign borders. The Administrative Office of the United States Courts recently announced that the Executive Committee of

the Judicial Conference of the United States opposes the amendment based upon statistics which suggest that such cases could flood the federal courts with thousands of cases involving homicides committed with a firearm. The National Law Journal, July 29, 1991, Nexis. The Executive Committee relied upon the most recent data available from the Federal Bureau of Investigation which reflected that 12,000 homicides involving firearms were committed in 1989. Approximately 95 percent of those homicides are believed to have involved firearms that moved through interstate or foreign commerce. If all such cases were prosecuted in federal court, the Executive Committee estimated that the cost to the Judiciary would exceed $2.5 billion. The Executive Committee's opposition to the amendment is consistent with the Judicial Conference's long-standing position that federal prosecutions should be limited to charges that cannot or should not be prosecuted in the state courts.

4. RICO

The Court has seen a recent rash of proliferation of criminal RICO prosecutions. In many of these cases, it would appear as if typical conspiracies involving mail fraud and state offenses were enhanced by the RICO charges.

B. CIVIL LEGISLATION

1. RICO

The Court has not, to date, seen a significant proliferation of civil RICO cases and it would not appear to impact civil

litigation at this time.

2. ERISA

Cases brought under the Employee Retirement Income Security Act of 1974 (ERISA) are beginning to impact the docket, primarily because of total preemption requiring federal jurisdiction. It would appear that defendants are increasingly removing all types of employment cases, traditionally removable only if diversity jurisdiction exists, under the guise of ERISA simply because the plaintiff has claimed a loss of benefits as a result of a discharge. Likewise, traditional bad faith claims against insurance companies are now being removed from state courts pursuant to ERISA when the underlying claim for benefits develops under an employee benefit plan. Although the West Virginia bad faith statute appears to regulate the insurance industry, the courts have interpreted ERISA to preempt any state cause of action if the claim arises under an employee benefit plan.

5. Superfund and Environmental litigation

These cases are typically complex and involve many parties. They suffer from the delays and expense caused by the problems previously mentioned in the section dealing with litigation involving the United States.

6. Federal Debt Collection Procedures Act

This statute, which became effective on May 29, 1991, established a new set of procedures for the collection of debts owed to the United States government. With some exceptions, the Act will preempt state law collection remedies that the United

States currently must utilize to collect a debt owed to the United States, and replace the state laws with a set of federal remedies that are to be applied uniformly throughout the country.

The applicability of the Act is quite broad, establishing the civil procedures for the United States to obtain a prejudgment remedy in connection with a claim on a debt or to obtain postjudgment recovery of a debt. Neither the Court nor the Advisory Group can anticipate the impact that it will have on the expense and delay of litigating other civil cases. If the Act is used extensively by the United States Attorney, there is no doubt that it will consume a considerable amount of time for the Clerk's Office and the Court. The Administrative Office of the United States Courts has advised that "Clerks' offices, of course, will have an essential role in the implementation of the procedures under the Act. Clerks will be receiving and docketing pleadings, including applications; issuing and signing notices; issuing and signing writs; scheduling hearings; on occasion, receiving deposits of certain proceeds; and within the prohibition of dispensing legal advice, explaining the Act to the public or referring the public to appropriate sources of information."

The impact on the Court will be substantial since the debtor has the right to request a hearing. Prejudgment remedies available include attachment, receivership, garnishment, and sequestration. The district court may assign its duties under the Act to a United States magistrate judge.

In addition to the natural pressure the Act will place on the

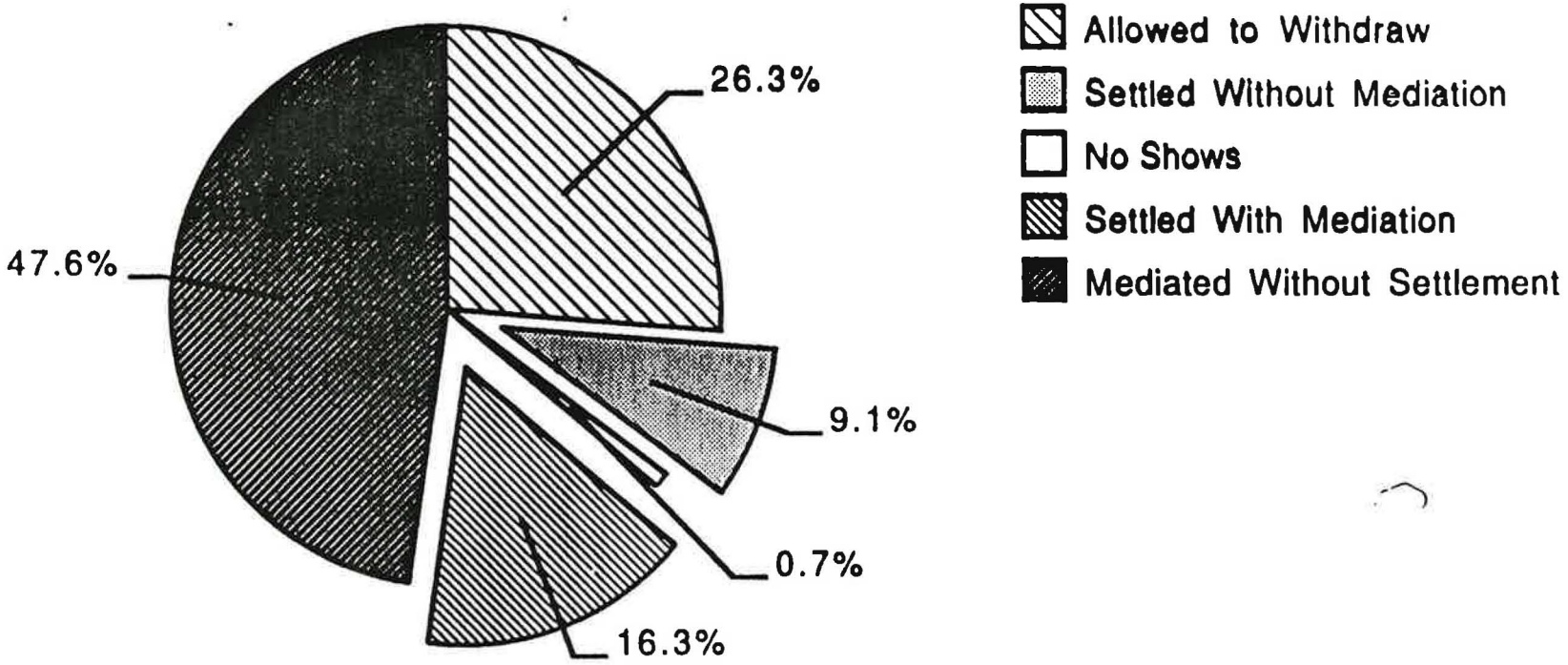
Court's docket by its complex nature, the problems earlier explained relating to litigation involving the United States government will most certainly surface. Given the types of obligations which fall within the scope of the Act, to name a few, debts based on educational loans, veterans benefits overpayments, Small Business Administration loans, criminal fines and restitution, it is expected that the Act, once fully implemented, will bear a considerable burden on the Court's docket, and therefore will require the most efficient administration possible.

7. Immigration Act of 1990

The Advisory Committee has not identified any significant impact this Act will make in this district.

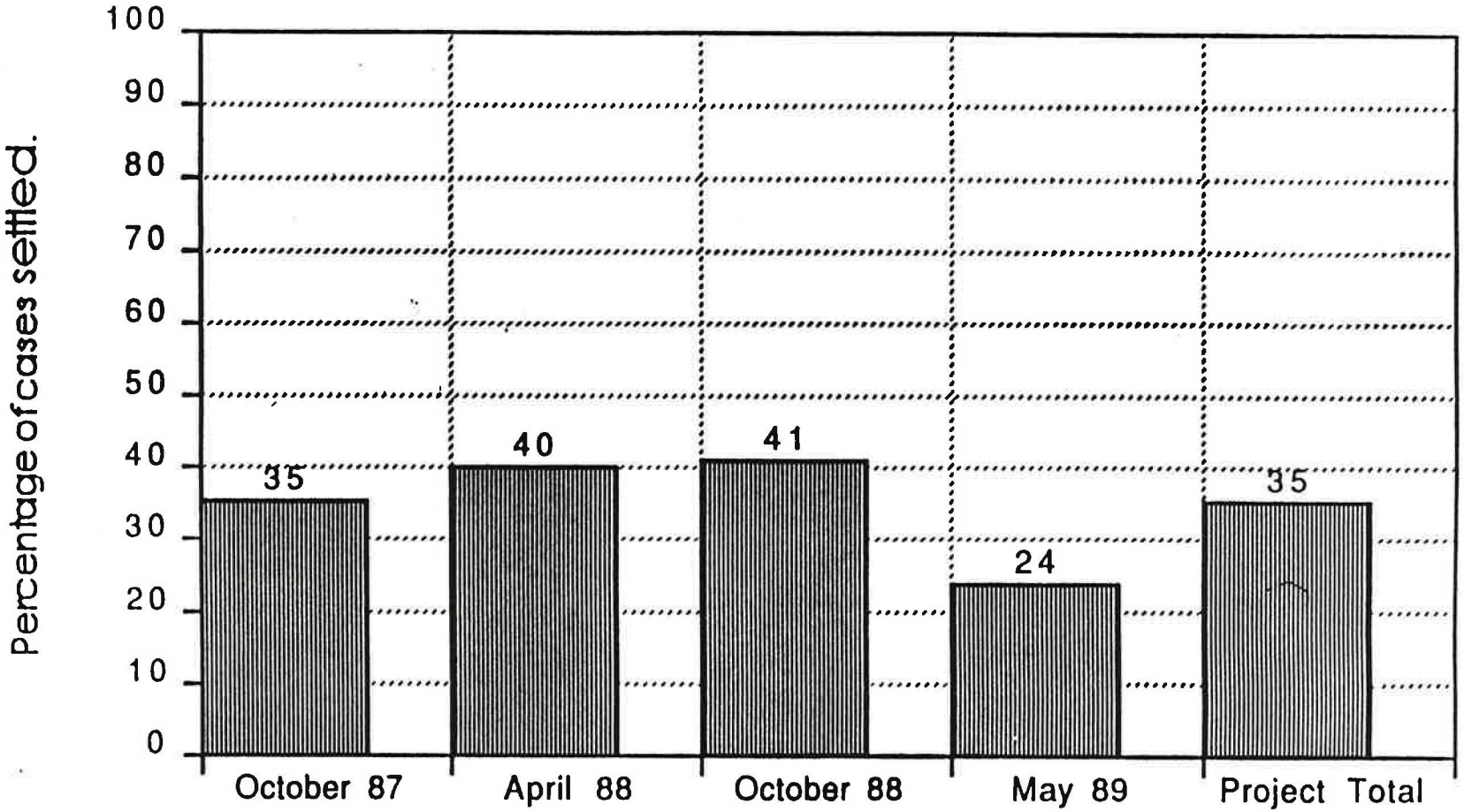
Settlement Week Pilot Project

(552 Cases Initially Included)



A

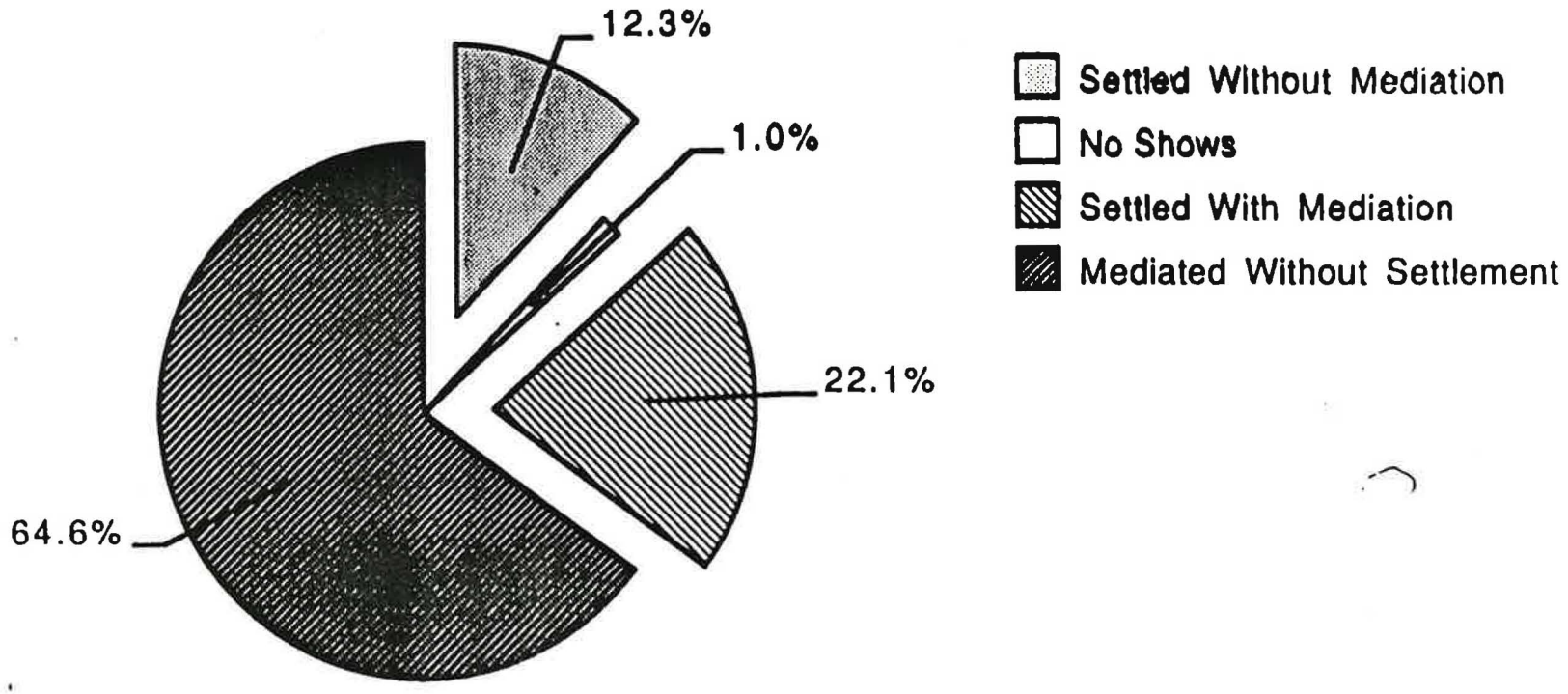
Settlement Week Project Summary



B

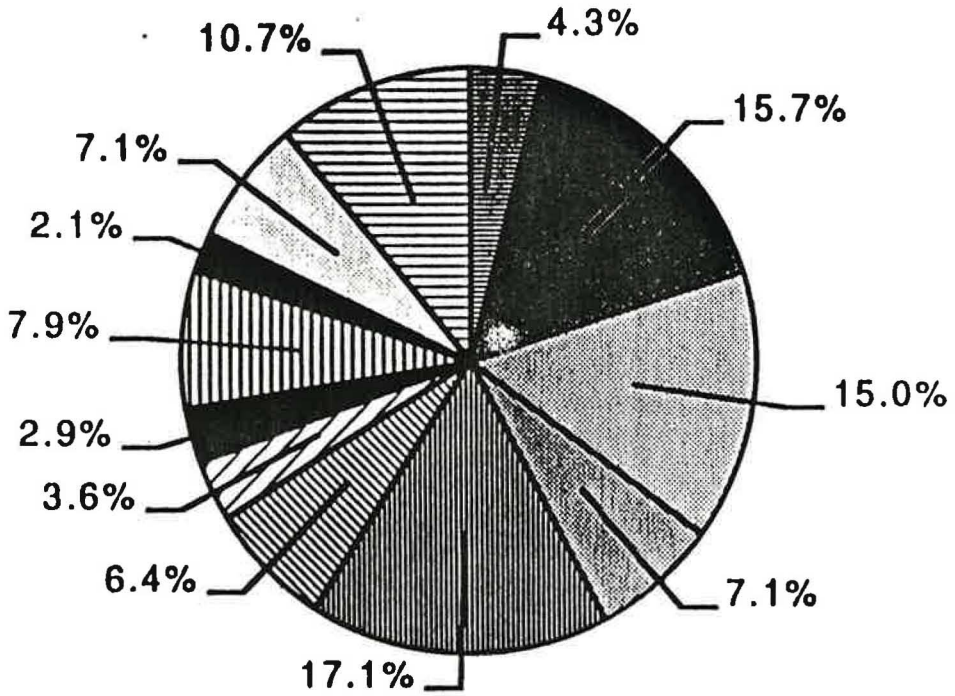
Settlement Week Pilot Project

(407 Cases Maintained)



C

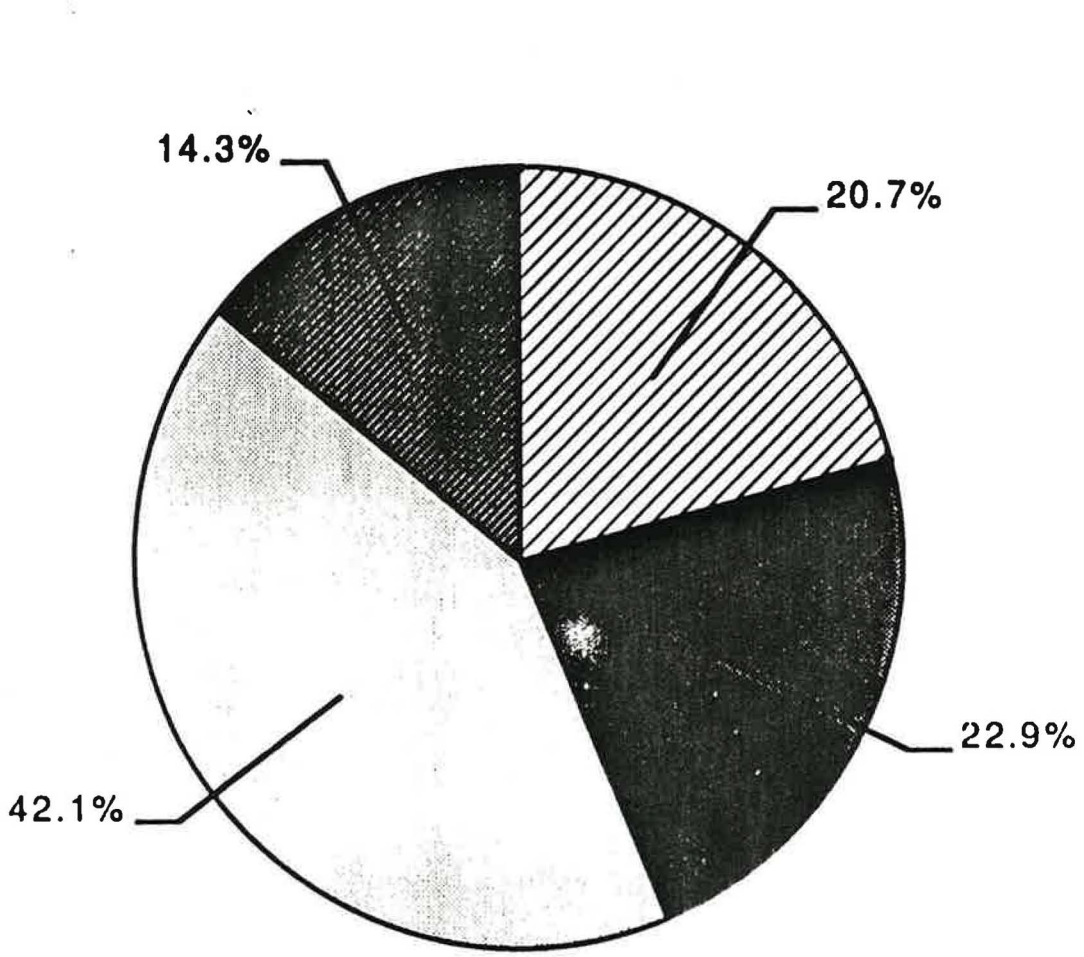
Nature of Suit



- Insurance Contract
- Other Contract
- Motor Vehicle Accident
- Product Liability
- Other Personal Injury
- Other Torts
- Intellectual Property
- Education
- Employment
- Energy
- Civil Rights
- Other

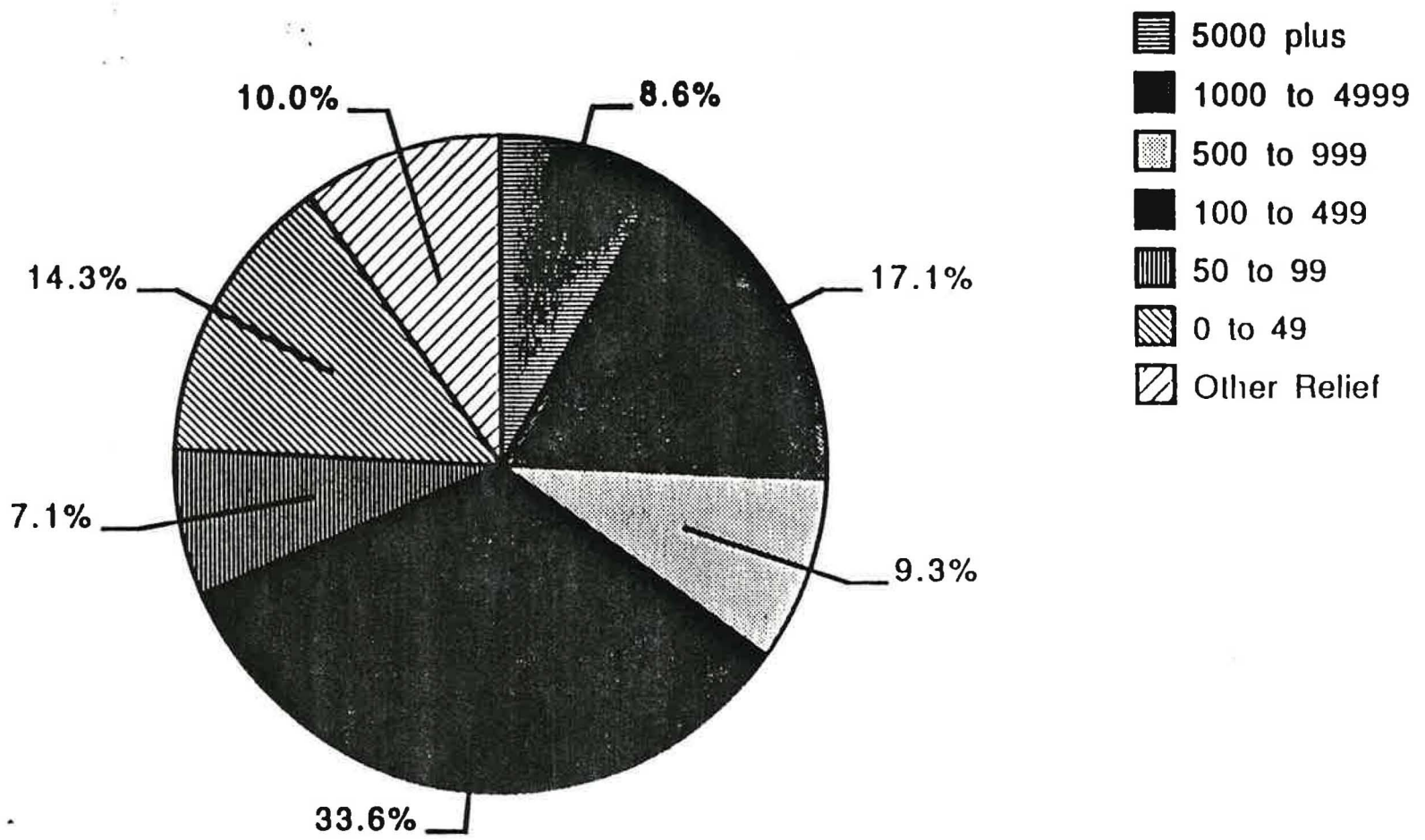
D

Age of Suit (in months)



E

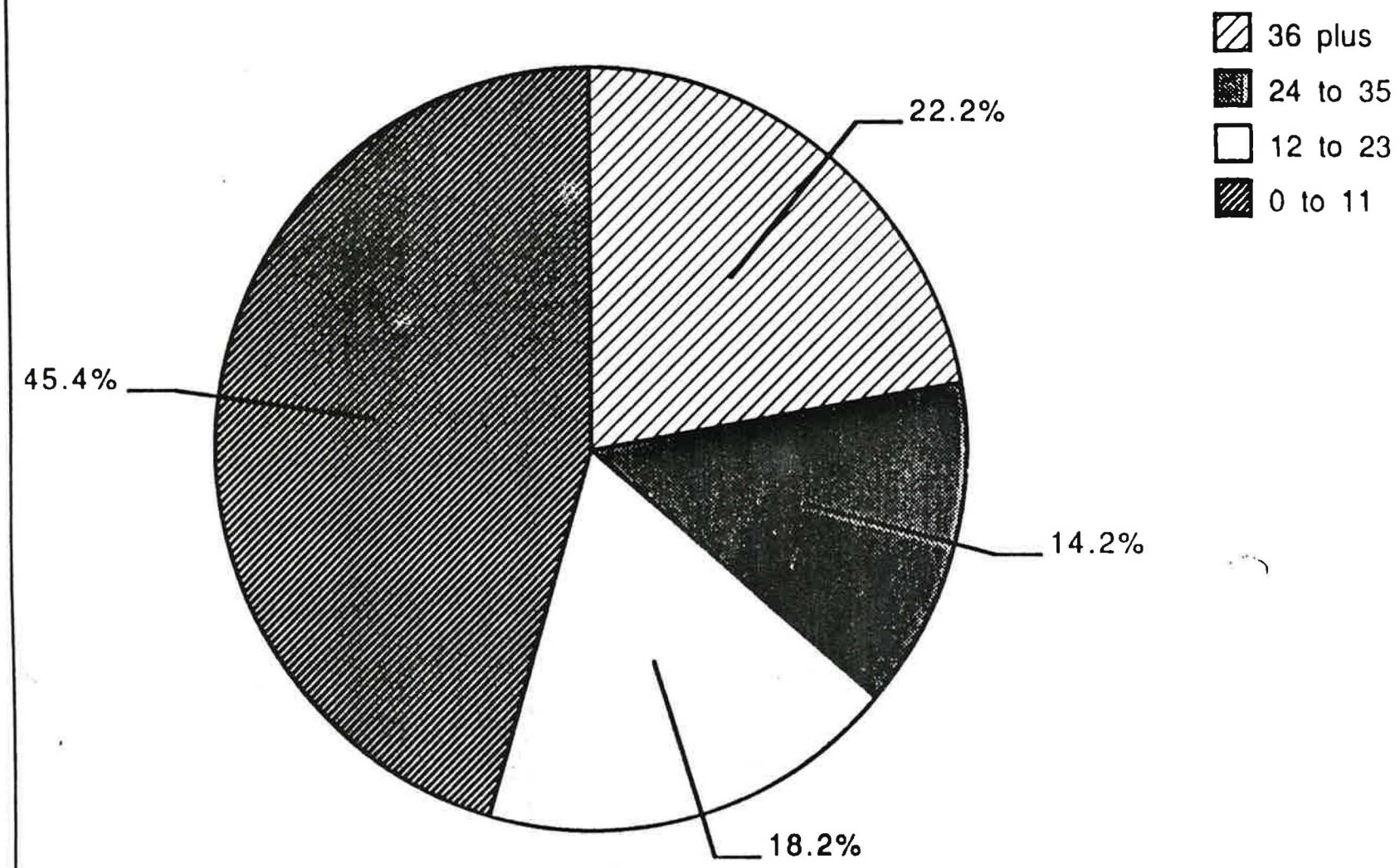
Amount sought in the Complaint (x 1000)



G

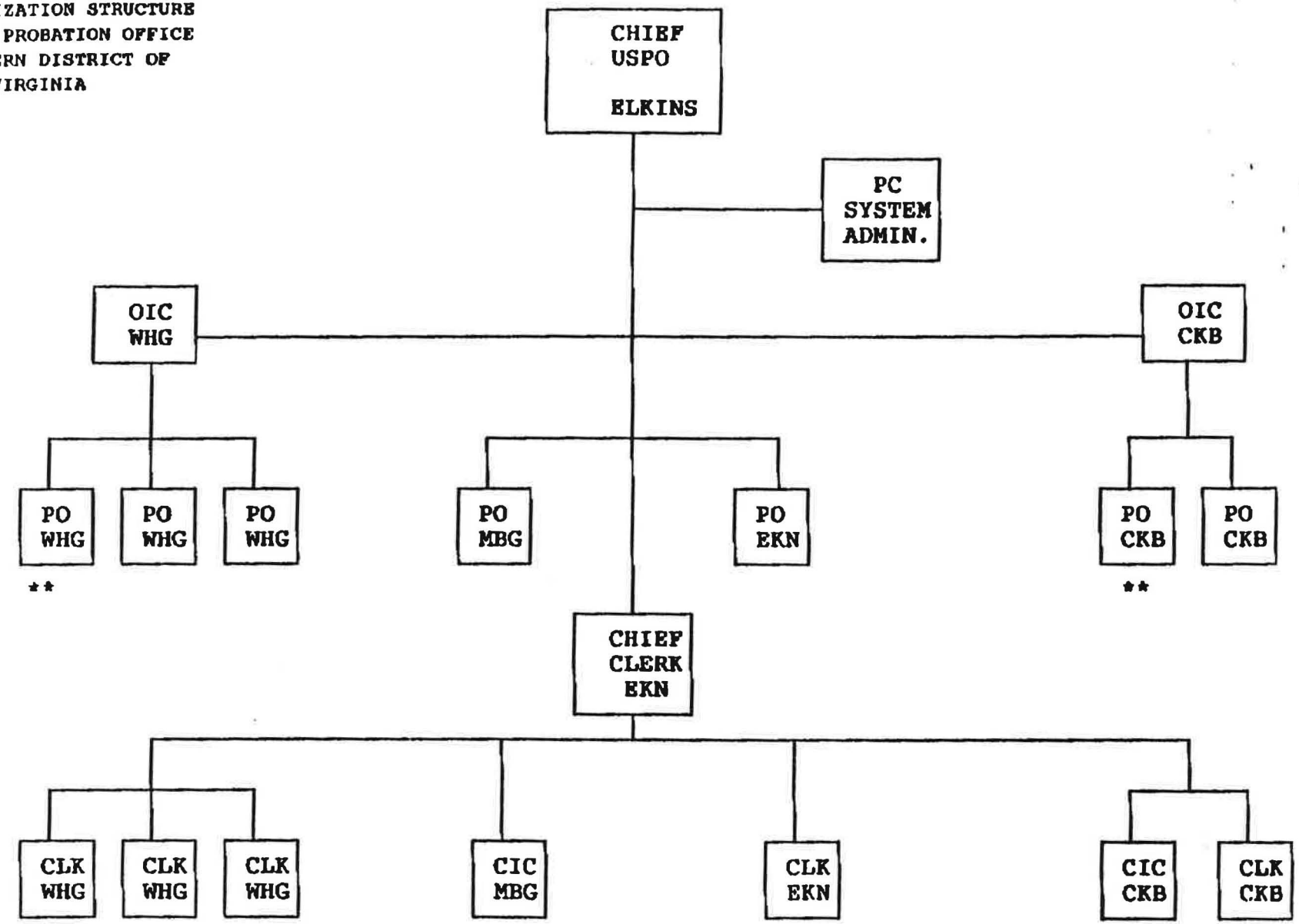
Age of Suit (in months)

District Wide as of June 30, 1988



F

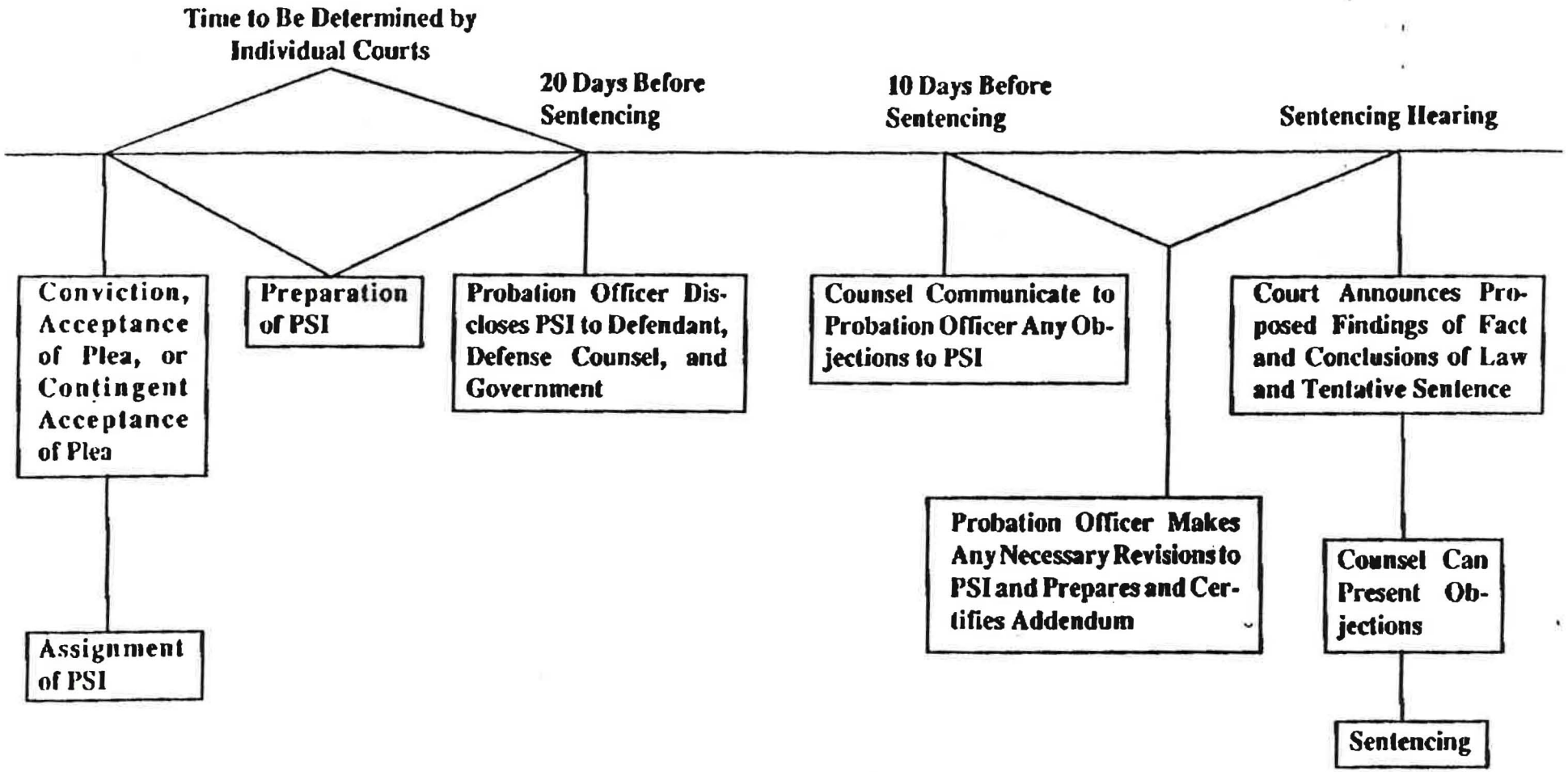
ORGANIZATION STRUCTURE
U. S. PROBATION OFFICE
NORTHERN DISTRICT OF
WEST VIRGINIA



OFFICE ABBREVIATIONS:
** - Grade 13's
EKN- Elkins (Headquarters)
CKB- Clarksburg
MBG- Martinsburg
WHG- Wheeling

August 27, 1991

Model Local Rule



TWELVE MONTH PERIOD ENDING JUNE

CRIMINAL FILINGS IN THE NORTHERN DISTRICT OF WEST VIRGINIA

1987		1988		1989		1990		1991	
Indictments	People	Indictments	People	Indictments	People	Indictments	People	Indictments	People
179	236	193	245	248	318	244	341	163	215

DEFENDANTS UNDER SUPERVISION IN THE NORTHERN DISTRICT OF WEST VIRGINIA

	CLARKSBURG	ELKINS	MARTINSBURG	WHEELING	TOTAL	AVERAGE PER OFFICER	NUMBER OF OFFICERS
1987	26	124	---	108	258	86	3
1988	76	129	---	103	308	103	3
1989	112	79	42	97	330	66	5
1990	131	90	82	146	449	64	7
1991	202	42	81	171	496	55	9

TWELVE MONTH PERIOD ENDING JUNE

REPORTS COMPLETED IN THE NORTHERN DISTRICT OF WEST VIRGINIA

1987	CLARKSBURG	ELKINS	MARTINSBURG	WHEELING	TOTAL
PRESENTENCE	41	84	0	72	197
COLLATERAL	9	27	0	19	55
OTHER	1	73	0	71	145
TOTAL	51	184	0	162	397
1988					
PRESENTENCE	50	41	0	61	152
COLLATERAL	19	19	0	22	60
OTHER	24	82	0	84	190
TOTAL	93	142	0	167	402
1989					
PRESENTENCE	46	74	0	60	180
COLLATERAL	28	21	0	20	69
OTHER	29	48	4	62	144
TOTAL	103	144	4	142	393

TWELVE MONTH PERIOD ENDING JUNE

REPORTS COMPLETED IN THE NORTHERN DISTRICT OF WEST VIRGINIA

1990	CLARKSBURG	ELKINS	MARTINSBURG	WHEELING	TOTAL
PRESENTENCE	47	67	36	91	241
COLLATERAL	25	32	11	23	91
OTHER	39	85	26	54	204
TOTAL	111	184	73	168	536
1991					
PRESENTENCE	64	40	33	88	225
COLLATERAL	32	35	14	20	101
OTHER	76	94	40	128	338
TOTAL	172	169	87	236	664

August 5, 1991

To selected members of
Executive Committee of the
Civil Justice Reform Act

Dear Members of the Advisory Group:

In a letter dated June 13th, 1991, the reporters presented a skeletal plan to the Executive Committee for comments and to see if the reporters' ideas were consistent with those of the Executive Committee. In a letter dated June 27th, 1991, Robert Steptoe responded on behalf of the Executive Committee to the ideas presented in the letter of June 13th, 1991. Based upon those comments and discussions to date, the reporters have prepared a revised draft plan which is being distributed to certain members of the advisory group for "feedback." The correspondence of June 13th and June 27th are included with this draft to provide background information.

After we receive the comments and suggestion from those who read this discussion draft, we will prepare a third draft to share with the entire Advisory Committee. The next draft will include a proposed analysis of the civil docket and the findings called for by the Civil Justice Reform Act. In preparing this section of our

report, we will rely on an initial draft that Bob Steptoe prepared for the reporters.

All members of the advisory group were to receive a memorandum entitled Guidance to the Advisory Group February 1991 from the Federal Judicial Center. On Page 10 of that memorandum, there is information concerning Type I and Type II civil cases. For most of the Type I cases, there is currently a procedure within the clerk's office which causes these cases to move through the pretrial and discovery stages without active judicial intervention. The clerk's office manages these cases until the case is ready for consideration and then brings case to the court for a decision. These cases will continue to be managed in that same manner. The procedure outlined below is, therefore, intended to apply to Type II cases which, according to the Chart I on Page 11 of the February memorandum, constitutes about 60% of the civil filings.

The proposed plan incorporates required disclosure of discovery material patterned after a draft revision of Rule 26 of the Federal Rules of Civil Procedure (a copy of the proposed Rule 26 is attached to the June 13th letter). Based upon the initial favorable response from members of the Executive Committee to this concept, we have modified the Federal Rule 26 to reflect generally its wording in our plan (a copy of the modified "Rule 26" is attached). The concept of Rule 26 is to expedite the exchange of routinely requested and provided information. Since the provisions

of the draft Rule 26 are tied to the filing of an answer in pending cases, it is important to address those civil cases in which Rule 12(b)(6) motions are filed. You will note that in the June 13th draft, the recommendation for dealing with 12(b)(6) motions, proceeded on the assumption that the rule should be concerned with over use of such motions. Based upon the comments of the Executive Committee, such use is not a significant problem in the Northern District of West Virginia. Therefore, the revised concept contemplates that the clerk's office should bring Rule 12(b) motions to the court's attention immediately. The court should give careful consideration to the merits of the motion and rule on the motion as quickly as reasonable. In appropriate cases, the court could enter an order postponing a decision on the motion until the trial on the merits. If the court entered such an order postponing a decision on the motion, such an order requires a responsive pleading to be filed within ten days (Rule of Civil Procedure 12(a)(1)) and this, in turn, would trigger the required discovery disclosure under "Rule 26." The Executive Committee's observation that the best way to avoid delay and cost is to reach the merits at this stage, if possible, is well taken.

Our draft plan contemplates that the required disclosure and the accompanying discovery under the Rules of Civil Procedure will proceed in a timely manner with a minimum expenditure of the court's time. The idea of required disclosure is that in almost all civil cases there is discovery information that is routinely

sought and obtained. Under required disclosure the parties provide such information and thereby the cost and delay involved in preparing routine interrogatories or pursuing other forms of discovery to obtain such information is avoided. With the required disclosure material in hand the remaining discovery should, in most cases, proceed in a timely manner. Based upon the suggestions of the Executive Committee, the plan would require all discovery in most civil actions to be completed within a hundred and eighty (180) days after the answer is filed.

One hundred and twenty (120) days after the answer is filed, the clerk's office will send to each party involved in the litigation a brief questionnaire which would require the party to advise the clerk whether all discovery will be completed within the one hundred and eighty (180) day deadline or whether additional time is necessary to complete discovery. The questionnaire will require the parties to describe what discovery has been completed and the nature of additional discovery needed or desired with sufficient detail to enable the court to make a decision as to whether active court intervention will be necessary in order to move discovery forward and/or whether an extension of time should be granted for the parties to complete the discovery.

In 1989, the Brookings Institution of Washington, D.C., published a report of a taskforce entitled Justice for All, Reducing Cost and Delay in Civil Litigation. The reporters have

found this report to be particularly helpful. One of the Reports' findings is that

> "meeting reasonable time expectations will be impossible unless courts have both the resources and the will to implement them consistently and then to convey this clearly to all participants. Firm trial dates, associated discovery cut off dates, and time limit for the disposition of motions provides clear warnings of the system's expectation for each case. Limiting relief from those dates to legitimate "good cause" exception ensures flexibility while at the same time enforcing the reasonable expectations for the matter." (Page 11).

It is, therefore, important for the party litigants to appreciate that the discovery deadline is to be adhered to with extensions granted only for "good cause."

Another recommendation of the Brookings report is that a plan includes differential case management. In recognition that certain cases are more complex than others, our revised proposal anticipates an early identification of complex litigation. For discussion purposes, a complex case is one that is complex enough

but there is no chance for the discovery to be completed within the hundred and eighty (180) day deadline or one in which structured staged discovery is necessary in order to reduce cost and avoid unnecessary delays. A case would be classified as complex upon the stipulation of all parties with court approval, upon the court's order on a motion filed by one of the parties or by the court on its own motion. If a case is classified as complex, then a scheduling conference will be held with the court and all parties within forty-five (45) days of the filing of the answer in order to tailor the discovery needs to that particular case.

By excluding complex cases, discovery in most cases can be completed in six (6) months. A realization that extensions will only be granted for "good cause" should provide the parties sufficient incentive to avoid delays and the accompanying cost.

Another observation made by the Brookings task force is:

> While the details of the case-tracking system (that is, the number of tracks) will likely vary from district to district, each tracking system must implement two interrelated procedures: establishing early, firm trial dates, and imposing time limits on the discovery process, directed toward completion of discovery, with related limits on the

> resolution of motions. The reason for this linkage is clear: the early completion of discovery can be counterproductive if the trial is then long delayed.

The "linkage" referred to in the last sentence of the quote presents an underlying theme of the Brookings report. Once discovery is completed, the case must promptly move to the next stage of litigation. The concensus at the April meeting of the advisory group and with the Executive Committee seems to be that in the substantial majority of the cases, it is only after discovery is completed that meaningful discussions of settlement can take place (or in certain complex litigation only after a certain stage of the discovery is completed). Therefore, in order to ensure that after the completion of discovery the cases will continue to move, settlement week conferences should be scheduled on a regular basis, perhaps every three months (if discovery is completed before the hundred and eighty (180) day deadline, the party should notify the clerk's office so that the case could be scheduled for the next settlement week conferences).

<u>All cases</u> which have completed discovery will be scheduled for settlement week conferences (in the terminology of alternative dispute resolution, settlement week is considered a form of mediation). If the parties agree or if the court, upon motion of one of the parties determines that the possibilities of settlement

will not be enhanced by referring the case to settlement week conferences, the court should explore with the party litigants other generally recognized forms of alternative dispute resolution to see if some other form of ADR would facilitate the resolution of the issues in a cost effective, time effective manner. Examples of other forms of alternative dispute resolution generally recognized are arbitration, mini-trials, mini-hearings, summary jury trials, the use of neutral evaluators for the utilization of a settlement judge/magistrate judge (which, in fact, is another form of mediation). As the name suggests, early neutral evaluators become involved early in the process to provide an objective assessment of the case. In such cases, it is probable the depositions of the party litigants will be taken soon after the answer is final. In such cases, the parties should agree to early dates for the depositions of the parties and advise the court of their desire to have an early neutral evaluation.

Perhaps the most poignant conclusion of the Brookings study is a statement concerning the setting of firm trial dates. In the discussion of setting an early and firm trial dates, the task force said

> Some courts already set early and firm trial dates. Indeed, subsection (b) of Rule 16, as amended in 1983, authorizes the practice. The task force has concluded, however, that a

systemwide requirement must be implemented. As Wayne Brazil, a leading procedural expert, has written, "fixing early and firm dates for the completion of trial preparation and for the trial itself is probably the single most effective device thus far developed for encouraging prompt and well-focused case development" (Brazil, 1981, p. 917). Professor Elliott suggests why:

> Perhaps the most important single element of effective managerial judging is to set a firm trial date. Limiting the amount of time before trial establishes a "zero sum game," in which part of the cost of working on one issue is the opportunity cost of not being able to work on other issues within the limited time available before trial. This creates incentives for attorneys to establish priorities and "narrow the areas of inquiry and advocacy to those they believe are truly relevant and material" and "to reduce the amount of resources

invested in litigation" (Elliott, 1986, pp. 313-14; citations omitted).

A 1986 American Bar Association publication also sets forth several reasons "why judges, lawyers and academics all agree" on the importance of setting firm trial dates. Such a procedure:

- dramatically increases settlement probabilities;
- eliminates duplicative preparation of witnesses when trials are rescheduled;
- is cost effective for the trial attorney because it allows efficient and predictable scheduling of the only commodity the attorney has to sell, time; and requires more serious planning by the court.

The statements of these commentators are borne out in the Harris survey, which found strong support among all respondent groups for "scheduling early and firm trial dates": 79

> percent of the plaintiffs' litigators, 76 percent of defendants' and public interest litigators, 85 percent of the corporate counsel, and 89 percent of the federal judges agreed with this view (Louis Harris and Associates, 1989, p. 55).

It is, therefore, important not only that the case move to the settlement conference immediately following the conclusion of discovery, it is also important that the case move promptly from the settlement conference to trial in the event the settlement conference is unsuccessful in resolving the dispute. Therefore, at the conclusion of the settlement conference, a firm date for the pretrial order pursuant to Rule 16 and the local rules of practice and a firm trial date should be established.

As was recognized and discussed at the April meeting of the advisory group, the Speedy Trial Act and its requirements have created very practical and very real problems for the scheduling of the court's civil docket. The reporters have discussed with the Chief Judge calendar options which may provide the court a method of complying with requirements of the Speedy Trial Act and yet still allow for fixed and firm dates for civil trial. It is recognized that it is likely for the court to meet its obligations both to the Speedy Trial Act and a commitment for fixed, firm trial dates for civil action that at times the assistance of senior judge

or visiting judges will be necessary to help dispose of large number of criminal cases started in a relatively short period of time.

As a demonstration district for the alternative dispute resolution, we recommend that our district should seek sufficient funds to pay out of pocket expenses of the "lawyer volunteers" who participate in the settlement week conferences. This is particularly important in light of the recommendation that essentially all civil cases be set for settlement week conferences as soon as discovery is complete and the accompanying increased volume this will place on the volunteers.

The one issue which the reporters believe needs further discussion in light of the Executive's Committee's recommendation is recommendation no. 4 of the letter of June 27, 1991. The reporters believe that the simultaneous disclosure set forth in 26 (a)(1), initial disclosure, will facilitate the orderly progression of discovery. However, as to the expert testimony (Rule 26(a)(2), we believe a sequencing as set forth in attached draft proposal which provides for the plaintiff to provide information as to its expert testimony and then for the defendants to provide its information as to its experts is both fair and practical. In most cases the experts the defense will call is dependant upon the experts the plaintiff will use. (Note that we have modified our draft for Rule 26 to count to the discovery deadline and not from

the trial date as set forth in the Rule 26 draft).

As indicated above, this skeletal plan is designed to present concepts upon which draft rules would be prepared. For example, provisions dealing with third party defendants will be drafted to be consistent with the concepts expressed above pertaining to "plaintiffs" and "defendants." We, therefore, welcome your comments and suggestions as to whether these concepts can be developed into a workable plan and what problems should be anticipated in drafting the rules based upon these concepts. In order for us to have a "plan" presented to the entire advisory group by the end of August, we would appreciate your comments and suggestions as soon as possible and no later than August 15th. The nature, the extent, and the diversity of the comments will undoubtly be important to the Executive Committee in deciding what additional steps are necessary before we can proceed to drafting the next version of the plan. Therefore, we will appreciate your comments, suggestions, and thoughts concerning this draft as soon as possible.

Very truly yours,

John W. Fisher, II

On behalf of the Reporters

JWF/ipb

CC: The Honorable Robert E. Maxwell

The Honorable Frederick P. Stamp, Jr.

COLLEGE OF LAW
WEST VIRGINIA UNIVERSITY

June 13, 1991

Robert M. Steptoe, Jr., Esq.
P.O. Box 2190
Clarksburg, WV 26302

Mr. Ray F. Formanek
1357 Headlee Avenue
Morgantown, WV 26505

James Warner, Esq.
P.O. Box 2040
Clarksburg, WV 26302

Michael Benninger, Esq.
318 Chestnut Street
Morgantown, WV 26505

Gentlemen:

Recently your reporters on Civil Justice Reform Act met to discuss a general plan for the Northern District of West Virginia. Our purpose was to set forth in writing some general thoughts that could be considered and then could be refined and shared with the members of the entire advisory group. We believe that if we are able to develop a general consensus on a basic plan, we could then prepare a more detailed proposal for consideration.

In our discussions we made the following assumption: Approximately 40% of the civil case files in this district could be classified as Type I cases. These include social security cases, student and veteran loan cases, habeas corpus petitions, state prisoner petitions, appeals from bankruptcy court, and land condemnation cases. (See the report from the Federal Judicial

Center). In each of these type of cases, there is currently a procedure which causes the cases to move through pretrial and discovery stages without active judicial intervention. For example, in social security cases the issue is joined on cross motions for summary judgement with the entire file of the case provided as part of the government's answer. In these catagories of cases the clerk's office is apparently able to manage the case until it is ready for consideration and to then bring the file to the court for a decision. Therefore, the following discussion is intended to be most applicable to the remaining 60% of civil case files which includes such cases as personal injury, contract, labor, tax, and the variety of other cases filed in federal court.

Based upon the discussions at our April meeting with the Advisory Committee and the literature that we have surveyed, there seems to be a consensus that a definition of minimum and required discovery is important in both keeping down the cost and reducing the delay in litigation. We, therefore, propose that our plan track the draft revision of Rule 26 of the Rules of Civil Procedure which was included in the materials that we received during the ALI-ABA video continuing legal education program which we attended in Pittsburgh. For convenience we are attaching a xerox copy of that draft rule. Since there are advantages to both following

the proposed revision of Rule 26 verbatam and adapting draft Rule 26 to specifically meet the needs of the Northern District of West Virginia, we will need guidance as to which of the two options would be most advantageous in our plan.

Since the provision of Rule 26 are tied to the filing of an answer in pending cases, we believe it will be important to address those civil cases in which 12(b)(6) motions are filed. Under the Rules of Civil Procedure, the filing of a 12(b)(6) motion stays the time for filing of an answer until the court rules on the motion. In order to require the filing of an answer, which triggers the required disclosure under proposed Rule 26, we believe the court should direct the clerk's office to bring all 12(b) motions to its attention immediately. The court could make a cursory examination of the motion with the idea that in most cases the Court would enter an order postponing a decision on the motion until the trial on the merits. The Court's order postponing a decision on the motion (Rule 12(a)(1)) requires a responsive pleading to be filed within ten (10) days and in turn triggers the required discovery disclosure under our plan.

Our proposal contemplates that the required disclosure and the accompanying discovery under the Rules of Civil Procedure will proceed in a timely manner. For example, we would anticipate that

in most cases the discovery, including all depositions, should be completed in one hundred and twenty (120) or one hundred and fifty (150) days after the answer is filed. For discussion purposes, let us assume the "deadline" for completing discovery is one hundred and twenty (120) days after the filing of the answer. Ninety (90) days after the answer is filed, the clerk's office would send to each party involved in the litigation a brief questionaire which would require the parties to advise the court whether all discovery will be completed within the one hundred and twenty (120) day "deadline" or whether additional time will be necessary. The questionaire would require the party to describe the nature of the additional discovery that is required in sufficient detail to enable the court to make a decision as to whether active court intervention will be necessary in order to move discovery forward or whether an extension of time should be granted for the parties to complete discovery. For example, if some of the witnesses the parties sought to depose are unavailable during the hundred and twenty (120) day period, an extension of time would enable the parties to complete discovery without judicial intervention. Our estimation, without any statistical information to support us, is that perhaps one half of the sixty percent (60%) of the case files (thirty to forty percent [30-40%] of the gross files) should be able to complete discovery within the assigned period of time and perhaps another twenty percent (20%) of the sixty percent (60%)

could complete discovery without active judicial intervention other than an extention of time. The remained of this sixty percent (60%) group will require active judicial management in order to move the discovery process to completion. The cases which will require judicial management include complex cases/issues or ones in which the litigants need Court rulings on motion to compel, protective orders etc.

The goal of the procedure outlined above is to try, with as little judicial intervention as possible, to separate those cases in which routine discovery can be moved forward by the parties pursuant to a deadline automatically set by the clerk's office from those in which the Court needs to be actively involved. Under our proposal the clerk's office would bring to the court's attention those case files in which the parties report in response to the ninety (90) day inquiry that additional time is necessary in order to complete discovery. The Court (or Court's designee) could then decide whether a reasonable extension of time is all that is needed or whether a discovery conference with the court or the court's designee (magistrate judge) is needed.

In those cases in which the discovery is completed by the parties within the one hundred and twenty (120) days or following an extension by the court, the Court would then set the case for a

"settlement conference." The term Settlement Conference as used herein is given a very general and broad meaning. It could be that the case would be set for "settlement week," or it could be that the conference would be with the judge, or the judge's designee (magistrate judge) and/or mediator. We believe what should occur at this stage is that the parties are brought together in a forum and with a format which will be conducive to bona fide discussions of settlement. Since discovery has been completed, each party should be able to make an honest assessment of the strengths and weaknesses of their case. Therefore, settlement discussions should prove fruitful. Since the "settlement week" concept has proven successful it would be one of the options for the "settlement conference." We need comments on what additional alternatives to the current settlement week concept should be "offered" as settlement conference options. Among the alternatives suggested at the April meeting to supplement settlement week (mediation) were mini-trials, advisory juries, and arbitration.

As indicated above your reporters are operating under the assumption that "settlement week", which has proved very successful in this district, should continue as a part of this plan. We are, however, uncertain as to whether the current system which utilizes volunteer facilitators would be capable of handling all civil cases which have completed the discovery process or

whether the settlement week as now structured would be the most appropriate alternative dispute resolution vehicle for all cases. For discussion purposes we assume that the percentage of cases currently utilizing "settlement week" could be expanded slightly under our proposal but that there would continue to be a substantial percentage of cases in which some other form of Alternative Dispute Resolution would perhaps be more suitable. We seek guidance as to what method could be used to channel cases into an appropriate "settlement conference" format.

With a full appreciation of the problems of the criminal docket and the requirements of the Speedy Trial Act, we believe it is important to try to follow the settlement conferences with firm trial dates for those cases which are not resolved during the settlement conferences.

As indicated above, we welcome comments and suggestions as to whether the concepts proposed herein can be developed into a workable plan or whether it presents fundamental deficiencies which need to be resolved before we move ahead. Your suggestions, comments, and refinements to this general proposal will enable us to prepare a more detailed draft plan based upon agreed general concepts. It is our hope that in early July we can start drafting a more detailed plan. Therefore, we will appreciate your

comments, suggestions, and thoughts concerning this proposal as soon as possible.

Very truly yours,

John W. Fisher, II
on behalf of the Reporters

JWF/ipb

CC: The Honorable Robert E. Maxwell
P.O. Box 1275
Elkins, WV 26241

The Honorable Frederick P. Stamp, Jr.
P.O. Box 791
Wheeling, WV 26003

Franklin D. Cleckley
WVU College of Law
Morgantown, WV 26505

Marjorie McDiarmid
WVU College of Law
Morgantown, WV 26506

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) **Required Disclosures; Methods to Discover Additional Matter.**

(1) Initial Disclosures. Except in actions exempted by local rule or when otherwise ordered, each party shall, without awaiting a discovery request, disclose to every other party:

(A) the name and, if known, the address and telephone number of each person reasonably likely to have information that bears significantly on the claims and defenses, identifying the subjects of the information;

(B) a general description, including the location, of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are reasonably likely to bear significantly on the claims and defenses;

(C) the computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making available such agreement for inspection and copying as under Rule 34.

Unless the court otherwise directs or the parties otherwise stipulate with the court's approval, these disclosures shall be made (i) by a plaintiff within 30 days after service of an answer to its complaint; (ii) by a defendant within 30 days after serving its answer to the complaint; and, in any event, (iii) by any party that has appeared in the case within 30 days after receiving from another party a written demand for early disclosure accompanied by the demanding party's disclosures. A party is not excused from disclosure because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosures, or, except with respect to the obligations under clause (iii), because another party has not made its disclosures.

(2) Disclosure of Expert Testimony. In addition to the disclosures required in paragraph (1), each party shall disclose to every other party any evidence which the party may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness that includes a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information relied upon in forming such opinions; any exhibits to be used as a summary of or support for such opinions; the qualifications of the witness; and a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years. Unless the court designates a different time, this disclosure shall be made at least 60 days before the date the case is scheduled for trial or has been directed to be ready for trial and is subject to the duty of supplementation under subdivision (e)(1).

(A) In lieu of providing a written report, a party may disclose the required information through a deposition of the witness under Rule 30 commenced at least 90 days before such trial date. Other parties shall have the right to defer their cross-examination of the deponent for a period of as many as 30 days. The deposition is not subject to the time limitations of Rule 30(d)(1). The deponent may not be called to testify in person at trial without leave of court.

(B) By local rule or by order in the case, the court may alter the type or form of disclosures to be made with respect to particular experts or categories of experts, such as treating physicians.

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, each party shall disclose to every other party the following information regarding the evidence that the disclosing party may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) **Claims of Privilege or Protection of Trial Preparation Materials.** When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, accompanied by a certificate by the movant that it has conferred with other affected parties in a good faith effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)4) apply to the award of expenses incurred in relation to the motion.

(d) **Timing and Sequence of Discovery.** Except with leave of court or upon agreement of the parties, a party may not seek discovery from any source before making the disclosures under subdivision (a)(1) and may not seek discovery from another party before the date such disclosures have been made by, or are due from, such other party. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) **Supplementation of Disclosures and Responses.** A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired as follows:

(1) A party is under a duty seasonably to supplement its disclosures under subdivision (a) if the party obtains information on the basis of which it knows that the information disclosed (A) was incomplete or incorrect when made or (B) is no longer complete and true. This duty also applies to information disclosed during the deposition of an expert whose opinions the party may present at trial.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties,

or at any time before trial through new requests for supplementation of prior responses.

(f) [Abrogated.]

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivisions (a) by a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney shall sign the disclosure. The signature of the attorney or party constitutes a certification that (A) the signer has read the disclosure and (B), to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry, the disclosure is complete as of the time it is made.

(2) Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Rule 30. Depositions Upon Oral Examination

(a) When Depositions May Be Taken; When Leave Required.

(1) Any party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

(2) Leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), must be obtained if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition, if taken, would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to go out of the United States and be unavailable for examination within the United States unless the person's deposition is taken before expiration of such period.

(b) Notice of Examination: General Requirements; Means of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the

Language to be inserted on the Attached pages As Numbered.

1. Unless the court designates different times, these disclosures shall be made (i) by plaintiff within 90 days after the service of an answer to its complaint, and (ii) by a defendant within 120 days after serving its answer to the complaint.

2.... within the time periods that disclosures are required in the preceding paragraph.

3.... at least 30 days before the end of the 180 day discovery period.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) **Required Disclosures; Methods to Discover Additional Matter.**

(1) **Initial Disclosures.** Except in actions exempted by ~~local~~ these rules or when otherwise ordered, each party shall, without awaiting a discovery request, disclose to every other party:

(A) the name and, if known, the address and telephone number of each person reasonably likely to have information that bears significantly on the claims and defenses, identifying the subjects of the information;

(B) a general description, including the location, of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are reasonably likely to bear significantly on the claims and defenses;

(C) the computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making available such agreement for inspection and copying as under Rule 34.

Unless the court otherwise directs or the parties otherwise stipulate with the court's approval, these disclosures shall be made (i) by a plaintiff within 30 days after service of an answer to its complaint; (ii) by a defendant within 30 days after serving its answer to the complaint; and, in any event, (iii) by any party that has appeared in the case within 30 days after receiving from another party a written demand for early disclosure accompanied by the demanding party's disclosures. A party is not excused from disclosure because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosures, or, except with respect to the obligations under clause (iii), because another party has not made its disclosures.

(2) **Disclosure of Expert Testimony.** In addition to the disclosures required in paragraph (1), each party shall disclose to every other party any evidence which the party may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness that includes a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information relied upon in forming such opinions; any exhibits to be used as a summary of or support for such opinions; the qualifications of the witness; and a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years. ~~Unless the court designates a different time, this disclosure shall be made at least 60 days before the date the case is scheduled for trial or has been directed to be ready for trial and is subject to the duty of supplementation under subdivision (e)(1).~~ 1.

(A) In lieu of providing a written report, a party may disclose the required information through a deposition of the witness under Rule 30 commenced at least ~~90 days before such trial date.~~ Other parties shall have the right to defer their cross-examination of the deponent for a period of as many as 30 days. The deposition is not subject to the time limitations of Rule 30(d)(1). The deponent may not be called to testify in person at trial without leave of court. 2.

(B) ~~By local rule or~~ by order in the case, the court may alter the type or form of disclosures to be made with respect to particular experts or categories of experts, such as treating physicians.

(3) **Pretrial Disclosures.** In addition to the disclosures required in the preceding paragraphs, each party shall disclose to every other party the following information regarding the evidence that the disclosing party may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

502

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken by stenographic means, a transcript of the pertinent portions of such deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made ~~at least 30 days before trial.~~ 3. Within 14 days thereafter, unless a different time is specified by the court, other parties shall serve and file (i) any objections that deposition testimony designated under subparagraph (B) cannot be used under Rule 32(a) and (ii) any objection to the admissibility of the materials identified under subparagraph (C). Objections not so made, other than under Rules 402-03 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) **Form of Disclosures; Meetings; Filing.** The disclosures required by the preceding paragraphs shall be made in writing and signed by the party or counsel in compliance with subdivision (g)(1). If feasible, counsel shall meet to exchange disclosures required by paragraphs (1) and (3); otherwise, such disclosures shall be served as provided by Rule 5 and, unless otherwise ordered, promptly filed with the court.

(5) **Methods to Discover Additional Matter.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission. Discovery at a place within a country having a treaty with the United States applicable to such discovery shall be conducted by methods authorized by the treaty unless the court determines that those methods are inadequate or inequitable and authorizes other discovery methods not prohibited by the treaty.

(b) **Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The Court ^ (2) **Limitations.** Limitations in these rules on the number and length of depositions and the number of interrogatories may be altered by ~~local rule~~ the Court for particular types or classifications of cases. The frequency or extent of use of the discovery methods permitted under these rules ~~and any local rule~~ shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery to the resolution of the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

• • • •

(4) **Trial Preparation: Experts.**

(A) A party may by deposition examine any person who has been identified as an expert whose opinions may be presented at trial.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of

litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) **Claims of Privilege or Protection of Trial Preparation Materials.** When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, accompanied by a certificate by the movant that it has conferred with other affected parties in a good faith effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)4) apply to the award of expenses incurred in relation to the motion.

(d) **Timing and Sequence of Discovery.** Except with leave of court or upon agreement of the parties, a party may not seek discovery from any source before making the disclosures under subdivision (a)(1) and may not seek discovery from another party before the date such disclosures have been made by, or are due from, such other party. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) **Supplementation of Disclosures and Responses.** A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired as follows:

(1) A party is under a duty seasonably to supplement its disclosures under subdivision (a) if the party obtains information on the basis of which it knows that the information disclosed (A) was incomplete or incorrect when made or (B) is no longer complete and true. This duty also applies to information disclosed during the deposition of an expert whose opinions the party may present at trial.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties,

or at any time before trial through new requests for supplementation of prior responses.

(f) [Abrogated.]

(g) **Signing of Disclosures, Discovery Requests, Responses, and Objections.**

(1) Every disclosure made pursuant to subdivisions (a) by a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney shall sign the disclosure. The signature of the attorney or party constitutes a certification that (A) the signer has read the disclosure and (B), to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry, the disclosure is complete as of the time it is made.

(2) Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Rule 30. Depositions Upon Oral Examination

(a) **When Depositions May Be Taken; When Leave Required.**

(1) Any party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

(2) Leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), must be obtained if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition, if taken, would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to go out of the United States and be unavailable for examination within the United States unless the person's deposition is taken before expiration of such period.

(b) **Notice of Examination: General Requirements; Means of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.**

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and if the

STEPTOE & JOHNSON
ATTORNEYS AT LAW
SIXTH FLOOR
UNION NATIONAL CENTER EAST
P. O. BOX 2190
CLARKSBURG, W. VA. 26302-2190
FACSIMILE (304) 624-8183 (304) 624-8000 WRITER'S DIRECT DIAL NUMBER
(304) 624-8142

June 27, 1991

Honorable John W. Fisher, II
United States Magistrate
West Virginia University
College of Law
P. O. Box 6130
Morgantown, WV 26506-6130

Dear Magistrate Fisher:

Thank you for your June 13 correspondence expressing preliminary thoughts respecting a general plan responsive to the Civil Justice Reform Act. I appreciate very much the hard work which you and the other reporters continue to devote to this project.

Your letter of June 13 requested input from the four members of the executive committee. Mike Benninger, Jim Varner, Ray Formanek, and I have discussed the proposal in detail, and this letter will reflect some of our joint suggestions, as well as a few areas where we disagree slightly.

RECOMMENDATION NO. 1: All members of the executive committee agree with the reporters' suggestion that all Rule 12(b) motions be brought to the court's attention promptly. However, we respectfully suggest that, rather than postponing decisions on such motions, a ruling be issued as quickly as possible, either by the court or by a magistrate to whom such motions might be referred. Our concern is that postponement of decisions on Rule 12(b) motions until the trial on the merits will, in the instance of meritorious motions, cause the litigants the substantial, unnecessary expense for discovery and trial preparation. Additionally, deferral will increase the administrative burden of managing cases which eventually will be dismissed on Rule 12(b) grounds. Therefore, because it has been our experience that most defendants do not file Rule 12(b) motions for impermissible reasons (delay, harassment, etc.), and because "motion practice" is not as common in West Virginia as in other

215 CHARLESTON NATIONAL PLAZA
P. O. BOX 1588
CHARLESTON, W. VA. 25326-1588
(304) 353-8000
FACSIMILE (304) 353-8180

000 HAMPTON CENTER
P. O. BOX 1616
MORGANTOWN, W. VA. 26507-1616
(304) 598-8000
FACSIMILE (304) 598-8116

126 EAST BURKE STREET
MARTINSBURG, W. VA. 25401-4399
(304) 263-6991
FACSIMILE (304) 263-4785

104 WEST CONGRESS STREET
P. O. BOX 100
CHARLES TOWN, W. VA. 25414-0100
(304) 725-1414
FACSIMILE (304) 725-1913

THE BRYAN CENTRE
82 WEST WASHINGTON STREET, SUITE 401
HAGERSTOWN, MARYLAND 21740-4804
(301) 791-8620
FACSIMILE (301) 739-3848

jurisdictions, the better procedure would call for Rule 12(b) motions to be ruled upon promptly. To the extent that lawyers abuse motions, sanctions may be applied.[1]

RECOMMENDATION NO. 2: All of the committee members agree that a discovery period of 120 days after the filing of the answer is a bit short. We suggest extending that period to 180 days after the filing of the answer, or third-party answer, if applicable. Most active trial practitioners, however well intentioned they may be, will probably have difficulty meeting a 120-day standard because of the competing demands of trials, discovery demands in other cases, appeals, criminal cases, etc. By setting a longer discovery period, we anticipate fewer motions to extend discovery, which in turn will reduce the administrative burden on the courts. Otherwise, we agree with the reporters' proposal of a standardized discovery period, including the use of a questionnaire toward the end of the discovery period, such as you have described in your letter. If the period of discovery is to be 180 days, perhaps the questionnaire would appropriately be send at the 150-day mark. Mr. Formanek, in particular, is concerned that repeated continuances and extensions not be granted.

RECOMMENDATION NO. 3: All committee members agree that a "settlement conference" after the completion of discovery is desirable. We further agree that cases should be set routinely for voluntary mediation under the "Settlement Week" model, which has been successful during past years. We believe that additional lawyers should be trained as mediators, and that consideration should be given to enlisting retired state court judges and retired or semi-retired respected trial lawyers as mediators. We also suggest that consideration be given to paying the out-of-pocket expenses of those individuals who are willing to give of their time to serve as mediators at the different court situses around the state. With respect to other ADR techniques, we agree that mini-trials, advisory juries, and arbitration can be helpful in certain cases, and that attempts should be made to suggest these relatively unused ADR techniques in particularly suitable cases. However, because these three particular ADR techniques are somewhat labor-intensive and expensive to clients, we recommend that they be offered, but not forced upon, litigants. Finally, we are in agreement that settlement conferences should be followed by firm trial dates. Absent some "carrot" or "stick", many litigants will not engage in settlement conferences as seriously as they should.

---

[1] Our observation that Rule 12(b) motions are not abused is purely personal. Obviously, we do not know what is happening in the many civil cases where we are not involved. Therefore, to validate our premise that Rule 12(b) motions are not used abusively, we suggest that the reporters may wish to seek input from Judges Maxwell and Stamp, as well as their respective law clerks.

RECOMMENDATION NO. 4: We have reviewed Proposed Rule 26, which apparently was drafted in March of 1991. Our understanding is that this document represents an early draft; that over the next few years changes can be expected; and that implementation of a new Rule 26 is not likely for three to five years. As we understand the situation, this draft is suggested by the reporters as a framework for a local rule for the Northern District. After reviewing the Proposed Rule 26, the committee members are in agreement that most of its provisions are workable and offer a reasonable framework for a local rule. We do, however, have several suggested modifications and comments.

First, as to Proposed Rule 26(d), entitled "Timing and Sequence of Discovery," we agree that this restriction on normal discovery should not be part of our local rule. We perceive the restriction of discovery until Rule 26(a)(1) initial disclosures are made as having the potential to impede discovery, as well as interfere with a litigant's right to conduct discovery and prepare a case as dictated by the needs and circumstances of that particular case. Should any party feel that normal discovery is being abused, that party could move for a protective order under Rule 26(c). Therefore, we recommend deletion of Rule 26(d).

Second, all committee members agree that the disclosure of expert testimony, provided for at Proposed Rule 26(a)(2), should be accomplished within the period of discovery and should not be delayed until "60 days before the date the case is scheduled for trial." We believe that discovery of expert testimony is often critical to the outcome of the case, and we believe that such discovery should be completed before the matter reaches "settlement conference." Despite agreement that disclosure of expert testimony should be accomplished within the discovery period, however, the entire committee did not agree as to a technique for such disclosure. Mr. Benninger prefers simultaneous disclosure, as provided under Rule 26(a)(2); conversely, the other three members of the committee suggest staged disclosure, with the plaintiff first making its disclosure and the defendant, after a period of 30 to 45 days, making its disclosure. Our reason for suggesting staged disclosure is the feeling that many defendants do not select experts, or even determine to use experts, until the plaintiff does so. Therefore, once a plaintiff makes his disclosure of expert testimony, the defendant needs a reasonable amount of time to determine whether an expert witness will be necessary and what experts are available. Additionally, in many instances the defendant must have the plaintiff examined by the defense expert, or have the defense expert visit the premises, perform certain tests, review documents and depositions, etc. in order to prepare an opinion. For this reason, three members of the committee recommend staged disclosure of expert witnesses; but, we hasten to point out that Mr. Benninger recommends simultaneous disclosure.

Finally, although the entire committee is in agreement as to the substance of the "initial disclosures" required by Proposed Rule 26(a)(1), we disagree as to the timing of such disclosures. Again, the point of our disagreement is whether such disclosure should be simultaneous or staged. Mr. Benninger recommends simultaneous disclosure; the other three members recommend that the defendant's disclosure be made "within 30 days after service of the plaintiff's disclosure." Our rationale for recommending a staged "initial disclosure" is that the defendant needs to know something about plaintiff's case before the defendant can reasonably designate potential witnesses and exhibits. Although a plaintiff may be able to designate witnesses and exhibits within 30 days after the filing of an answer, because the plaintiff has the advantage of working up its disclosure prior to the filing of suit, the defendant is typically taken by surprise and requires a somewhat longer time to identify witnesses and exhibits. Personally, we do not think the additional 30 days granted to a defendant for the purpose of making initial disclosures puts the plaintiff at any disadvantage, and we believe that defendants will generally make more complete and helpful disclosures if given the extra time within which to work on the disclosures. As noted, Mr. Benninger favors simultaneous disclosure.

The other members of the committee may wish to add suggestions, and if so, I anticipate they will do so promptly by letter. However, I believe this letter fairly summarizes our reaction to the initial proposal from the reporters.

I hope that these recommendations will be of help to the reporters in drafting the next proposal, to be shared with all members of the advisory group. As you and I have discussed, however, it may be advisable to have the next draft reviewed by not only the four members of the executive committee, but also a slightly expanded group consisting of some other members of the advisory group. This is not something that we have discussed with Judges Maxwell and Stamp, but if they have no objection, I think you and I are in agreement that the next level of review might well be accomplished by a slightly larger group.

With best personal regards, I remain

Very truly yours,

Robert M. Steptoe, Jr.

RMS,JR:mo

cc: Honorable Robert E. Maxwell, Chief Judge
Honorable Frederick P. Stamp, Jr., Judge
James A. Varner, Esquire
J. Michael Benninger, Esquire
Mr. Ray F. Formanek