Report on the Impact of the Cost and Delay Reduction Plan Adopted by the United States District Court for the Southern District of Texas

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Cost and Delay Reduction Plan Report
United States District Court
Southern District of Texas

Contents

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Introduction

In October of 1991, the Southern District of Texas adopted a Cost and Delay Reduction Plan (the Plan) under the Civil Justice Reform Act of 1990 (the Act).[1] Provisions in the Plan and in the Act require regular reporting on the effects of the Plan on cost and delay in civil litigation in the district.[2]

As a Pilot district, the Southern District of Texas recognized its obligation to experiment with a variety of case management tools. The Plan reflected this obligation. Many difficulties obstruct the full analysis of the effectiveness of the Plan, however. External factors, a number of which are enumerated below, influenced the performance of the Court during 1992, making the process of identifying the impact of the Plan difficult. To counteract this, measurements were made comparing groups of cases with few variables between them whenever possible. Implementation of many parts of the Plan was delayed indefinitely because of financial and other concerns. The Plan requested authorization for 32 new positions in the district,[3] but only five (5) were authorized. Restricted funding in the Courts in fiscal year 1993 has further limited the personnel of the Court, with a reduction to 72% of full staffing allocation levels. As much of the Plan has been implemented as possible given these personnel limitations.

In comparing the performance of the Court in 1992 to previous years, it is important to mention the changes which have occurred in the district. In the Houston division, there were numerous changes in the personnel of the Court. During 1992, two (2) new judges, Judge Ewing Werlein, Jr., and Judge Lee Rosenthal, took the bench. Chief Judge James DeAnda resigned in 1992, and Judge Norman Black was elevated to Chief Judge. Senior Judge John Singleton also resigned from the bench. Magistrate Judges Marcia Crone and Maryrose Milloy joined the Court in 1992, while Magistrate Judge George Kelt left. In the Brownsville division, Magistrate Judge John Black took the bench, and in McAllen division, Magistrate Judge Peter Ormsby was invested.

Other important changes have had various impacts on the operations of the Court in southern Texas. During the last three years, annual criminal felony filings have fallen over 40%, from 2324 in 1990 to 1365 in 1992. In the same period, civil case filings have declined about

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[1] Pub. L. 101-650, Title I, §§ 101-105. The United States District Court for the Southern District of Texas adopted a Plan on October 24, 1991, in General Order 91-24.

[2] 28 U.S.C. § 475 requires annual district court assessment. Section 6 of the Plan of the Southern District of Texas requires annual evaluation of Voluntary Disclosure. Section 7.K.3 of the Plan, adopted as Local Rule 22.K.3, requires annual reporting on Alternative Dispute Resolution proceedings.

[3] The Plan, section 10.A-F.

3%, from 5983 in 1990 to 5778 in 1992.[4] Geographically, new filings in the district have declined in the southern divisions, and increased in the northern divisions, changing the balance of the workload in the district. This change has been largely due to the decline in criminal filings, but the accompanying fluctuation in civil filings has also had some impact. Because of the imminent appointment of a new U.S. Attorney for the district, it is impossible to predict criminal case activity in the district.

There is, however, substantial evidence that the criminal docket is becoming more complex. The year ending June 30, 1992 saw an average of about 1.63 defendants per felony criminal case filed in the district, higher than all but one year since 1980.[5] While case filings were declining so drastically during the last three years, the number of new defendants indicted on felony charges dropped only 37%. This shows that the actual criminal workload has not declined as much as indicated by the change in new case filings.

Finally, in 1991 the Multi-District Litigation Panel ordered that all asbestos personal injury product liability cases nation-wide be transferred to the Eastern District of Pennsylvania for case management purposes. As a result of this order, 315 cases were terminated in the Southern District of Texas in December of 1991. A substantial number of these cases were over three years old. In compliance with this order, all asbestos cases filed in the Southern District of Texas during 1992 were transferred to Eastern Pennsylvania. Also, cases of this type were being managed in groups, resulting in 148 terminations during 1991 prior to the order for transfer. Removal of these cases from the Southern District of Texas changed the complexion of the docket.

Assessing the impact of the Civil Justice Reform Act and the Cost and Delay Reduction Plan adopted by the Court will be difficult. There are many different factors contributing to changes in the Southern District of Texas. In the report contained on the following pages, it is important to be mindful of these disparate factors, because they demonstrate how quickly the caseload in this district could surpass the emergency levels reached in 1989.

Condition of the Civil and Criminal Dockets

The pending caseload in the Southern District of Texas has continued to decline over the last year. From the 1991 level of 8486, the total pending caseload in the district dropped nearly 8%, to 7812 cases at the end of 1992.[6] This represents a 24.3% reduction from the 1990 level

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[4] Annual Report of the Director of the Administrative Office, Appendix I, Detailed Statistical Tables, 1990 through 1992.

[5] Annual Report of the Director of the Administrative Office, Appendix I, Detailed Statistical Tables, 1980 through 1992.

[6] Except where otherwise noted, all statistics are taken from monthly statistical reports prepared within the Southern District of Texas and from the Civil and Criminal ICMS Docketing Systems.

of 10,324. The pending caseload, which plunged during 1991, leveled off during 1992, as Figure 1 demonstrates. Part of the reason for this leveling off was that total filings increased. In calendar year 1991, the district experienced 6873 new case filings, of which 5302 were civil and 1571 were criminal. By contrast, the district received 7040 new case filings in 1992, of which 5710 were civil and 1330 were criminal. Since most criminal cases are resolved within a uniform period of time,[7] a reduction in new criminal filings accompanied by a larger increase in civil case filings would tend to cause an increase in average time to disposition of all cases in the district. This tendency should cause the Court to slow in its rate of case dispositions relative to case filings. Since the Court closed cases at such a high rate in 1991, this slowing still allowed the Court to gain ground against its pending caseload.

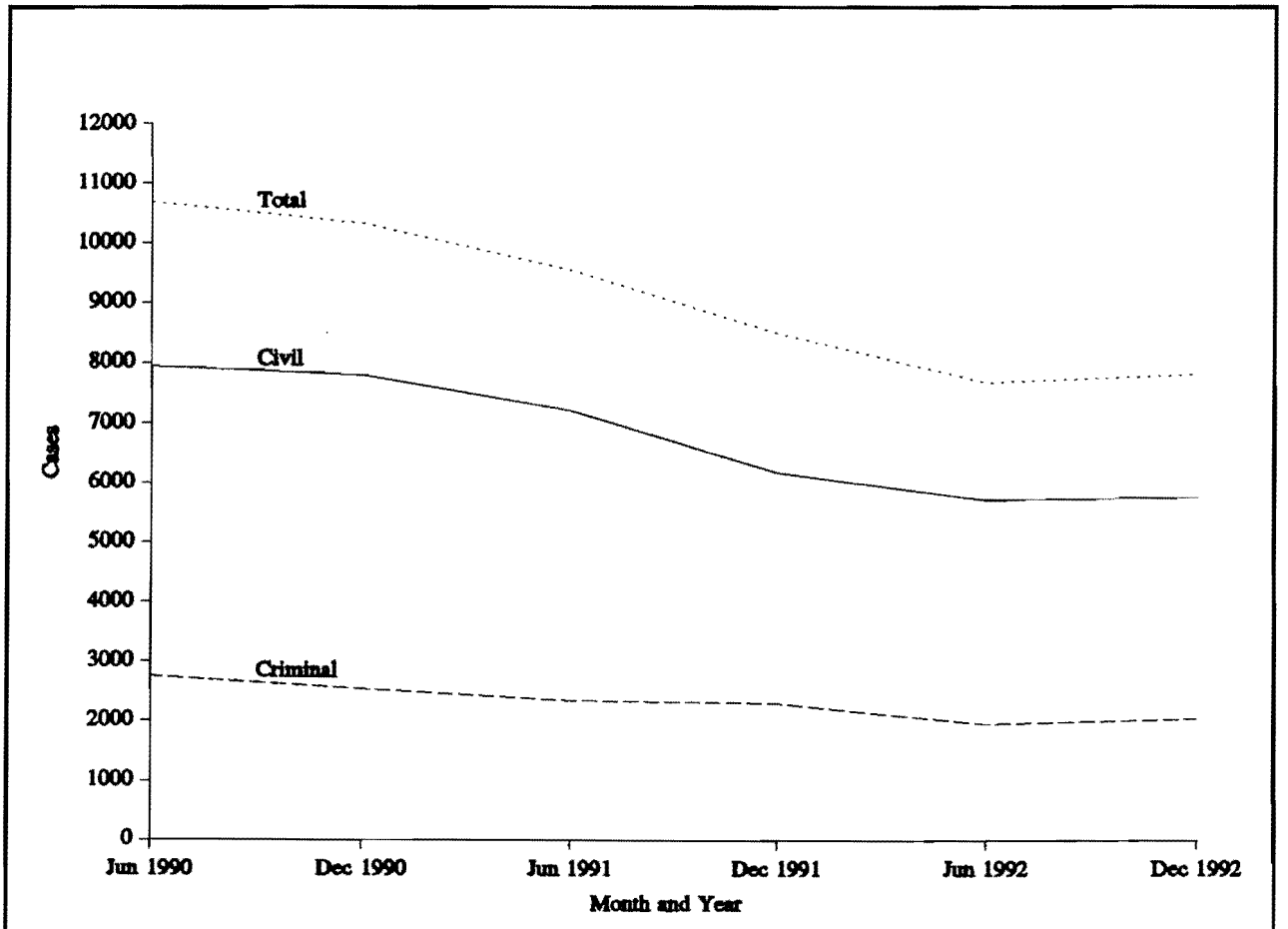

Figure 1 Southern District of Texas Pending Caseload, 1990 through 1992.

As described above, the decline in the criminal caseload was accompanied by an increase in the average complexity of criminal cases. Changing prosecutorial philosophies in the U.S. Attorney's office account for this shift between 1990 and 1992. The result has been that judges in the Southern District of Texas have been assigned more than 40 more felony criminal

[7] The Criminal Speedy Trial Act and other statutory constraints insure that most criminal cases are concluded in an expedient manner.

defendants per judgeship than the national average, while handling only 29 fewer civil cases.[8] The unique demands on judicial time represented by the largest felony criminal caseload in the country contribute to delay in civil cases. A return to a prosecutorial philosophy of zero-tolerance could increase the pressures faced by this Court just as quickly as they declined during the last three years.

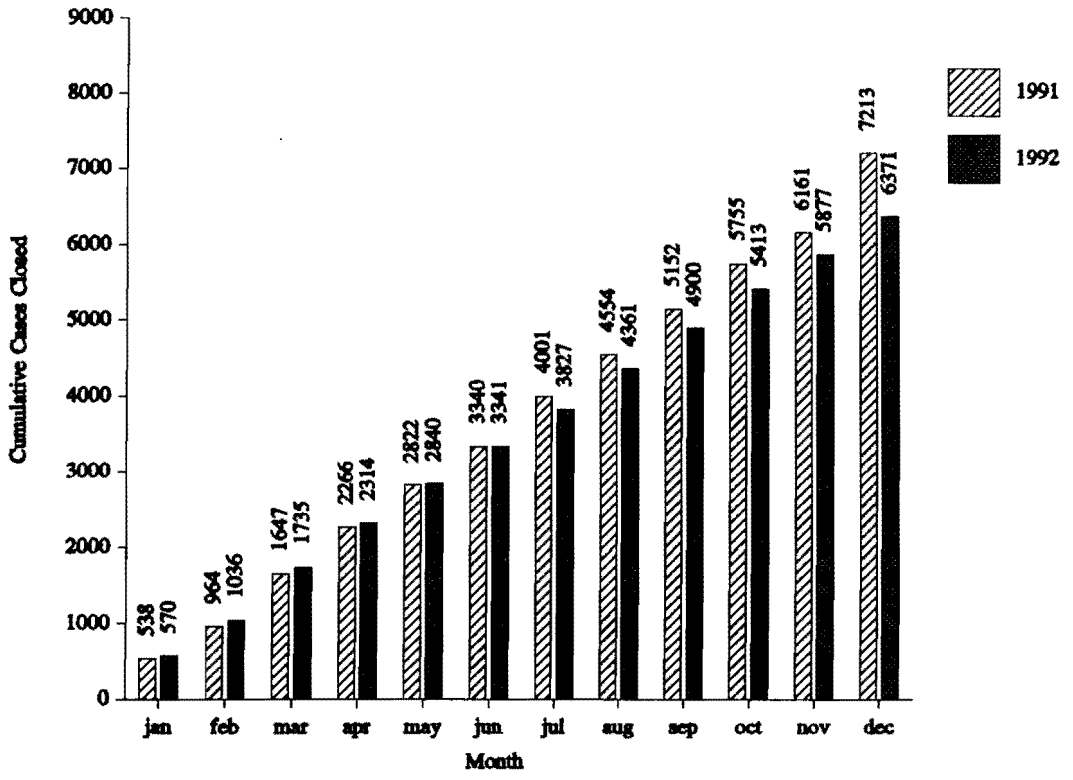

Figure 2 Cumulative Case Closings Month by Month, 1991 and 1992.

Civil case closings for 1991 and 1992 are compared on Figure 2. The Court clearly slowed its rate of case closings in the second half of 1992. This slowing may be accounted for in two ways. First, most of the changes in judicial personnel occurred during the summer of 1992, from May through September. Clearly this is the period during which the Court begins to close fewer cases. Second, there was a substantial reduction in older cases ripe for termination. Between September 30, 1991 and September 30, 1992, the Court reduced the

[8] Report of the Director of the Administrative Office, Appendix I Detailed Statistical Tables, 12 Month Period Ending June 30, 1992. June 1992 Federal Court Management Statistics profiles for the Southern District of Texas and for All District Courts, transmitted September 14, 1992.

number of pending civil cases older than three (3) years by over 50%, from 852 to 375. This decline compares to the modest reductions or increases of previous years (increase of 3.1% in 1989–90, decline of 20.1% in 1990–91).[9] Combined with the increase in civil filings experienced during 1992, a decline in case terminations is to be expected.

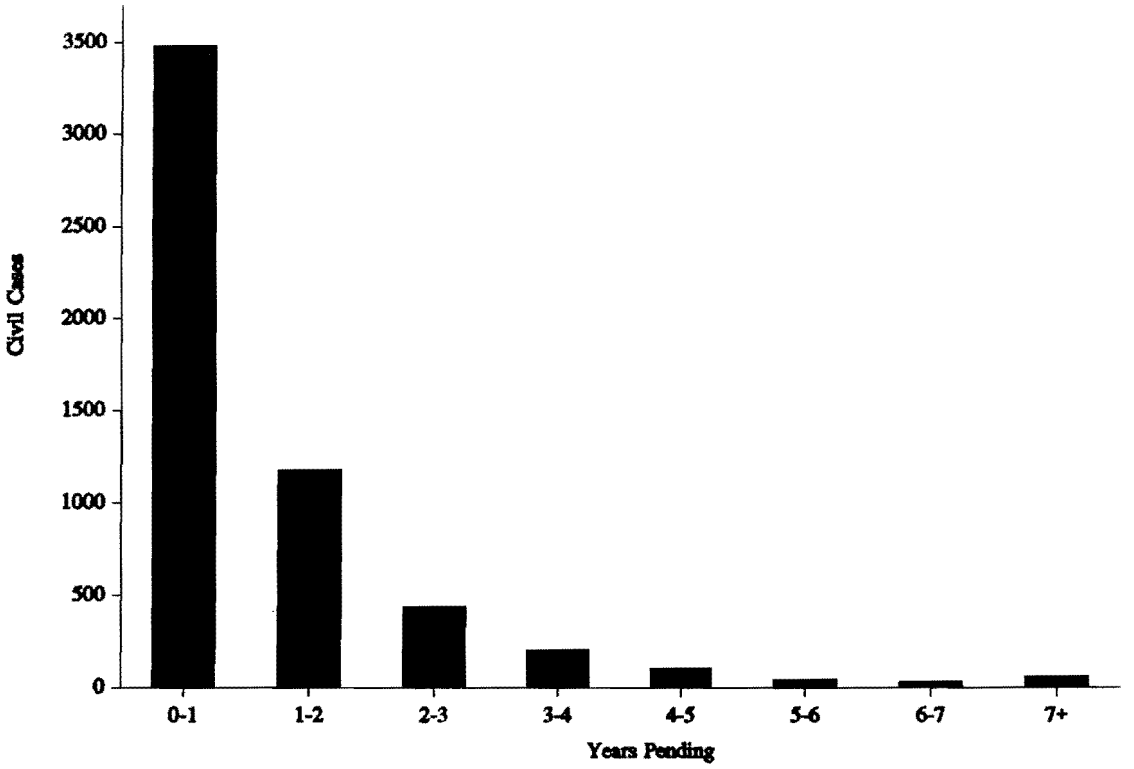

Figure 3 Age of Civil Cases Pending at the End of the Calendar Year, 1992.

The relative age of the civil caseload is represented in Figure 3. Clearly the majority of cases pending were filed during 1992. With fewer old cases requiring attention, the Court had more time free to concentrate on managing younger cases. As Figure 4 illustrates, the Court closed new cases faster in 1992 than in 1991. The new case management techniques introduced by the Plan, including pretrial conferences in most cases, joint discovery/case management plans and increased referrals to magistrate judges, contributed to this acceleration of case processing. Other important contributors to this phenomenon include the drop in criminal filings, the lowest number of pending cases since 1983, and the addition of judges and magistrate judges to the Court.

[9] September 1992 Federal Court Management Statistics profile of the Southern District of Texas, transmitted February 16, 1993.

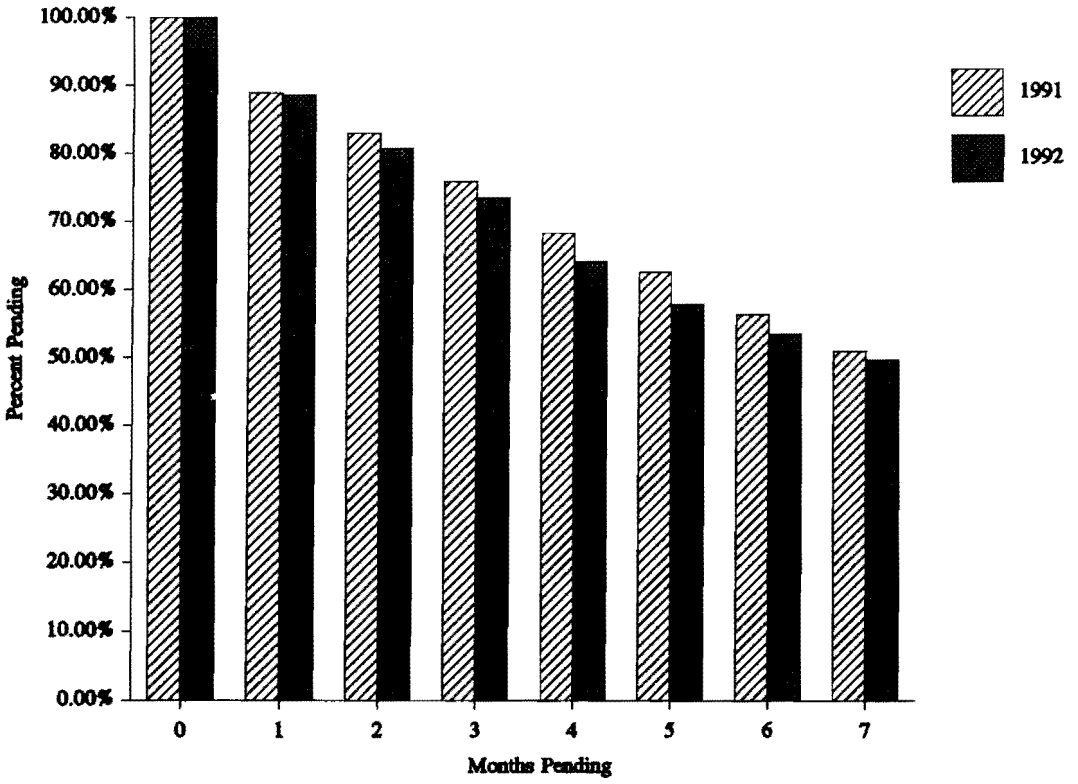

Figure 4 Early Terminations, 1991 cases compared to 1992 cases. Cases opened between July 1, 1991 and December 31, 1991 are compared to cases opened between January 1, 1992 and May 31, 1992.

The pending civil caseload in the Southern District of Texas is quite diverse, as Figure 5 reveals. The caseload varies considerably between the various divisions, however. Charts showing the natures of suit of new case filings during 1992, and of pending cases at the end of 1992 for each division are contained in Appendix A. Generally, it appears that each nature of suit category continues to occupy approximately the same percentage of the pending docket as it does at filing. It is notable that prisoner cases, which are differentiated from other types of cases in their case management, usually occupy a lower percentage of the pending caseload than of the filed caseload. This implies that these cases are closed earlier, while other cases tend to remain pending longer.[10] Other differentially managed cases, including Social Security and Bankruptcy cases, make up too small a percentage of the docket for this representation to demonstrate anything significant.

[10] The characteristics of prisoner litigation which might contribute to this phenomenon are described on page 9.

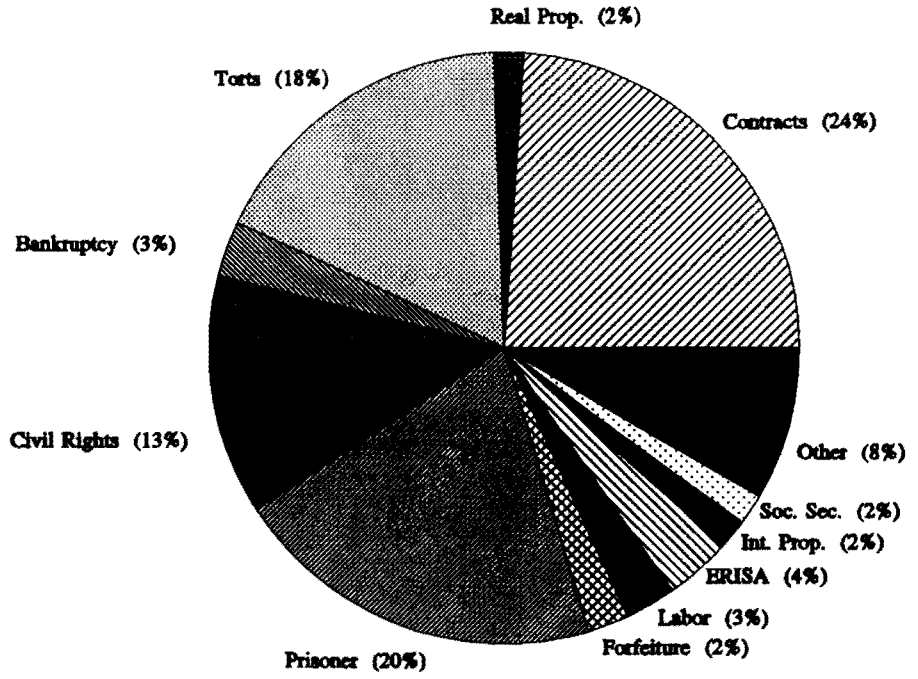

Figure 5 Natures of Suit of Pending Civil Cases at the end of calendar year 1992.

In assessing the condition of the docket, the Advisory Group compared the ratio of civil pending cases to terminated cases.[11] This is considered a good indicator of whether a court is staying abreast of its docket. On Figure 6, downward slopes indicate years during which the Court was gaining ground against its pending caseload, and upward slopes mark periods when the Court fell behind. The figure shows that the Court handled its caseload in a particularly expeditious manner up through June of 1992. The added judicial personnel, combined with new case management practices, are expected to cause this graph to either slope downward or remain relatively flat in the future, but abrupt fluctuations, such as a rapid increase in new case filings, could cause the Court to temporarily lose ground against the pending caseload.

One of the most important changes in the Southern District of Texas which occurred during 1992 was the addition of judicial personnel. While the district experienced 416 weighted filings per judgeship during the 12 month period ended September 30, 1992, there were also 53.1 vacant judgeship months reported. This resulted in the sitting judges in the Southern District of

[11] For an explanation of the utility of this form of analysis, see John Shapard, "How Caseload Statistics Deceive," Federal Judicial Center, August 9, 1991.

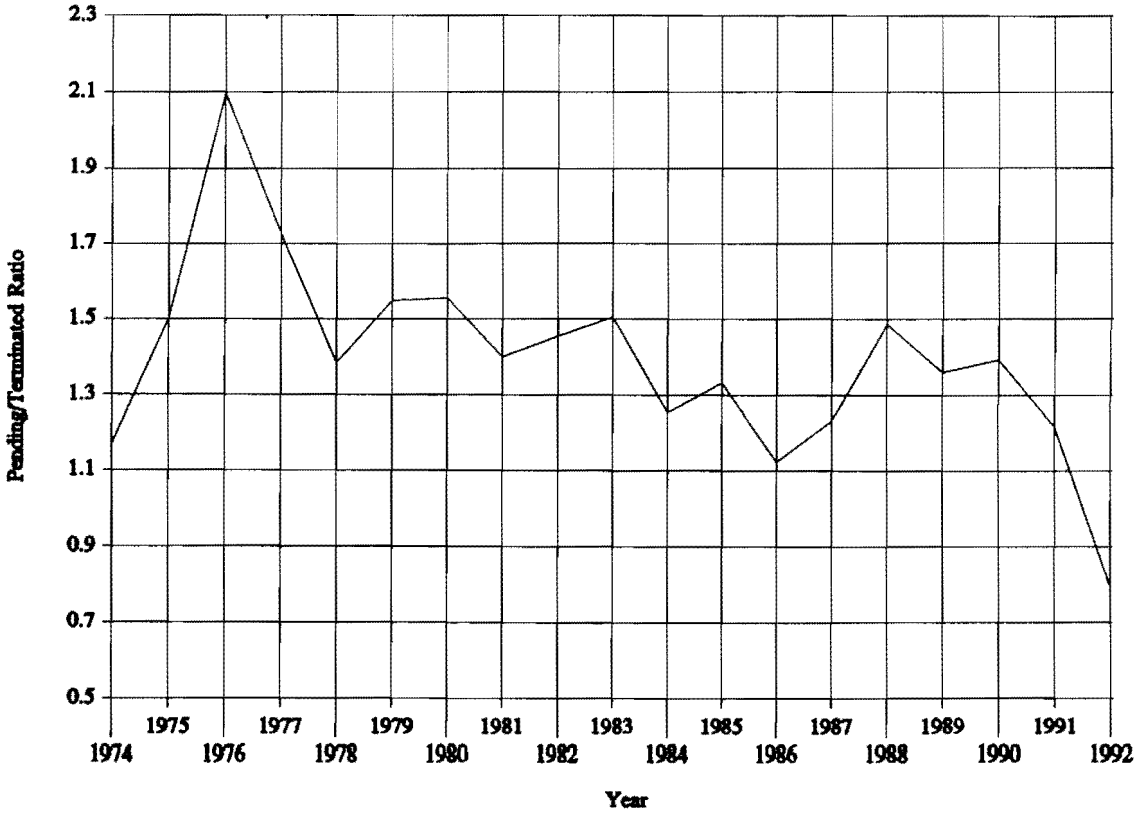

Figure 6 Ratio of Annual Civil Pending Cases to Terminations for the Southern District of Texas. Statistics reflect the twelve month period ending June 30, 1974 through 1992.

Texas actually receiving 552 weighted filings each. The national average of weighted filings per judgeship was 416 during the same period, translating to 501 weighted filings per sitting judge.[12] The Southern District of Texas labors under a substantial burden, and will continue to do so until the judgeships authorized by Congress are filled.

Clearly, the caseload of the Southern District of Texas has changed considerably during the last year. It is difficult to predict what the effects of expected future changes, such as the appointment of four (4) additional District Judges[13] and a new U.S. Attorney within the district, will have on the district. Therefore, individual parts of the Plan adopted by the Court will be assessed for their particular impacts on cost and delay in this district.

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[12] September 1992 Federal Court Management Statistics, op. cit.

[13] These judges fill the three (3) Judicial Improvement Act of 1990 judgeships which remain vacant, as well as the judgeship left vacant by the retirement of Chief Judge DeAnda.

Differentiated Case Management

Implementation of the Differentiated Case Management system outlined in the Plan (part 1) was hindered by a lack of funding for the additional personnel requested. While the Plan asked for three (3) staff attorneys and two (2) secretaries to screen filings and prepare recommended orders, the district was only allotted one (1) staff attorney for this purpose. This position was not funded and filled until October 19, 1992. In anticipation of implementing as much of this section of the Plan as possible, however, steps were taken to establish case management vehicles to facilitate review of these cases. Where feasible, review was undertaken of the classes of cases described in the Plan.

The following types of cases were set aside for special handling under the Plan: asbestos personal injury, U.S. government collections, prisoner civil rights, habeas corpus, bankruptcy appeals, social security appeals, removals, cases with the FDIC, RTC, or FSLIC as parties, and cases filed by *pro se* plaintiffs. Since all asbestos cases were, and continue to be, transferred to the Eastern District of Pennsylvania, these cases are no longer managed by this Court.

Government collection cases filed in the Houston division, including recovery of overpayment and enforcement of judgment, recovery of defaulted student loans and recovery of overpayment of veterans benefits, are all assigned to one Article III judge. Until his retirement, Senior Judge Singleton received these cases. Since then, Chief Judge Black has been assigned all new cases of this type, as well as all of those cases which were assigned to Judge Singleton. During the calendar year 1992, the number of these cases pending before the court declined from 255 to 55, a drop of 78.4%. New filings of these cases during the last few years have likewise decreased. Significantly, only 94 new government collections were filed during 1992, representing 1.6% of the docket. During the 1980's, government collection cases were responsible for a large increase and subsequent decline in civil case filings. At their peak, these cases were 21.3% of filings nationwide.[14]

Prisoner cases from the Houston and Galveston divisions have been reviewed by staff attorneys in the Clerk's office for several years now, with a demonstrable impact on the average time to disposition of these cases. Those cases filed from the Corpus Christi division have been handled by the staff attorneys since September of 1991. During the calendar year 1992, prisoner case filings increased sharply from the 1991 level of 626 habeas corpus and civil rights cases filed in Corpus Christi, Galveston and Houston to 1081 total in 1992. This represents an increase of 72.7%. Pending prisoner cases, however, had increased only 32.2% by the end of the year, from 777 to 1027.

[14] See L. Ralph Mecham, Director, Administrative Office of the United States Courts, 1991 Annual Report of the Director, Book One, Judicial Business of the United States Courts, pages 6 and 7.

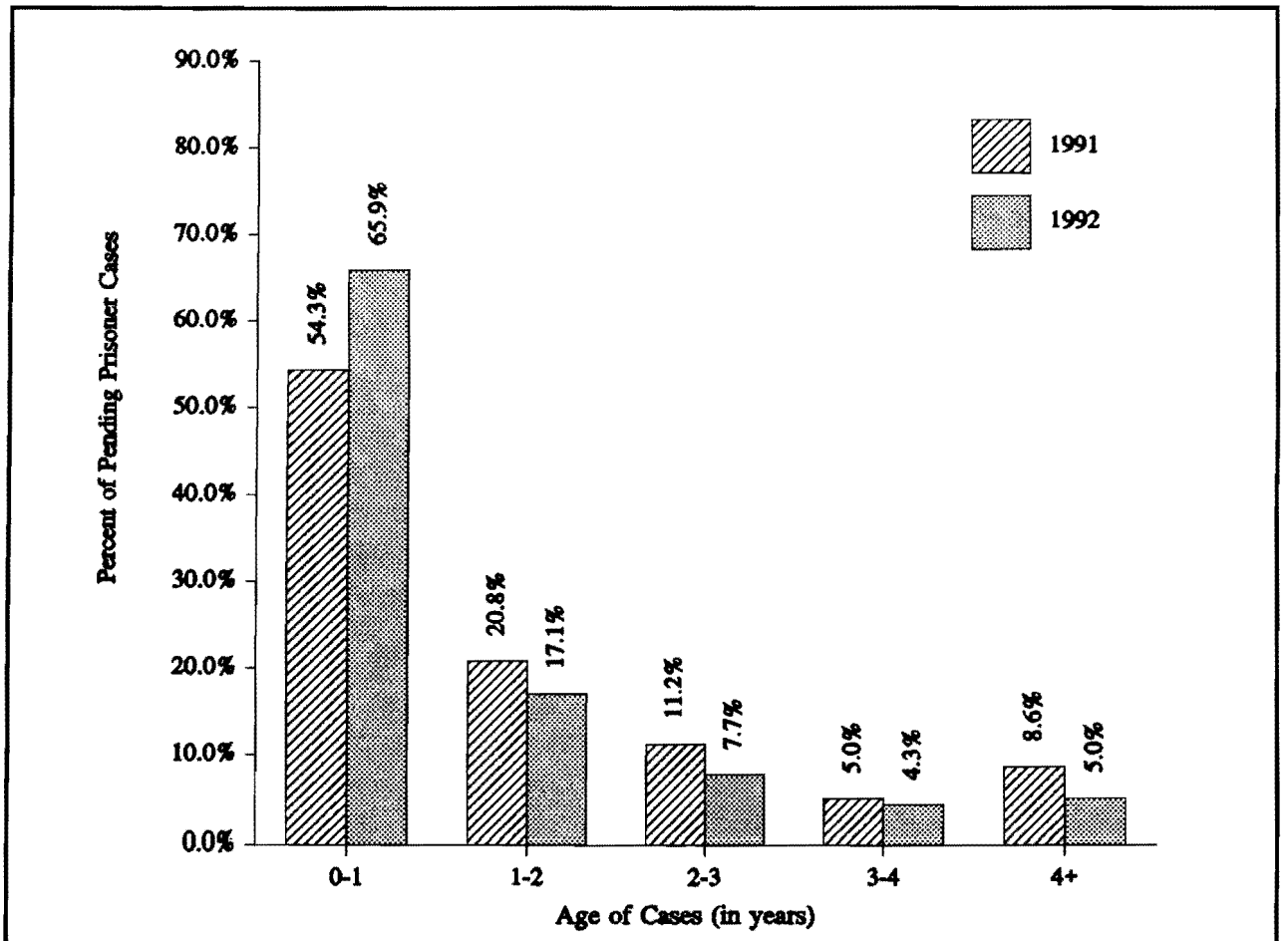

Figure 7 Pending Prisoner Civil Rights and Habeas Corpus cases at the end of 1991 and 1992. Corpus Christi, Galveston and Houston cases only.

The nature of this class of cases is such that most can be disposed of very quickly. Those which are not dismissed early in the case, however, can remain pending for many years. For example, the *Ruiz* case remains active after over 20 years. Because of this, mere pending caseload numbers are a misleading presentation of the Court's management of these cases. As Figure 7 shows, the prisoner cases pending at the end of 1992 were younger than those pending at the end of 1991. This demonstrates that the Court was able to close many older cases, and still competently handle the massive influx of new cases which the district experienced in 1992. Of the 1081 prisoner cases filed in 1992, 672 (62.2%) were still pending at the end of the year. By way of comparison, 422 (67.4%) of the 626 prisoner cases filed during 1991 were pending at the end of 1991. The addition in October of a third staff attorney to help handle prisoner litigation in the district should allow this increase in prisoner filings to be managed even more effectively. Differential handling of prisoner cases in the Southern District of Texas appears to be successful in reducing delay in those cases, and in minimizing their impact on other civil cases.

Bankruptcy and social security appeals were classes of cases intended to be reviewed by the group of staff attorneys established under the Plan. When it became apparent that funding for these resources would not be available, the Clerk's office took steps to insure that as much of this part of the plan as possible would be implemented. Reports in the Civil Integrated Case Management System database were established to enhance case management of these classes of cases. Additionally, Clerk's office personnel conducted periodic reviews of the pending caseload of bankruptcy and social security appeals and prepared recommendations for judicial action in those cases which might benefit from it. This activity was concentrated in, though not confined to, the Houston division office.

There is evidence that additional attention focused on these cases had some impact. The number of pending bankruptcy appeals in the district declined 18.2%, from 159 to 130. The number of pending social security appeals dropped 15.9%, from 113 to 95. These reductions are well above the overall change in civil pending cases in the district, which was 6.7%. Part of this change is accounted for by the decrease in the numbers of new bankruptcy and social security appeals filed between 1991 and 1992. In 1991, 181 bankruptcy appeals and 102 social security appeals were filed in the district. Filings of these cases dropped 12.7% in 1992, to 164 and 83, respectively. However, larger numbers of the new cases were closed during 1992: of the bankruptcy appeals filed in 1991, 112 (61.9%) were pending at the end of the year, compared to 84 (51.2%) of those filed in 1992; of the social security appeals filed in 1991, 84 (82.3%) were pending at the end of the year, compared to 68 (82.9%) of those filed in 1992. The nature of social security appeals requires later procedural dismissals than bankruptcy appeals. Thus, it can be concluded that 1992 saw more early dismissals of bankruptcy appeals, as well as more complete review of pending social security appeals.

The other three case types designated for early attention under the Plan were removals, cases with *pro se* plaintiffs, and FDIC, FSLIC and RTC cases. Currently, these provisions of the Plan have not been implemented because the anticipated personnel was not forthcoming. One staff attorney, hired in October of 1992, has been designated to fulfill as much of this portion of the Plan as feasible. An initial sampling of removal cases in which motions for remand had been filed discovered few common or patterned early disposition characteristics. However, it was concluded that, due to the complex legal and unique factual issues, review of the removal cases would be more efficient following the expiration of thirty days after removal to allow the court to have the opportunity of reviewing any remand motions that may be filed. Given the limited resources available, it may be possible to review all removal cases at the time of filing for immediate *sua sponte* remand if there is not diversity jurisdiction. A system for the early systematic review of the diversity issue is being developed by the staff attorney. The staff attorney is also developing a procedure for the systematic review and disposition of non-prisoner *pro se* cases prior to substantial involvement of a judicial officer.

Differentiated case management of certain identifiable classes of cases was recognized as a worthy goal by the Advisory Group, and the district is implementing as much of this part of the Plan as possible. Budget constraints have limited the Court's capability to effect some of the necessary innovations, however. Efforts continue to progress at complete realization of the goals of the Plan with regard to differential case management.

Magistrate Judge Referrals

The judges of the Southern District of Texas have used the new judicial resources made available by the filling of 3 additional magistrate judgeships in the district. Referrals have become a familiar occurrence in civil cases throughout the district, and consents to proceed before magistrate judges are also more common.

During the calendar year 1992, over 340 cases were referred to magistrate judges for pretrial management. Over 1000 orders were entered referring motions to magistrate judges for rulings or recommendations. At the end of 1992, there were 171 pending cases which had been referred to magistrate judges for management, as well as 329 pending cases with motions referred to magistrate judges. 1992 saw 236 cases transferred to magistrate judges for case management through trial.[15] This is an increase from 67 transfers in 1991, and 58 in 1990. Magistrate judges disposed of 93 cases during 1992, compared to 66 dispositions in 1991 and 53 in 1990. Case dispositions are expected to increase to keep pace with transferrals, but a lag appears because all cases can not be terminated quickly.

From an average of 32 cases pending before magistrate judges at the end of the last three years,[16] the number has risen to a total of 118 as of December 31, 1992. This represents an increase of over 200% in the number of cases; magistrate judges are currently assigned four times the percentage of the pending caseload which they held at the end of 1991. The consent assignments to magistrate judges, coupled with large numbers of referrals for pretrial management, has allowed Article III Judges substantially more time to concentrate on their remaining civil cases.

Initial Pretrial Conferences and Discovery/Case Management Orders

The Plan modified Local Rule 8 to require a pretrial conference within 140 days of filing of most civil cases in the Southern District of Texas. In accordance with the Plan, an order is entered in all but a select group of newly filed cases[17] requiring that, prior to this conference,

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[15] It is important to note that parties must indicate consent to proceed before a magistrate judge before a case may be transferred to a magistrate judge for management through disposition. A substantial increase in consent referrals to magistrate judges indicates that public awareness of this valuable judicial resource has expanded markedly.

[16] As of December 31, 1989, 34 civil cases were pending before magistrate judges in the Southern District of Texas. This declined to 29 in 1990, and then rose again to 34 in 1991.

[17] Cases excluded from a mandatory pretrial conference and discovery/case management plan include prisoner civil rights and habeas corpus actions, government student and loan and veteran loan actions, social security appeals, bankruptcy appeals and complaints to

parties will prepare and file a joint discovery/case management plan. The form of this plan is contained in Appendix B. The only statistical evidence available regarding the effect which this part of the Plan has on cost and delay is that presented on page 5 and following.

Complex Cases

The Plan recommended that judges use specialized techniques in those cases identified as complex in nature. The Time Study and evaluation currently being performed by the RAND corporation as part of the Civil Justice Reform Act of 1990 is gathering information on complex cases, and will provide some insight into the impact that the Plan has on them.

Voluntary Disclosure

Part 6 of the Plan required the judges of the Southern District of Texas to order discovery in a fixed number of cases to proceed under the proposed federal rule on voluntary disclosure. A form order for Accelerated Discovery was entered at filing in the first 20 cases assigned to each judge in the Houston division. 10 cases each from the Corpus Christi, Galveston, Laredo, McAllen and Victoria divisions also received this form order. Judge Kenneth Hoyt in the Houston divisional office has entered this order in all of his new case filings since January 1, 1992. Bankruptcy appeals, social security appeals, government collection cases, asbestos cases, forfeitures and prisoner cases do not receive this order. The Accelerated Discovery order was entered in 498 civil cases filed in 1992.

Since the costs associated with discovery are difficult to measure, statistics are only available on secondary aspects of the Voluntary Disclosure rule. The easiest aspect to measure is the time from filing to disposition. Of course, a significant percentage of the cases proceeding under accelerated discovery remain pending on the Court's docket. Therefore, it is only possible to compare cases closed within the first few months after filing. Figure 8[18] shows that a larger percentage of accelerated discovery cases than of conventional discovery cases were closed within the first 180 days of filing. The differences are statistically significant, and seem to indicate that about half of all cases filed will remain pending 240 days after filing regardless of the discovery rule.

In an attempt to define whether the same closing patterns are exhibited for all cases, the samples were divided into groups by nature of suit. Over 90% of the sampled accelerated discovery cases fell into four (4) definable case-type categories: contract cases, tort cases, relatively complex cases (civil rights and intellectual property cases), and labor cases. Although the sample size was not large enough in three of these to provide statistically significant data for

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forfeit seized assets. (Local Rule 8, Southern District of Texas)

[18] Cases filed in the first three months of 1992 were sampled. Only cases within the Houston division were sampled to control for case management methods and circumstances. Accelerated discovery cases used in sample - 220. Conventional discovery cases used in sample - 469.

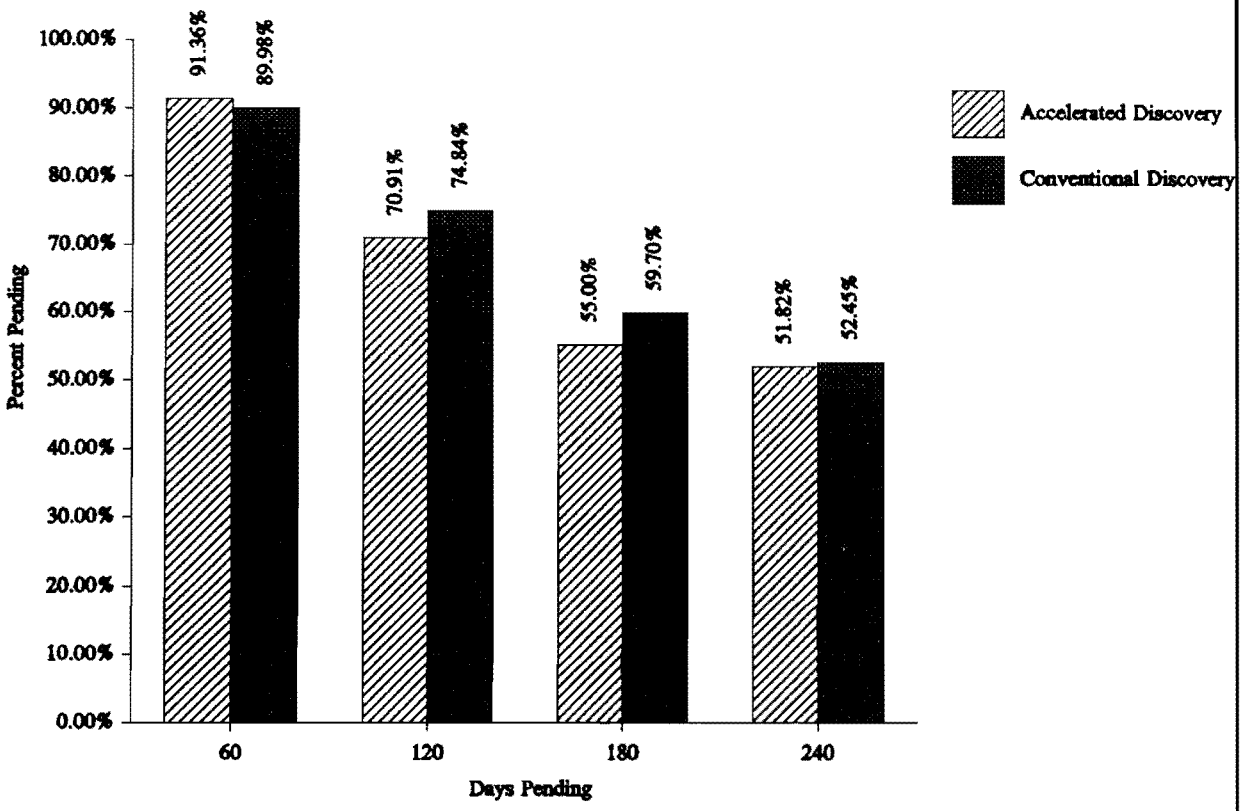

Figure 8 Houston Division Accelerated Discovery Cases and Conventional Discovery Cases, Percent Pending after fixed periods of time.

this analysis, there were enough contract cases.[19] Figure 9 shows the relative closing rates of contract cases when the style of discovery was varied. Contract cases proceeding under accelerated discovery closed significantly faster than those under conventional discovery. Appendix C contains graphs showing performance for tort, complex and labor cases. While the sample sizes for tort, complex and labor cases weren't sufficiently large for significant conclusions to be drawn, these representations are important. If larger samples of these cases show the same characteristics as this small sample, then it appears that accelerated discovery has the affect of delaying disposition of cases in these three categories.

[19] Cases filed in the first three months of 1992 were sampled. Only cases within the Houston division were sampled to control for case management methods and circumstances. Accelerated discovery cases used in sample – 88. Conventional discovery cases used in sample – 175.

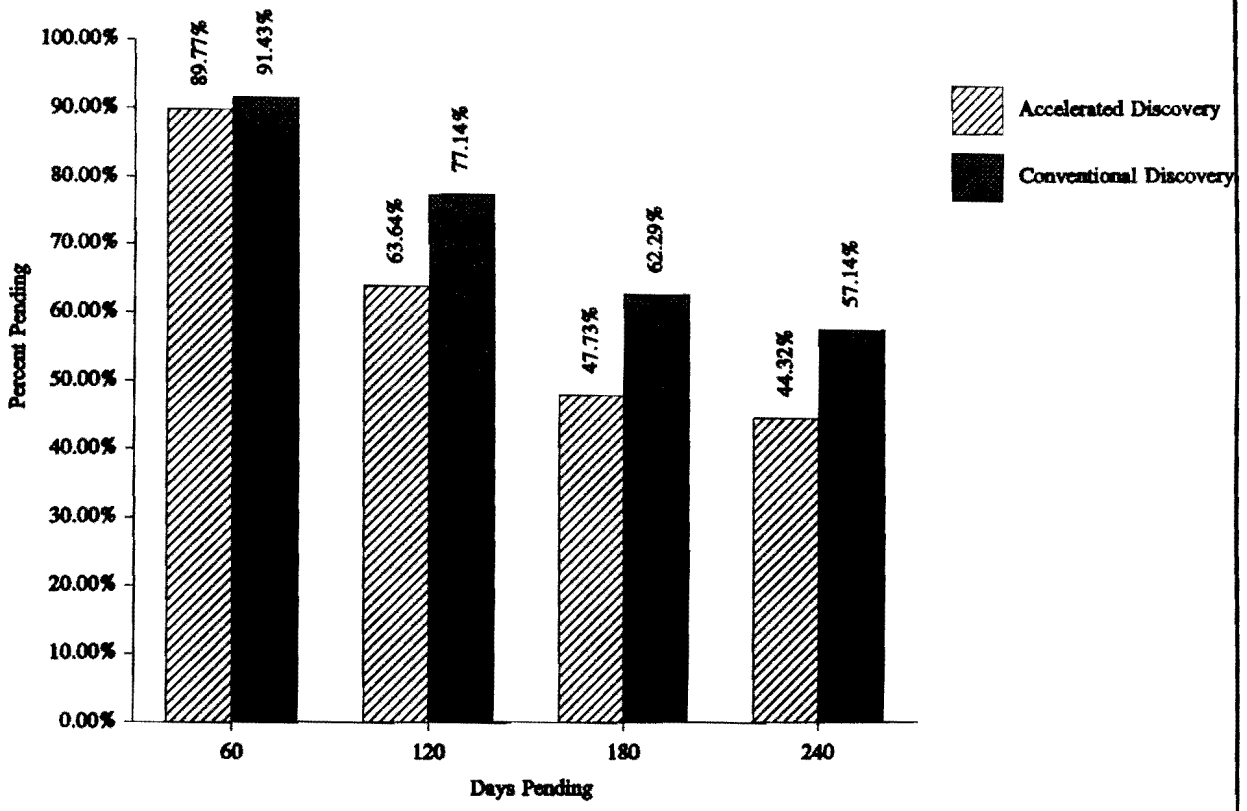

Figure 9 Houston Division Accelerated Discovery and Conventional Discovery Contract Cases: Percent Pending after fixed periods of time.

A second comparison was made of the affect on motion practice had by accelerated discovery. For cases filed within a set period of time, the number of discovery motions[20] was counted. Figure 10 shows the results of this comparison in equivalent terms for each type of case examined. It is apparent that motion practice is relatively unaffected by accelerated discovery in contract cases. Equally apparent, however, is the fact that tort and complex cases tend to have significantly more discovery motions filed when proceeding under accelerated discovery. Labor cases, the majority of which were ERISA cases, showed the most improvement, with significantly fewer discovery motions filed.

Possible reasons for the varied reactions to accelerated discovery among different case types are numerous. Contract and labor cases often emphasize legal issues, in contrast to tort cases, in which factual issues are often central. As a result, the discovery in contract cases may often be limited to a small number of stipulations and an exchange of witness lists, while tort cases may require more in-depth deposition of witnesses. Additionally, there is some anecdotal

[20] "Discovery" motions counted include motions to quash, to suppress, to compel, for sanctions, for protective order, and for discovery.

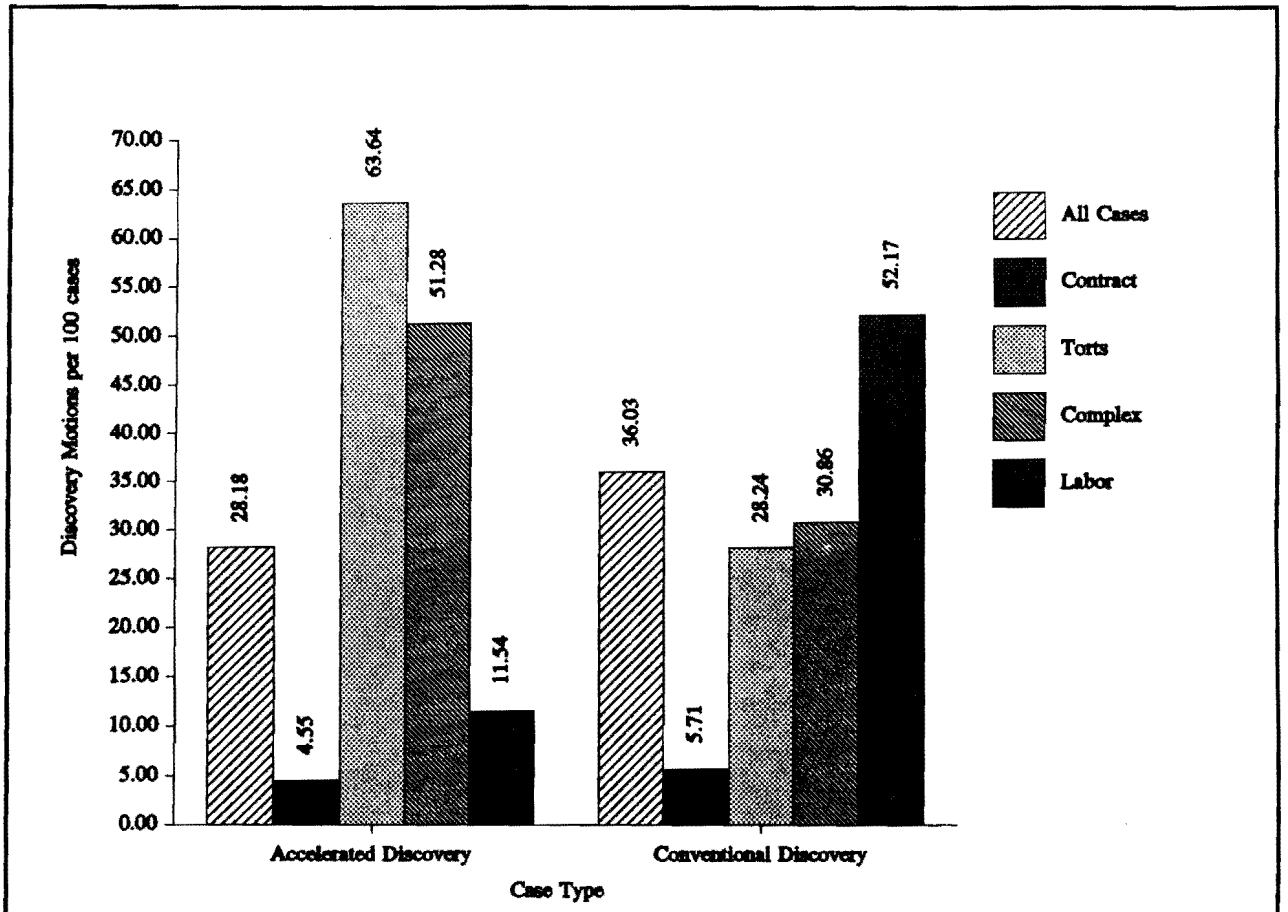

Figure 10 Discovery Motions per 100 cases, by case type: Accelerated and Conventional Discovery Cases.

evidence that discovery in tort cases is often much more adversarial than in other types of cases. In an adversarial atmosphere, motion practice might be expected to increase if a rule were written which encouraged challenges of the disclosures of other parties.

No firm conclusions about the behavior of labor cases under varying types of discovery can be drawn without examination of a larger sample. It is interesting to observe, however, that labor cases appear to have a mixed reaction to accelerated discovery. While those cases under accelerated discovery had substantially less motion practice than those under conventional discovery, time to disposition seemed to actually be longer in the former than in the latter. This appears counter-intuitive at first. One possible explanation is that motion practice is reduced in accelerated discovery cases because the discovery in labor cases is more uniform than in other types of cases, making disclosure of all information relevant to the case easy to accomplish, and thus reducing the need to ask the court to force disclosure. Receiving this large volume of information early in a case, however, might persuade a party which would otherwise offer a settlement to continue litigation because they feel that their case is strong.

Voluntary disclosure does appear to have a definite affect on cases in which it is applied. Reasons for variations in behavior of different types of cases can only be conjectured. At this early stage of experimentation with voluntary disclosure in the Southern District of Texas, it appears that some types of cases close more rapidly and with less costly activity under accelerated discovery, while others show the opposite tendencies. While it seems likely that time will indicate that some cases should not be ordered to proceed under accelerated discovery, this conclusion would be premature at this point.

Alternative Dispute Resolution

During the calendar year 1992, 232 pending and newly filed cases were referred to alternative dispute resolution (ADR). Local Rule 22, approved as part of the Cost and Delay Reduction Plan adopted under the Civil Justice Reform Act of 1990, gives broad discretion to the judges of this Court to refer cases to various types of ADR. The varieties of ADR suggested in the rule are arbitration, mediation, mini-trial and summary jury trial. Of the cases referred to ADR in 1992, all but four (4) were ordered into mediation proceedings. Two (2) of the exceptions were cases referred to arbitration, and two (2) were ordered into summary jury trials before a magistrate judge.

Attempts to quantify the impact of ADR on cost and delay statistically are problematic. Because the criteria used by judges to select cases for referral to ADR are difficult to define, and because they may vary considerably from judge to judge, there is no definable category of cases to use as a "control" group for comparison purposes. All that can really be reliably presented are the numbers of referrals and their results. It is important to note that not all cases which participated in alternative dispute resolution during 1992 are reflected in these statistics. Many parties voluntarily submit their cases to mediation or arbitration without an order from the Court. The Court often is only informed of such participation in ADR if the mediation is successful, and then only in the form of voluntary dismissals or agreed judgments.

Figure 11 graphs the numbers of referrals ordered in each month of 1992. The Court appeared to gain confidence in the efficacy of ADR as the year went on, and a larger number of referrals can be anticipated during 1993. Prior to 1992, only very small numbers of cases were referred to ADR. The cases referred in 1992 represent 1.1% of the new filings in 1992, and 2.2% of those pending at the beginning of the year.

Several types of cases filed in the Southern District of Texas are clearly inappropriate for referral to ADR. Figure 12 shows a breakdown of the cases referred during 1992. Cases which make up a significant percentage of the pending caseload, such as prisoner litigation, bankruptcy appeals and U.S. government litigation,[21] do not receive referrals to ADR for obvious reasons. The case types which were represented, but not enumerated on Figure 12, were real property cases - 3, RICO cases - 2, bankruptcy withdrawal of reference - 1, prisoner petitions - 1 and

[21] Social security appeals, recovery of defaulted student loans, recovery of overpayment of veteran's benefits, etc.

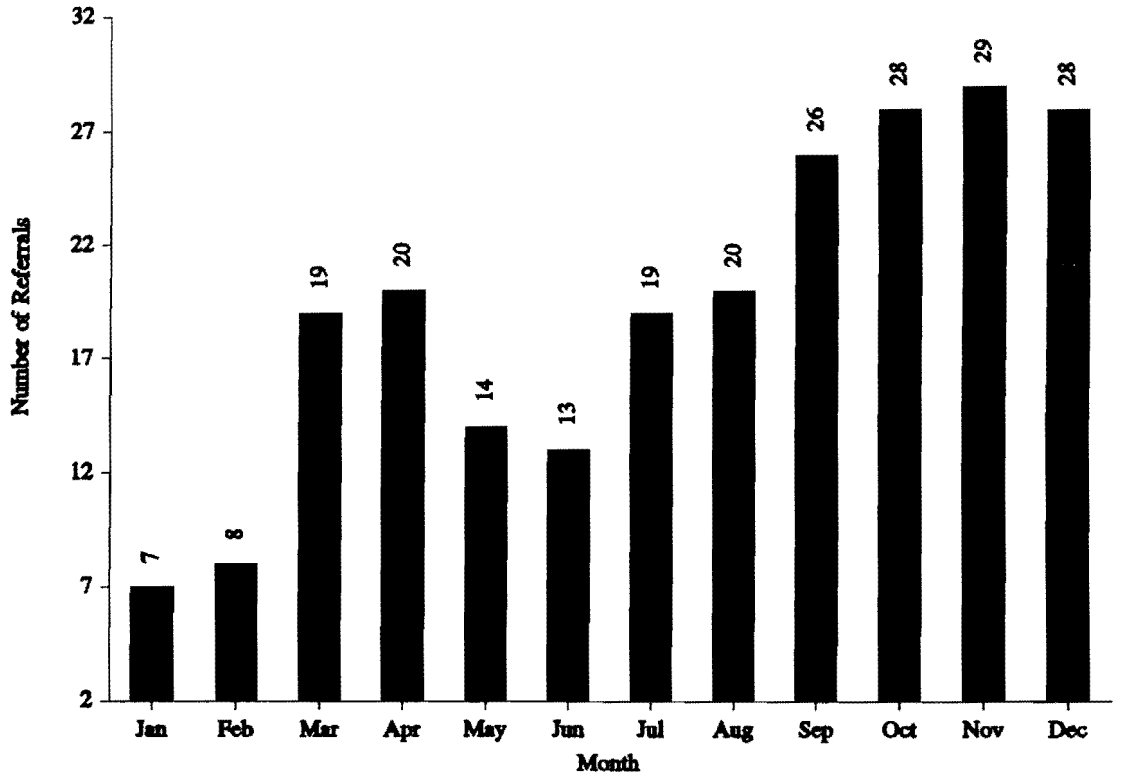

Figure 11 Cases Referred to Alternative Dispute Resolution in 1992.

other statutory actions (nature of suit 890) - 12. The types of cases referred are clearly quite diverse, ranging from simple slip-and-fall tort cases to complex intellectual property actions.

Out of 228 cases referred to mediation, 91 were closed at the end of 1992. All four (4) of the cases ordered into arbitration or summary jury trials closed. Since a significant number of cases were referred to mediation, the time to termination can be measured. Figure 13 shows the rate of closing for the 79 cases referred to mediation in the first six months of 1992. Slightly more than half of these cases were resolved within 6 months of the referral. None were terminated by a trial verdict. If the cases most likely to be referred to ADR would normally go to trial, then this 50% termination rate without trial could be considered to reduce costs significantly. If, however, cases referred to ADR are representative of most cases, disposition without trial would be expected well over 90% of the time, and cannot be cited as a benefit. In either instance, it is possible that Alternative Dispute Resolution resulted in earlier disposition of a case than otherwise would have occurred.

69 cases filed in 1992 were referred to ADR. There was an average of 162 days from filing to referral, or 5.4 months. Eighteen (18) of them closed during 1992. It appears that early referral to ADR does not necessarily speed resolution, but other goals, including narrowing issues

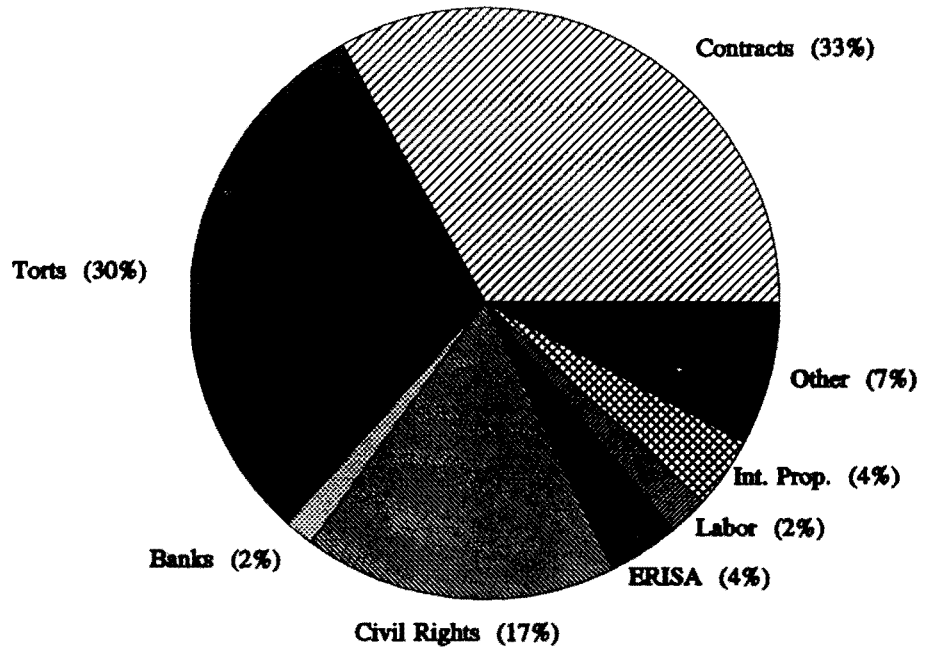

Figure 12 Cases Referred to Alternative Dispute Resolution During 1992.

and focusing attorney's attention on their cases earlier in the litigation process, may help curb cost and delay in these cases.

As mandated by Local Rule 22, memoranda were filed by ADR providers after completion of ADR proceedings. 93 memoranda were filed. In 61 (65.6%) of these cases, the provider indicated that the case had settled. Average fees charged were $2,026.76 in each case. These fees often covered several days of sessions, and were usually shared by several parties. The lowest fee charged was $400 (discounting several cases in which no fees were charged because the cases settled prior to mediation), and the highest was $19491.40.

Questionnaires were sent to all parties and attorneys of record upon receipt of a memorandum from the ADR provider. Copies of the questionnaires can be found in Appendix D. 111 responses were received from attorneys, and 58 from their clients. According to attorneys, 40 (36.0%) of them were referred to ADR by agreement of the parties, while the other 71 (64.0%) were ordered into ADR by the Court. Their clients showed a similar breakdown, with 22 (37.9%) saying that they consented to referral to ADR, and 36 (62.1%) indicating that they were ordered to ADR by the Court.

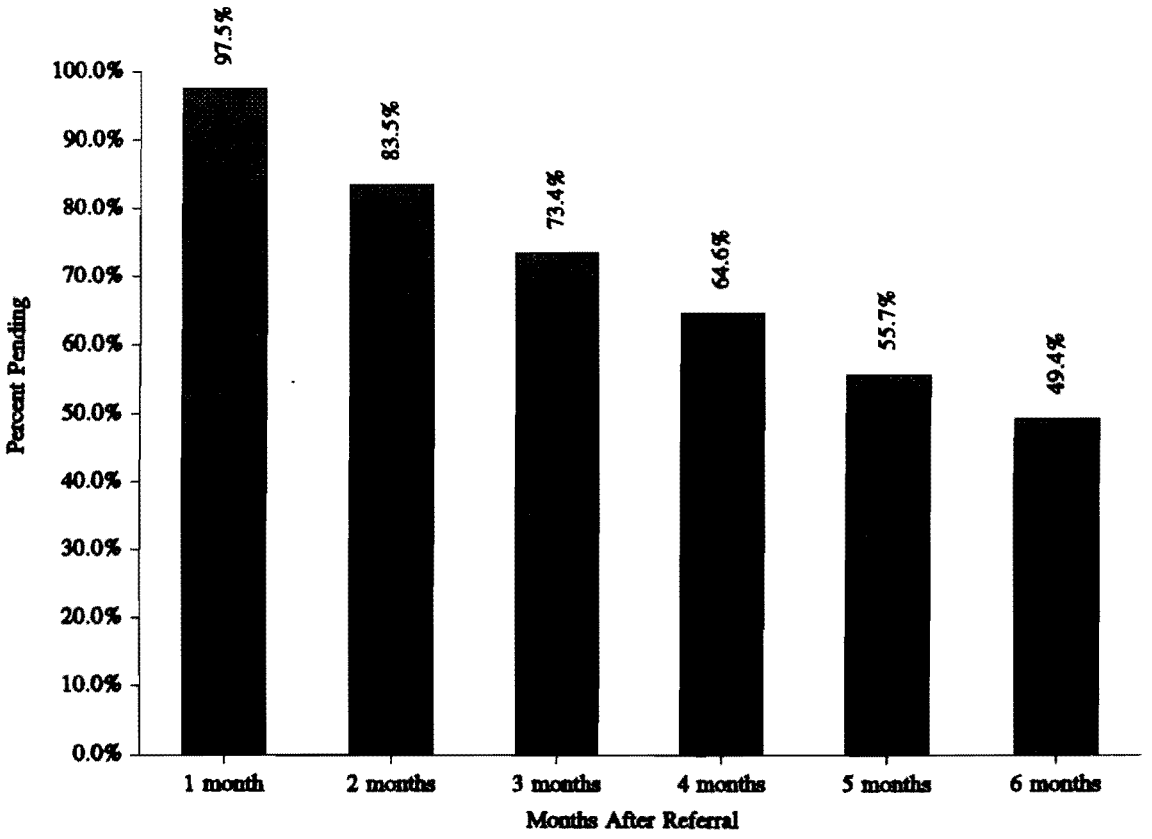

Figure 13 ADR Referrals. Percent pending after fixed periods of time.

The responding attorneys included 54 (48.6%) who represented a defendant, 47 (42.3%) who represented plaintiffs, and 10 (9.0%) who represented other types of parties.[22] 61 (54.9%) of the attorneys who replied felt that ADR was helpful to understanding the issues in the case, while 50 (45.1%) did not. Of those who thought ADR was helpful, 37 (60.6%) represented defendants, 16 (26.2%) represented plaintiffs, and 8 (13.1%) represented other parties. In contrast, of those who thought ADR was not helpful, 17 (38.0%) represented defendants, 31 (62.0%) represented plaintiffs, and 2 (4.0%) represented other parties. This indicates either that plaintiffs' attorneys were less satisfied with ADR, or that plaintiffs' attorneys are more inclined to feel that they understand the issues in a case well enough prior to an ADR proceeding. Figure 14 shows the results of ADR proceedings as indicated by responses to attorney questionnaires. More than three-quarters of the respondents stated that their cases had settled, usually during the ADR proceeding.

[22] Other types of parties included intervenors, receivers and insurance companies not actually named in the case.

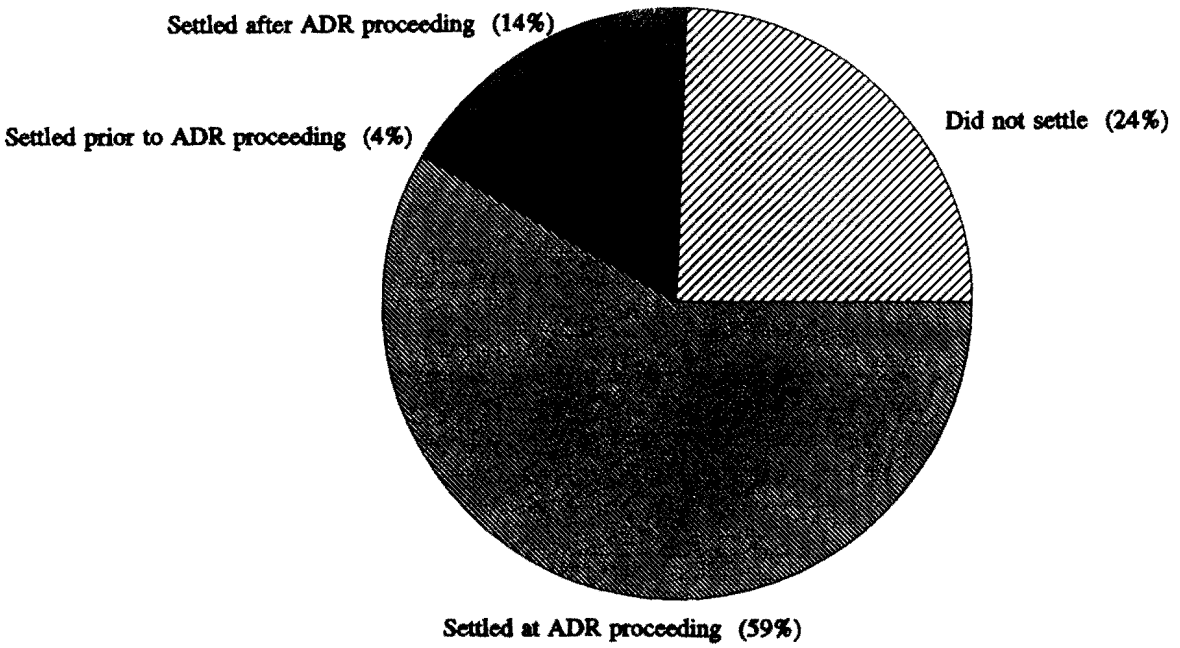

Figure 14 Results of ADR: Attorney Questionnaire Responses.

Responding clients were made up primarily of defendants, with 34 (58.6%) of the 58 responses. 19 (32.8%) of the respondents were plaintiffs, and 5 (8.6%) held some other role in their case. An overwhelming 79.3% (46 out of 58) of those replying stated that the ADR proceeding was helpful to understanding the issues of the case. 20.7% (12 out of 58) did not think that the proceeding was helpful. There was not a significant difference between plaintiffs' and defendants' responses to this question. Figure 15 shows the responses given by clients when asked what the results of ADR had been. As with the attorneys, the majority of respondents indicated that their cases had settled at the ADR proceeding.

One possible indication of litigant satisfaction with the ADR program in the Southern District of Texas is the respondents evaluation of the ADR providers. Out of the 169 responses received, only 2 considered the skill and effectiveness of the ADR provider to be unsatisfactory; both of these evaluations were from clients. 76 (68.5%) of the attorneys said that their ADR provider was excellent, while 35 (31.5%) deemed the ADR provider to be satisfactory. 34 (58.6%) of the clients judged their ADR provider to be excellent, and 22 (37.9%) regarded him or her as satisfactory. Evaluated from this perspective, the ADR program appears to be quite satisfactory to nearly every participant. The ADR providers in the Southern District, whether

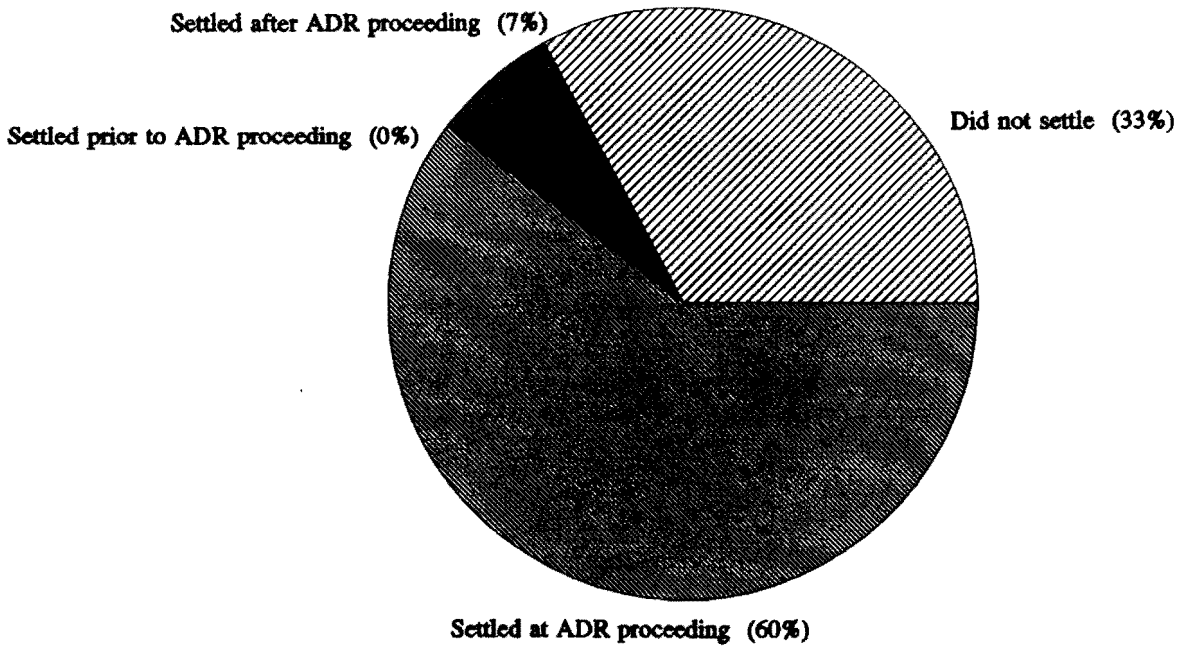

Figure 15 Results of ADR: Client Questionnaire Responses.

court appointed or selected by the parties, were nearly universally considered to be competent and effective.

Two other queries on the questionnaires are of interest when evaluating the ADR program. First, the questionnaire asked how many hours the ADR proceedings consumed. The average time reported by attorneys was 7.7 hours. Assuming that the attorneys who responded were representative of all those who participated in ADR, this implies that the average fees charged were about $263.11 per hour. Clients reported a similar average time of participation, at 8.3 hours. By this measure, ADR proceedings usually take at least one full day to complete. Notably, the ten attorney respondents representing parties other than plaintiffs or defendants reported an average of 10.7 hours for their ADR proceedings, indicating, as would be expected, that the issues involved in cases with additional parties take longer to resolve.

Second, respondents were asked to report their previous experience in ADR. Attorneys reported an average of 9 previous ADR proceedings, with little variation among those representing different types of parties. Clients averaged about 5 ADR proceedings here. Clients who were plaintiffs reported an average of 6.7 previous ADR proceedings, while those who were defendants reported only 4.8. Attorneys indicated that nearly 80% of their previous experience

with ADR was with mediation proceedings, while clients reported the same percentage of mediation as arbitration: 47.6%. It is possible that confusion about the difference between arbitration and mediation is responsible for this difference. Neither group reported more than 5% of their previous ADR experience as summary jury trials and mini-trials.

While there is no conclusive statistical information to indicate the effects of the ADR program in the Southern District of Texas, there is some circumstantial evidence that the program is a success. With the judges gradually increasing the number of cases they refer to ADR, whether in response to litigant demand or *sua sponte*, it is clear that the Court is gaining confidence that ADR is a valuable case management tool. Also, it is clear from the questionnaire responses that attorneys and the parties they represent usually consider ADR to be helpful and productive. 118 attorneys are on the list of ADR providers maintained by the Clerk's office under Local Rule 22.E. More than 90 different ADR providers, individuals and services, have received referrals. These numbers are expected to rise this year. ADR has become an important element of the Court's case management practices.

Conclusion

The year 1992 was a year of changes for the Southern District of Texas. Because of the numerous changes in the complexion of the court and its docket, it is difficult to identify factors which contribute to or inhibit the reduction of cost and delay in civil litigation in the district. By its nature, the Civil Justice Reform Act is meant to encourage experimentation with many case management tools, but the nature of the Courts is such that experiments cannot even approach laboratory conditions. Therefore, any measurement of the effects of the experiments is in a large part conjecture.

Past experience has shown that the addition of judicial personnel will positively impact the flow of cases through the Courts. The judges who joined the court during 1992, therefore, are expected to help the Court make inroads into its pending civil docket. The appointment of four more judges to fill the vacancies currently endured by the Court will further aid in this endeavor. Were all judgeships in the Southern District of Texas filled, the average number of new cases filed per judge would approach the number recommended by the Administrative Office and the Judicial Conference. This aspect alone of the Judicial Improvements Act of 1990, of which the Civil Justice Reform Act was a part, has provided the judges of the Southern District of Texas with a much needed respite from the flood of cases with which they contend.

The decline in new case filings, both civil and criminal, from their mid-eighties highs, has also somewhat relieved the burdens born by this Court. It is difficult to predict the future trends in filings due to the enormous numbers of variables, but civil filings have already ceased to decline. It cannot be overemphasized that the level of filings currently being experienced in the Southern District of Texas is only low relative to the extraordinarily high level of a few years ago. This decline to near the national average workload could quickly reverse with the passage of new causes of action through Congress, or a push for more litigation by the U.S. Department of Justice. The U.S. Courts were unprepared when they were suddenly inundated during the last decade, and have only recently brought under control a caseload bloated by asbestos product

liability cases, a zero-tolerance drug prosecution policy, and litigation of student loan default cases. It is imperative that the Courts not allow themselves to be taken by surprise should another such increase in the caseload take place. The provisions of the Civil Justice Reform Act can be an important part of preparation for such an eventuality.

Unfortunately, due to restrictions on funding, several of the components of the Plan adopted in the Southern District of Texas could not be fully implemented. The limited money available for personnel when the plan was set in motion allowed only five (5) out of 32 identified needs to be filled. The 1993 budget further restricted fulfillment of the Plan when the all district courts were limited to .72% of allocated staffing. As much as possible the Plan has been executed, but certain provisions, including additional courtroom support for judges and initial review of broad categories of cases by staff attorneys, are either impossible or severely reduced in effect without the personnel requested.

Those aspects of the Plan which have been fully implemented appear to have had a definite impact on litigation in this district. Magistrate judges are rapidly assuming a greater role in case management. Alternative dispute resolution has proven to be a valuable tool in many cases, and the judges are referring many more cases to mediation. In some types of cases, voluntary disclosure has reduced motion practice and encouraged early resolution of litigation. The initial results of the Plan are encouraging in many respects. The possibility that voluntary disclosure may have a detrimental effect on cost and delay in certain classes of litigation must be more closely examined in the future, however. Additionally, there are certain parts of the Plan, such as initial pretrial conferences and joint case management orders, for which the impact is difficult to measure statistically. It is hoped that the study being performed by the Rand Corporation will assist in such analysis. Until this study has been completed, however, only anecdotal information will be available about the influence of these parts of the Plan.

The Judicial Improvements Act of 1990 had several important effects on the Southern District of Texas. Much needed judicial personnel was added. A dialogue between the Court and the community was established. The Court was subject to examination in many areas, and measures to assist in controlling the docket were adopted. These effects of the Act have been invaluable, and it can only be hoped that the processes established will continue to have salutary consequences as the Court prepares to enter the twenty-first century.

Appendix A

Nature of Suit Breakdowns by Division

All Divisions

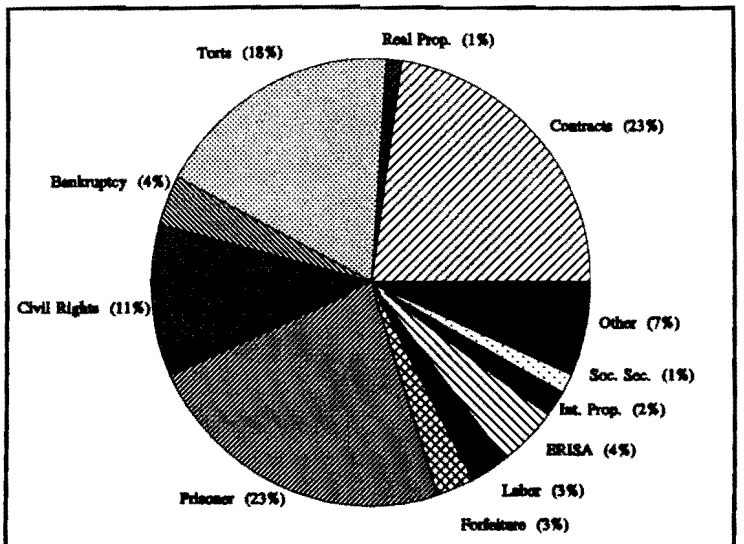

Figure 16 Natures of Suit of New Civil Cases Filed during the Calendar Year 1992. All Divisions.

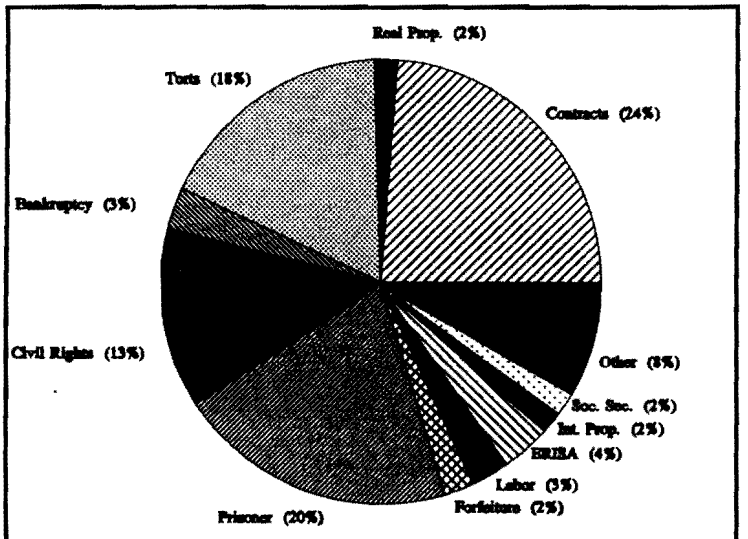

Figure 17 Natures of Suit of Pending Civil Cases at end of calendar year 1992. All Divisions

Brownsville Division

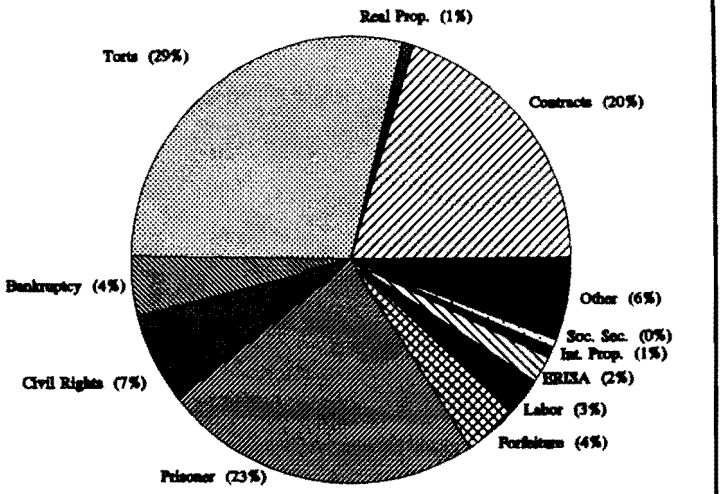

Figure 18 Natures of Suit of New Civil Cases Filed during the Calendar Year 1992. Brownsville Division.

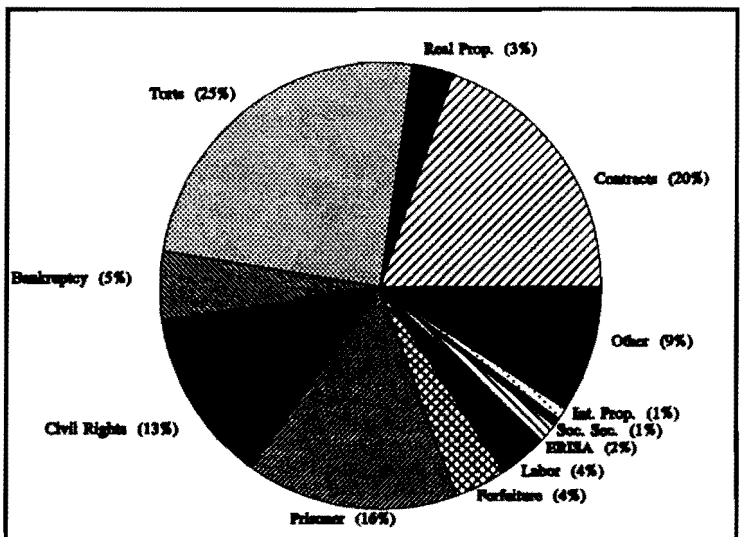

Figure 19 Natures of Suit of Pending Civil Cases at end of calendar year 1992. Brownsville Division.

Corpus Christi Division

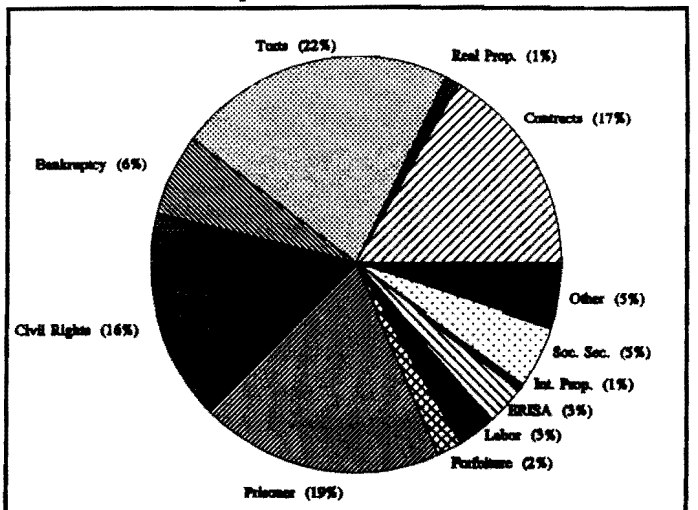

Figure 20 Natures of Suit of New Civil Cases Filed during the Calendar Year 1992. Corpus Christi Division.

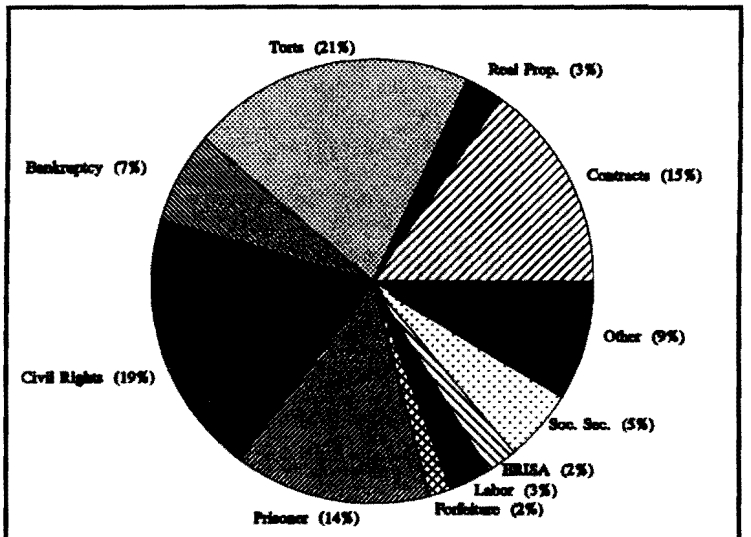

Figure 21 Natures of Suit of Pending Civil Cases at end of calendar year 1992. Corpus Christi Division.

Galveston Division

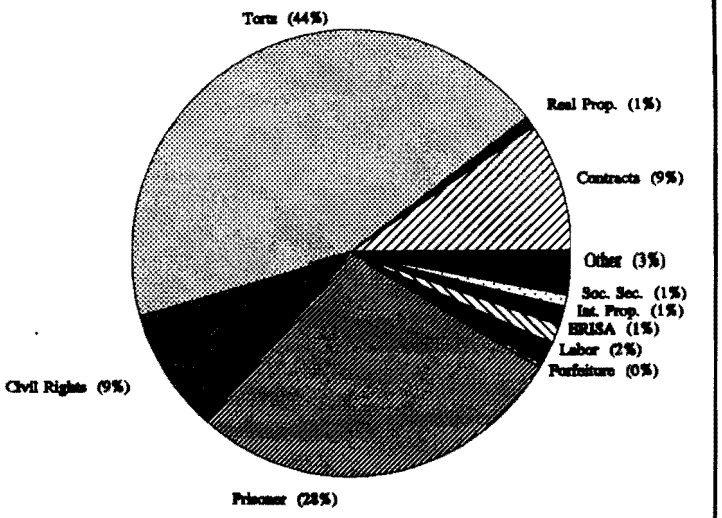

Figure 22 Natures of Suit of New Civil Cases Filed during the Calendar Year 1992. Galveston Division.

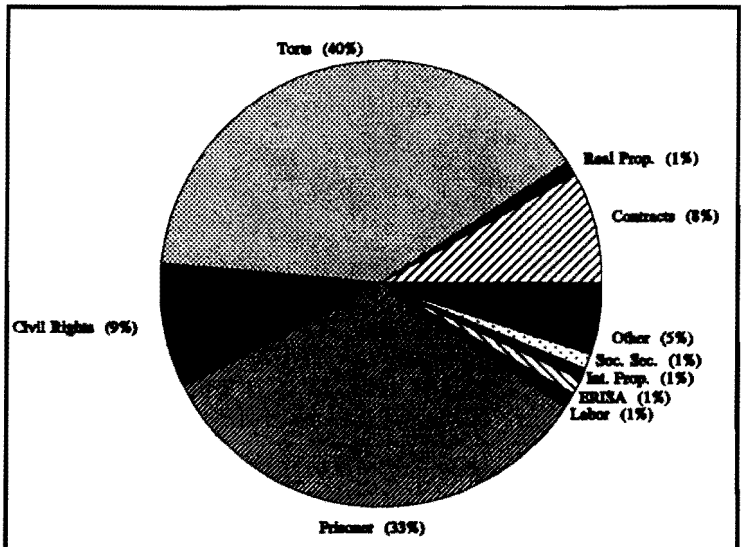

Figure 23 Natures of Suit of Pending Civil Cases at end of calendar year 1992. Galveston Division.

Houston and Victoria Divisions

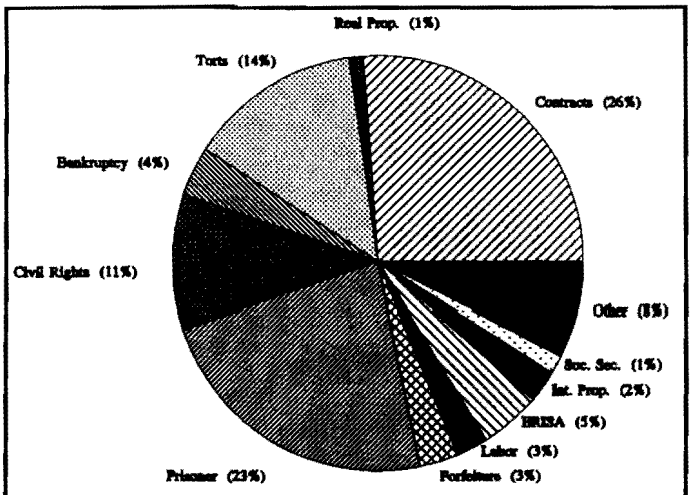

Figure 24 Natures of Suit of New Civil Cases Filed during the Calendar Year 1992. Houston and Victoria Divisions.

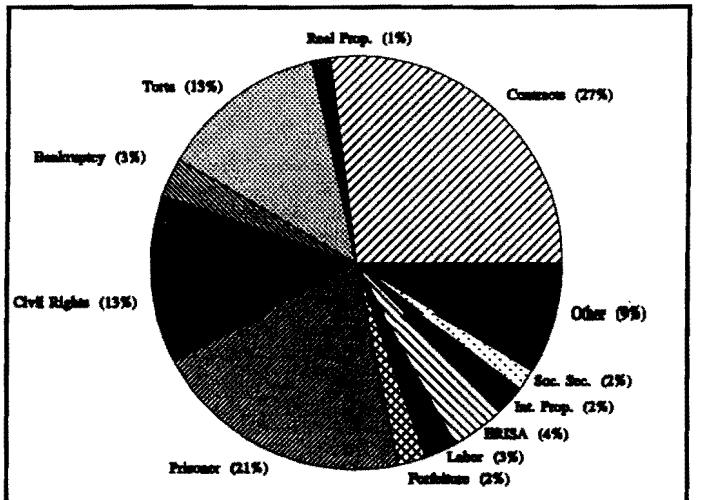

Figure 25 Natures of Suit of Pending Civil Cases at end of calendar year 1992. Houston and Victoria Divisions.

Laredo Division

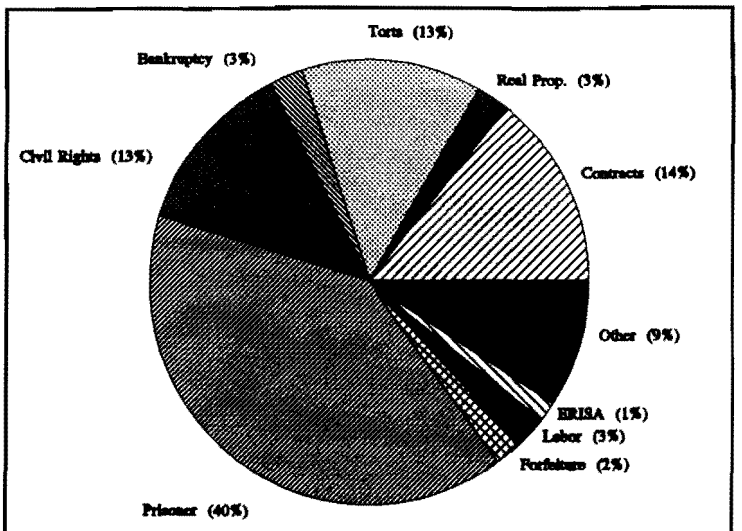

Figure 26 Natures of Suit of New Civil Cases Filed during the Calendar Year 1992. Laredo Division.

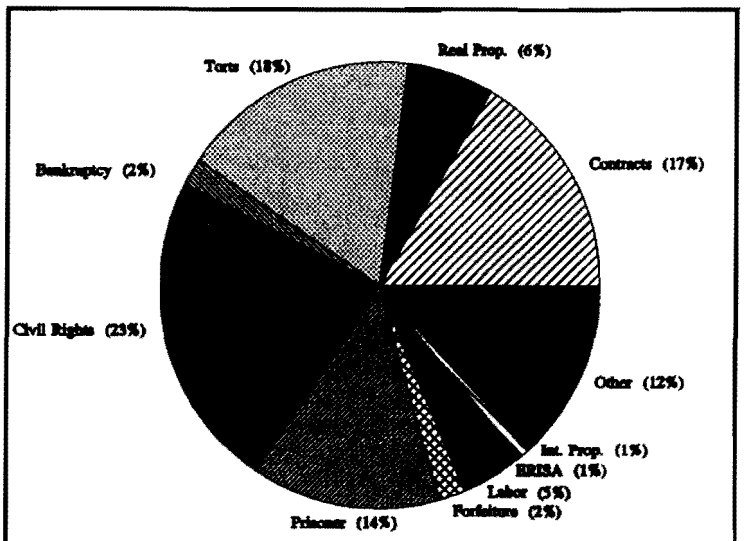

Figure 27 Natures of Suit of Pending Civil Cases at end of calendar year 1992. Laredo Division.

McAllen Division

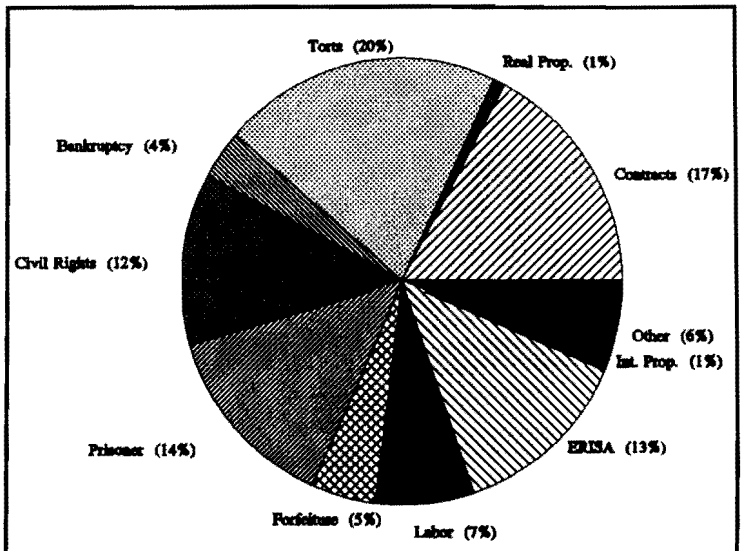

Figure 28 Natures of Suit of New Civil Cases Filed during the Calendar Year 1992. McAllen Division.

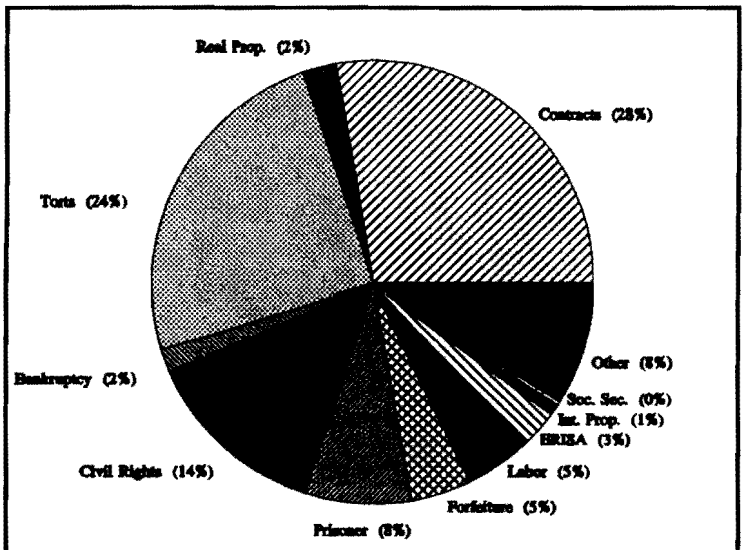

Figure 29 Natures of Suit of Pending Civil Cases at end of calendar year 1992. McAllen Division.

Appendix B

Joint Discovery/Case Management Plan Form

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
_____ DIVISION

_____	§	
	§	
V.	§	CA NO. _____
	§	
_____	§	

JOINT DISCOVERY/CASE MANAGEMENT PLAN

1. List the cases pending in this district or any other district, with their cause number and name of judicial district, which are related to this case.

2. What is Plaintiff's allegation of federal jurisdiction?

3. Does/do the Defendant(s) agree or disagree?

4. List any pending motions that could be ruled on at the scheduling conference.

5. Does either party anticipate the need to add additional parties?

6. List additional parties and when they can be added.

7. List any anticipated interventions.

8. Is there any issue in the case which may raise class allegations or class action issues?

9. Are there any other motions pending? List them.

10. What discovery has been undertaken to date?

11. If plaintiff(s) anticipate the use of interrogatories, when will they be ready to send?

12. Plaintiff(s) anticipate taking the following expert depositions at the following time(s):

13. The Defendant(s) and other parties anticipate taking the following expert depositions at the following time(s):

14. List oral depositions Plaintiff anticipates taking, and their anticipated completion date.

15. List oral depositions Defendant(s) or other parties anticipate taking, and their anticipated completion date.

16. State the time required for completion of discovery.

17. Has a jury demand been made? Is the demand timely?

18. Will parties consent to trial by Magistrate Judge? Jury trial, if available before District Judge, is also available before Magistrate Judge.

19. Have the attorneys discussed the Alternative Dispute Resolution with their clients? If so, is there a reasonable possibility that Alternative Dispute Resolution would be suitable in this case?

20. Are there any other matters peculiar to this case, including discovery, which deserve the special attention of the Court at the initial pretrial conference?

21. How long will it take to try this case.

22. List the names, bar numbers, addresses, and telephone numbers of all counsel.

Appendix C

Case Closing Rates
for
Accelerated and Conventional Discovery Cases

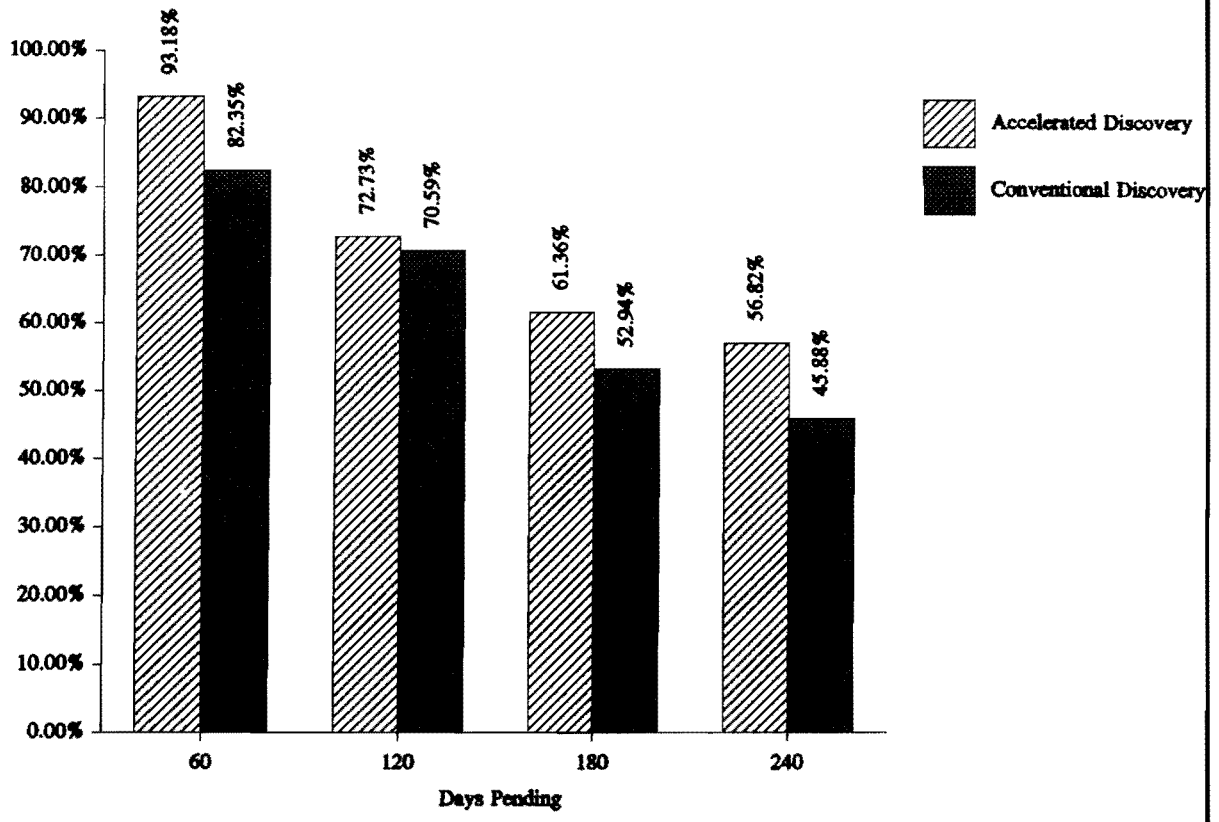

Figure 30 Houston Division Accelerated Discovery and Conventional Discovery Tort Cases: Percent Pending after fixed periods of time.

Cases filed in the first three months of 1992 were sampled. Only cases within the Houston Division were sampled, so that a comparison could be made with as identical a selection of case management methods and circumstances as possible. Accelerated discovery cases used in sample – 44. Conventional discovery cases used in sample – 85.

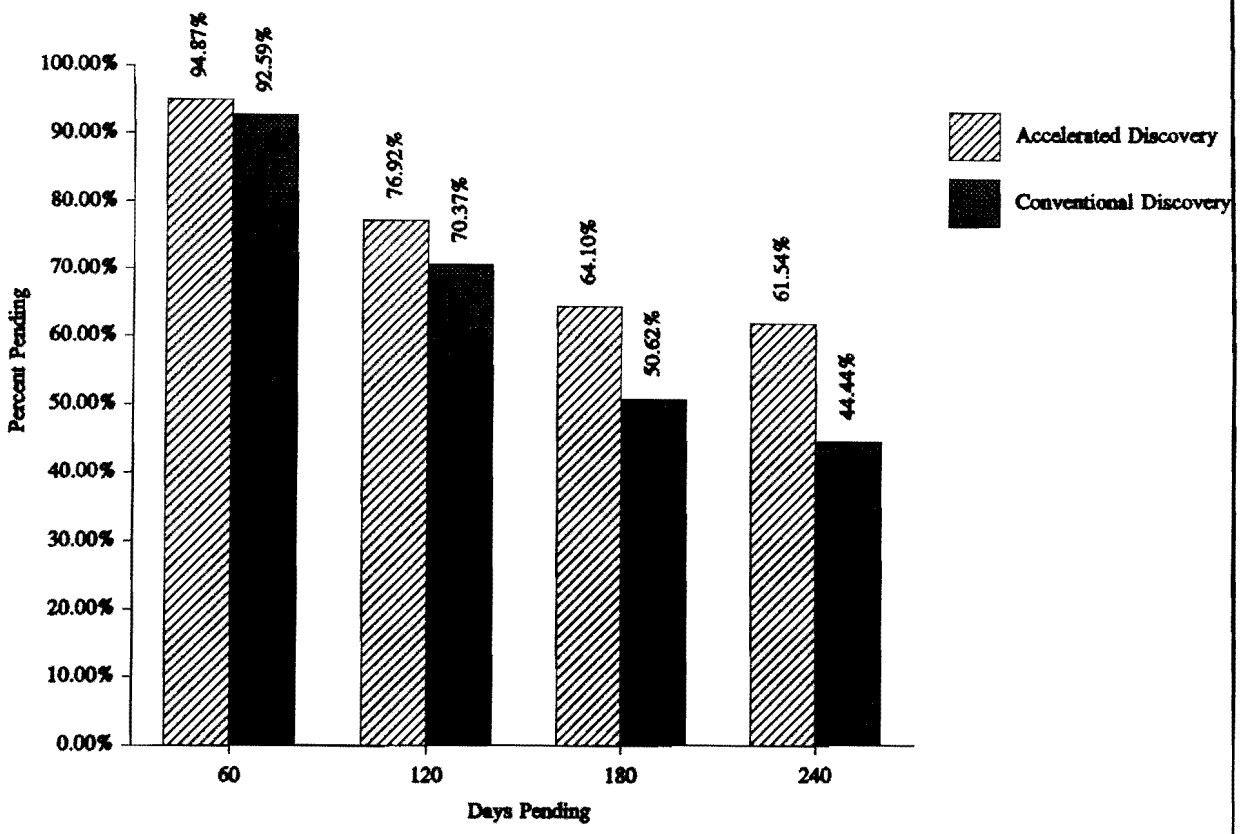

Figure 31 Houston Division Accelerated Discovery and Conventional Discovery Complex Cases: Percent Pending after fixed periods of time.

Cases filed in the first three months of 1992 were sampled. Only cases within the Houston Division were sampled, so that a comparison could be made with as identical a selection of case management methods and circumstances as possible. Accelerated discovery cases used in sample – 39. Conventional discovery cases used in sample – 81.

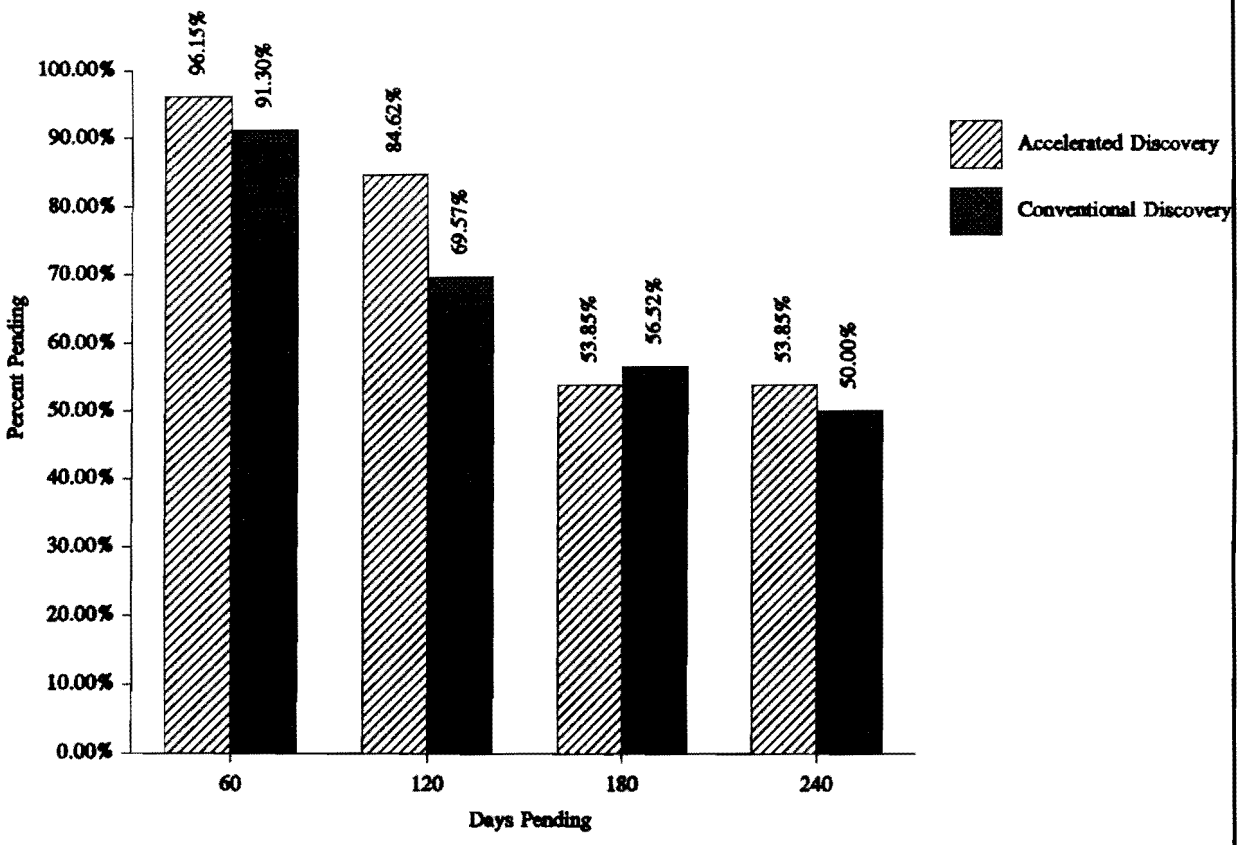

Figure 32 Houston Division Accelerated Discovery and Conventional Discovery Labor Cases: Percent Pending after fixed periods of time.

Cases filed in the first three months of 1992 were sampled. Only cases within the Houston Division were sampled, so that a comparison could be made with as identical a selection of case management methods and circumstances as possible. Accelerated discovery cases used in sample – 26. Conventional discovery cases used in sample – 46.

Appendix D

Attorney and Litigant Questionnaires
for
Alternative Dispute Resolution Cases

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

ALTERNATIVE DISPUTE RESOLUTION QUESTIONNAIRE

Evaluation by Attorney

PLEASE PRINT OR TYPE

Civil Action No: Case Name:

Your name: _____ Telephone No.: ( ) _____
Representing: self: _____ party name: _____
Your address: _____

You represented: plaintiff _____ defendant _____ other (specify): _____
Type of Case: _____
Amount in controversy and relief sought by **plaintiff**: $ _____ Other relief: _____
Amount in controversy and relief sought by **other party**: $ _____ Other relief: _____

Name of ADR provider: _____
ADR method used: mediation _____ mini-trial _____
summary jury trial _____ arbitration _____

Referral to ADR was: court ordered _____ agreed upon by the parties _____
ADR provider was: court selected _____ agreed upon by the parties _____

Was the ADR proceeding helpful to understanding the issues in the case? Yes _____ No _____
ADR proceeding consumed _____ hours (not including preparation time).

Results of ADR proceeding:
_____ Case settled after referral but before ADR proceeding
_____ Case settled at ADR proceeding
_____ Case settled after ADR proceeding as a result of ADR proceeding
_____ Case settled after, but not as a result of, ADR proceeding
_____ Case did not settle

Comments: _____

Please evaluate the skill and effectiveness of the **ADR provider**:
excellent _____ satisfactory _____ unsatisfactory _____

Comments: _____

Previous participation in ADR proceedings (number of each):
mediation _____ mini-trial _____
summary jury trial _____ arbitration _____

Trial Setting: ___/___/___
Discovery Cut-off: ___/___/___
Judge: _____

Signature: Date:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

ALTERNATIVE DISPUTE RESOLUTION QUESTIONNAIRE

Evaluation by Client

(To be completed by client representative(s)
who attended ADR proceeding)

PLEASE PRINT OR TYPE

Civil Action No: Case Name:

Your name: _____ Telephone No.: ( ) _____
Representing: self: _____ party name: _____
Your address: _____
_____
You were: plaintiff _____ defendant _____ other (specify): _____

Name of ADR provider: _____
ADR method used: mediation _____ mini-trial _____
summary jury trial _____ arbitration _____

Referral to ADR was: court ordered _____ agreed upon by the parties _____
ADR provider was: court selected _____ agreed upon by the parties _____

Was the ADR proceeding helpful to understanding the issues in the case? Yes _____ No _____
ADR proceeding consumed _____ hours (not including preparation time).

Results of ADR proceeding:

_____ Case settled after referral but before ADR proceeding
_____ Case settled at ADR proceeding
_____ Case settled after ADR proceeding as a result of ADR proceeding
_____ Case settled after, but not as a result of, ADR proceeding
_____ Case did not settle

Comments: _____

Please evaluate the skill and effectiveness of the **ADR provider**:
excellent _____ satisfactory _____ unsatisfactory _____

Comments: _____

Previous participation in ADR proceedings (number of each):
mediation _____ mini-trial _____
summary jury trial _____ arbitration _____

Your attorney's name, address and telephone number:

Signature: Date: