RAND

Shapiro

September 10, 1992

Mr. Mark Shapiro
Administrative Office of the U.S. Courts
Court Administration Division
Washington DC 20544

Dear Mark:

Thanks for loaning me your file copy of the Southern District of Texas Advisory Group Report. We have made a copy and your original is enclosed.

Sincerely,

James Kakalik
Co-Director, CJRA Evaluation

JK:rm

Enclosure: As noted above.

213-393-0411

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# REPORT AND PLAN CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

OCTOBER 18, 1991


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**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**

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## I. PRELIMINARY CONCLUSIONS AND INTRODUCTORY STATEMENT

The Advisory Group for the Southern District of Texas is a diverse group spanning the spectrum of legal practice and the sprawling geography of the District.[1] Because the Southern District is a Pilot District required to implement its Civil Justice Expense and Delay Reduction Plan by January 1, 1992, the Group has worked on an accelerated basis. The Group has made extensive efforts to obtain comments from all the various constituencies affected by cost and delay in the federal courts and to develop relevant data.[2]

The Group reached consensus on a number of broad points.

First, the problems of cost and delay in the federal courts are severe and merit remedial efforts.

Second, the principal causes of delay in civil cases in the Southern District have nothing to do with the degree of effort made by the judges or their methods of operation. The judges are working hard and efficiently on their civil dockets, given the demands of their criminal dockets. Techniques for judicial management are well known. The Southern District, however, has simply not been given resources commensurate with its workload, which has increased enormously with population growth, new federal causes of action, and a disproportionate burden of federal criminal cases. This fact overwhelms all other variables affecting time of case disposition in the Southern District. Judges burdened by their criminal dockets and the sheer size of their combined criminal and civil dockets do not have time for intensive civil case management.

The Southern District has operated with seven judges fewer than the number determined necessary to handle its caseload with optimum docket management.[3] Even though the recent creation of five additional judgeships will ameliorate the situation, the District will still remain with two fewer judges than has been determined necessary. Further, the pattern of delays in filling judgeships has resulted in 95.7

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[1]The membership of the Group, with biographical data, is set forth in Appendix A.

[2]The Group's organizational structure and data gathering methodology and efforts are set forth in Appendix B.

[3]*Report of the Proceeding of the Judicial Conference of the United States*, 58 (Mar. 1990).

vacant judgeship months over the past ten years, the equivalent of eight judges sitting for one full year.[4]

Third, the judicial branch is vital to our tripartite system of checks and balances. Federal judges play an essential role in making constitutional rights real and making federalism work. It is no exaggeration to say they have served as "the thin black line between order and chaos."[5] Great care should be taken not to diminish the stature of the judiciary in the name of reform. The greatness of judges in history cannot be measured in the number of cases they closed. Considering its tasks and the inadequate resources it has been given, our federal court system has performed astonishingly well. Efforts at reform should be informed and incremental.[6]

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[4]*See Federal Court Management Statistics, Twelve Month Period Ended June 30, 1986-90*, at 84.

[5]Charles A. Wright, *The Wit and Wisdom of Bernie Ward*, 61 Texas L. Rev. 13, 19 (1982).

[6]The Advisory Group for Texas endorses the statement of the Federal Courts Study Committee in its *Report*:

> What is to be done? We share the view of Edmund Burke that radical social reform is justifiable only as a last resort, because its total impact is so difficult to predict; and Jefferson's correlate, that 'moderate imperfections had better be borne with.' Incremental reform, building on an existing and time-tested structure and changing it as little as seems consistent with the goals of reform, is much to be preferred to a leap into conceptual outer space. So it is incremental reform that we recommend in this report.

*Report of the Federal Courts Study Committee* 9 (Apr. 2, 1990).

> Before we embark on such turbulent waters, we should consider most carefully the possibilities for incremental reform, and that is what this report mainly tries to do. In addition, we need studies--more ambitious than the time granted to this committee has permitted us to undertake--of possible reforms that by virtue either of their radicalism or of our lack of knowledge of their probable effects cannot be considered for immediate adoption.

*Id.* at 13.

It would be all too easy to throw the baby out with the bath water.

Fourth, there is little empirical or scientifically validated data on the causes of cost and delay.[7] The Brookings Institution study,[8] for example, and the bulk of the literature in the field is simply anecdotal. Anecdotal evidence suggests that a principal cause of delay and expense is "discovery abuse." We do not find in the federal legislation any definition or in the literature a standardized definition of "discovery abuse." The Group in its efforts used the following working definition: Discovery abuse is (1) taking discovery for the purpose of inflicting costs on an opponent, (2) taking discovery to build up fee charges (a practice encouraged by class action attorney fee formulae and fee shifting statutes), and (3) taking discovery beyond that necessary for a reasonably competent attorney to prepare adequately for trial given the issues and risks involved in the case. The Group is satisfied that all of these types of discovery abuse exist, and efforts should be made to minimize or eliminate them.

We have no data, however, on what percentage of cases involve discovery abuse. We know that approximately 50% of the cases involve no discovery, and a substantial additional percentage involve very limited discovery. *See infra.* p. 62 & n.87. We do not know how many of the cases that involve very extensive discovery have such a degree of complexity and potential economic loss that extensive discovery is justified. It seems clear on a broad perspective across the spectrum of cases that the transaction cost of discovery is too expensive

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[7]*Compare* Taylor & Schmermund, *Procedural Reform of the Civil Justice System* (1989) (Louis Harris and Associates study conducted for The Foundation for Change, "documenting major problem" of cost and delay in civil litigation; basis for Brookings Institution report, *Justice For All, Reducing Costs and Delays in Civil Litigation: Report of a Task Force* (1990) and the subsequent Civil Justice Reform Act) *with* Dungworth & Pace, *Statistical Overview of Civil Litigation in the Federal Courts* (Rand, The Institute for Civil Justice 1990) (pointing to the paucity of empirical data and concluding that the rate of disposition of civil cases in 1986 was about the same as in 1971).

[8]Brookings Institution, *Justice For All*, *supra* n.7. *See also Agenda for Civil Justice Reform in America, A Report from the President's Council on Competitiveness* (Aug. 1991).

in the dispute resolution process. We do not know, however, whether more cases would have to be tried if discovery is significantly curtailed. Nor do we know what the loss in obtaining justice would be from arbitrary curtailment of discovery. Many great wrongs, such as the uranium cartel and the knowledge of certain producers of the harmfulness of asbestos, have come to light only after intensive and seemingly repetitive discovery efforts. Our objective is to secure "the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1 (emphasis added).

Nor do we know what degree of correlation there is between costs and delay.[9] Given the wide variance in disposition times between the various federal districts, empirical studies should be attempted to determine whether there are significant cost savings in courts with fast moving civil dockets. While techniques of case management are well known, there has been no demonstration that a broad application of them will result in net savings in the total costs of the administration of justice.[10] Clearly, if we are to make intelligent and efficient efforts at broad scale reform, we need to know a great deal more than we know now.

Fifth, a vital factor in effective reform is the degree of professionalism lawyers bring to their roles in the process. Lawyers who conciliate when that best serves their clients' true interests, who avoid expensive discovery when it is not truly necessary, who refuse to pursue marginal dilatory motions, who aspire to serve the ideals of the profession rather than profit maximize, can do much to reduce cost and delay. Clearly, a goal of the judiciary, the law

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[9]*See* Trubek, Sarat, Felstener, Kretzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. Rev. 72 (1983); Courts Administration Division, Administrative Office of The United States Courts, *Costs to Parties In Civil Litigation: A Summary of Significant Studies*, (Oct. 1990).

[10]Effective case management will require creating a system that will permit judges or magistrates to be able to acquire sufficient knowledge of cases early in their history to make informed decisions. This will require far greater resources than exist in many districts. Further, participation in increased procedural requirements will involve significant costs to the litigants. In theory, the costs to the litigants will be more than offset by more limited and efficient discovery. The procedure could, however, stimulate activity in cases that would have settled without significant judicial involvement or activity by the litigants.

schools, and the Bar should be to enhance professionalism.[11] Without professionalism, any set of rules is subject to manipulation. The judiciary must play a key role in both inspiring and requiring professionalism and punishing abuse.

Lawyers, of course, reflect the mores of their society. Our society has become extremely litigious, using the courts for both worthy causes such as the advancement of civil rights and product safety reform as well as trivial and venal ones, such as lawsuits over small slights and lawsuits that are simply economic blackmail, whose sole merit is that they are cheaper to settle than to litigate. An increasing number of new federal causes of action have been created over the past three decades.[12] Federal fee shifting statutes can serve high policy goals. Unfortunately, they can also make it possible to litigate matters of small substance without concern for legal fees, exacerbating the filing of unworthy causes. Many statutes also breed litigation because insufficient thought was given to litigation ramifications or because of legislative inability to reach a clear resolution.

Separating the wheat of cases that are worthy of the federal courts from the chaff of controversies that have no business in federal courts requires both an intellectual discipline that our lawmakers have not consistently utilized, as well as a political consensus that we have not achieved. Without such discipline and consensus, our courts will continue to be heavily burdened no matter what reforms we implement.

Sixth, Congress and the Executive Branch have essential roles to play in the improvement of the administration of justice. Keeping judicial resources commensurate with the courts' burdens is as critical as limiting creation of new federal causes of action and minimizing statutory ambiguity. Creation of sufficient judgeships with adequate support to match population increases, economic growth, and increased federal causes of action is mandatory if judges are to

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[11]*See* American Bar Association, *Report of the Commission on Professionalism* (1986); Tex. Gov't Code Ann., *The Texas Lawyer's Creed--A Mandate for Professionalism* (Vernon Supp. 1991); *see also* Hon. Eugene A. Cook, *The Search for Professionalism*, 52 Tex. B.J. 1302 (1989) (text and background of the Texas Lawyer's Creed, adopted by the Texas Supreme Court and Court of Criminal Appeals).

[12]*See Report of the Federal Courts Study Committee* at 5 (Apr. 2, 1990).

implement the case management techniques espoused by the Civil Justice Reform Act in a beneficial manner.

Similarly, expeditious filling of judicial vacancies by prompt legislative recommendation, Executive Branch nomination, and Senate confirmation would minimize the cost of persistent understaffing because of judicial vacancies in districts which have an adequate number of judgeships. Recognizing that some delay is necessarily built into a system of checks and balances, it could be ameliorated by immediately providing the requisite support resources for newly created judgeships, which could be shared by sitting judges until the new judges can be seated. The exercise of prosecutorial discretion by the Department of Justice is also vital. In the past, the Southern District has been inundated with less serious criminal cases which could have been more than adequately handled by state prosecutors. Given the myriad number of federal crimes which overlap state crimes, any district can be overwhelmed by an undiscriminating United States Attorney.

In light of these preliminary conclusions and to comply with our statutory mandate, we submit the following report and recommendations.[13]

[13]The Group recommends changes in local rules. If the Court decides to implement them, it could put them in place on the basis of "immediate need" under 28 U.S.C. § 2071(e) (Supp. I 1990) and "promptly thereafter" have a notice and comment period as required by 28 U.S.C. § 2071 and Federal Rule of Civil Procedure 83.

## II. DESCRIPTION OF THE SOUTHERN DISTRICT OF TEXAS

### A. Number, Location, and Demographics of Divisions

The Southern District of Texas is a huge, sprawling, demographically diverse district. The district is located in south and southeastern Texas and contains forty-three counties. It covers 14,108 square miles, just less than one-fifth the state. It lies in a belt approximately 150 to 200 miles wide along the Texas Gulf Coast, beginning fifty miles west of the Louisiana border and extending parallel to the Gulf Coast to the Rio Grande River. It includes about 250 miles of border with Mexico.

The district headquarters is in Houston.[14] There are six additional divisional offices, located in Brownsville, Corpus Christi, Galveston, Laredo, McAllen, and Victoria. By local usage, the courts sitting at Brownsville, Laredo, and McAllen are known as the "border" or "Valley" divisions. With the exception of Galveston, the divisional offices are hundreds of miles from Houston. Geography, therefore, plays a central role in court management in the district. With Houston as headquarters, the sheer distance to the six divisional offices requires complex management of clerical, judicial, attorney, and litigant time.

Houston, Corpus Christi, Galveston, and Brownsville are deep water ports, and each division has a large number of admiralty, longshoremen, personal injury, and cargo damage cases. Brownsville, McAllen, and Laredo are located along the Mexican border, with major highways leading to Monterrey and Mexico City. As a consequence, these border divisions are burdened with extremely heavy criminal caseloads, including drug smuggling and immigration cases. In these border divisions, magistrate judges handle all misdemeanor and immigration cases. This brings some relief to the court's docket, but the Speedy Trial Act and the prior U.S. Attorney's zero tolerance policy (prosecuting small drug cases that could be effectively handled by the State) have contributed to delay in civil case management in the border divisions.

Farther north, the United States border patrol has checkpoints on the only two major northbound roads from Mexico into Texas in Brooks and Kenedy Counties. As a result, the

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[14]The mileage from Houston to each divisional office is indicated in parentheses: Brownsville (375); Corpus Christi (250); Galveston (58); Laredo (320); McAllen (350); and Victoria (120).

Corpus Christi division also has experienced an increased criminal docket. The Department of Defense has selected Corpus Christi as a home port for naval operations, and this is expected to have a major impact on civil and criminal filings. Further, in January 1991 the Federal Bureau of Prisons opened the Three Rivers Federal Correctional Institution, a 1,300 inmate facility in Live Oak County, which is within the jurisdiction of the Corpus Christi division. This facility is expected to generate increased prisoner filings in the Corpus Christi division.

Houston is the nation's fourth most populous city and the largest in the south and southwest. The Houston-Galveston-Brazoria Consolidated Metropolitan Statistical Area (CMSA) ranks ninth in population growth among the nation's metropolitan areas and is the largest in the south and southwest. Dun & Bradstreet reports the Houston metropolitan area is home to 10,313 companies with recorded sales of $1 million or more in 1988. The CMSA is the nation's eleventh-ranking metropolitan area in retail sales volume.

Houston is a major international city, nationally ranking third in foreign trade offices, fifth in foreign consulates, and sixth in international air passengers. Houston is the base of operations for the international energy industry, with 623 firms from fifty-one nations. There are 574 domestic firms in Houston with branch operations in 108 foreign countries, and 766 firms or organizations in Houston involved in some phase of international business, without branch offices abroad. Foreign governments recognize Houston's leading role in international business, and fifty-seven foreign governments maintain consular offices in the city, making Houston's consular corp the largest in the south and southwest. In addition, twenty-eight foreign governments maintain trade, investment, and tourism offices in Houston, and the city has twenty-nine active foreign chambers of commerce and trade associations.

Houston ranks third among U.S. ports in total tonnage and second in foreign tonnage. Four major rail systems operate fourteen lines of mainline track radiating from the city. Approximately six hundred common carrier truck lines operate daily schedules serving the southwestern distribution center and provide routes throughout the state and nation.

The Houston area is one of the nation's most important oil and gas transmission centers. Of the nation's twenty-five largest pipeline companies that move natural gas, eleven are headquartered in Houston. The passenger traffic at Houston Intercontinental Airport ranks eighteenth in domestic service and eighth in international service nationwide. The city's two airports, Houston Intercontinental and Hobby, handled

23,754,904 domestic and 1,939,286 international passengers during 1989-90.[15] The Houston-Galveston area also serves as the aerospace center for the nation.

Thus, as a major metropolitan area with significant domestic and commercial activity, the Houston division sustains a heavy civil docket of complex corporate and commercial litigation. Many of these cases are multiparty, multiclaim lawsuits, and the Houston division handles a number of complex, multidistrict antitrust suits.

In the Houston-Galveston divisions, the presence of twenty large state correctional facilities further complicates civil case management. Fifty-four percent of some forty thousand state prisoners are incarcerated in Texas State Department of Correction facilities within the Houston-Galveston area. As a result, these divisions receive a high volume of prisoner litigation based on federal civil rights statutes,[16] with a current pending caseload of approximately 558 cases in addition to 338 pending habeas corpus cases. Most prisoners file *pro se*. These prisoner petitions typically require significant court time in screening and processing.

### B. Judicial Officers and Caseload Allocation

#### 1. Article III Judgeships

##### (a) Assignments

Presently in the Southern District of Texas there are thirteen active judges and two senior judges, assigned to the following divisions:

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[15]Greater Houston Chamber of Commerce, *Houston Facts* (1990).

[16]These are primarily complaints arising under 42 U.S.C. § 1983 (1988).

| Division | Active Judges | Senior Judges | Vacancies |
|---|---|---|---|
| Brownsville | 1 | | 1 |
| Corpus Christi | 1 | | |
| Galveston | 1 | 1 | |
| Houston | 8 | 1 | 2 |
| Laredo | 1 | | 1 |
| McAllen | 1 | | 1 |
| Victoria | 0 | — | — |
| Total | 13 | 2 | 5 |

The Biennial Judgeship Survey for 1990[17] identified the need for an additional seven judgeships in the district based on the increased criminal filings and judicial time associated with these cases. The Judicial Conference of the United States Courts recognized this need for seven additional judgeships and approved the request. Congress, however, in the Judicial Improvement Act of 1990, authorized only five additional judgeships for the district.[18] The Judicial Council for the Fifth Circuit designated these judges to sit in the following divisions:

1 Judgeship at Brownsville
1 Judgeship at Laredo
1 Judgeship at McAllen
2 Judgeships at Houston

The Court for the Southern District, in executive session on November 27, 1990, resolved that all new judges will be assigned cases from other divisions to equalize an average caseload across the district. The court resolved to transfer certain Corpus Christi cases to the McAllen and Brownsville divisions, particularly cases arising from activities in Brooks and Kenedy Counties. The immigration checkpoints in these counties contribute significantly to annual criminal case filings. The court further decided that the Corpus Christi division will handle Victoria division cases.

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[17]*Biennial Judgeships Survey for the Southern District of Texas* (Oct. 1989).

[18]*See* Judicial Improvements Act, Pub. L. No. 101-650, 104 Stat. 5089 (1990); Federal Judicial Judgeship Act, Pub. L. No. 101-650, 104 Stat. 5098 (1990).

### (b) Caseload Statistics and Judicial Time

Caseload statistics in relation to authorized judgeships, actual judgeships, and national averages are analyzed in Part III of this *Report* on assessment of conditions in the district. The detailed collection and analysis of these statistics is set forth in the *Report of the Clerk on the Status of the Docket* (April 29, 1991) included as Appendix C.[19] The Advisory Group draws some summary observations about the relationship between judicial officers and caseload in the district.

Civil and criminal filings for each authorized judgeship and actual judge have increased since 1987. Similarly, weighted filings for each judgeship and active judge also have increased. The Southern District of Texas ranks seventh among all districts in weighted caseloads for authorized judges. While case termination statistics show a decrease for authorized judgeships, terminations for actual judges sitting have increased since 1987. The Southern District of Texas ranks fourth among all districts in authorized judge case terminations.

For a four-year period through 1990, civil filings for authorized judgeships increased approximately 6%, while civil filings for active judges increased approximately 21%. During this same period, criminal felony filings increased approximately 37% for authorized judgeships and 56% for active judges. The number of defendants in each criminal case increased 139% for authorized judgeships and 171% for active judges.

Much of the criminal docket consists of drug-related offenses. In the Southern District of Texas, these cases typically involve multiple transactions, multiple defendants, and complicated legal and factual issues. These cases require more judicial and staff time than other cases. In addition, most drug-related cases in the Southern District of Texas require the use of an interpreter, further taxing court resources.

Nonetheless, a comparison of criminal filings for the year ending March 31, 1991, with the previous year reveals a district-wide decline of 23% in criminal filings. This

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[19] *See* Part III *infra*; *see also* Appendix C: *Report of the Clerk on the Status of the Docket* (Apr. 29, 1991). These statistics are drawn from *Federal Court Management Statistics For the Period Ending June 30, 1990*.

statistic reflects the prosecution philosophy of the new United States Attorney to leave petty drug offenses to the State system and to concentrate on more significant cases. If the State does not handle the minor cases adequately, this policy would have to be reconsidered. While the major cases will be fewer in number, each may require more judicial resources than many smaller cases combined.

The pending caseload statistics for authorized judgeships have not increased since 1987. However, in this period, there has been almost a 14% increase for active judges, from 783 to 889 pending cases. This increase in pending cases is not proportional to the increase in total filings for each judge. The Advisory Group believes this is the result of the assiduous efforts of active judges to expeditiously dispose of cases, reflected in the district's termination statistics.

The allocation of judicial time varies within the district, reflecting regional differences. For example, in the border divisions of Brownsville, McAllen, and Laredo, the war on drugs and flood of illegal aliens resulted, in the last three years, in 56% of felony filings. During this time, criminal matters consumed 90% of judicial time. On average, 74% of criminal filings are felonies. Of felony offenses, 42% are drug cases, 33% are immigration cases, and 8% are fraud cases. Border division judges predominantly manage felony filings, and 95% of felony defendants negotiate a plea before trial. Magistrate judges manage most misdemeanor filings. Each border division judge hears an average fifty-eight criminal trials and five civil trials a year, spending about 414 hours over 120 days in trial time.

The Houston region, including the Galveston and Victoria divisions, provides a stark contrast to the border region. Here, criminal felony filings related to drug offenses are 8% of the total docket. However, despite the relatively small percentage of criminal filings, criminal matters consumed 40% of the Houston division's total judicial time. Felony cases comprise 92% of annual criminal filings, of which 22% are drug cases, 24% are fraud cases, and 10% are weapons cases.

The Advisory Group concluded that, for the Houston region, different types of criminal filings and defendant pleas explain the disproportionate time consumed by criminal filings in these divisions. Here, 16% of defendants go to trial, and judges average fourteen criminal trials a year. The Houston area judges average approximately nineteen hours over four-and-a-half days for each criminal trial. In comparison, border judges average approximately six hours over two days for criminal trials.

Civil filings provide the most striking distinction between the Houston region and the border divisions. In the Houston region, civil filings constitute 92% of each judge's docket, compared to 24% in the border divisions. The Houston area judges average twenty-five civil trials a year. For each trial, the judges spend approximately fourteen hours over four days on the bench. In total, Houston area judges yearly average approximately 520 hours over 119 days in trial, while border division judges spend approximately 414 hours over 120 days in trial.

In the remaining division--Corpus Christi--criminal cases comprise 54% of the docket, of which 89% are felonies. Drug cases account for 86% of felony cases in this division. During the last three years, 26% of Corpus Christi defendants were dismissed, 68% negotiated a plea, and 6% went to trial. The small percentage of defendants going to trial resulted in an average twenty-eight criminal trials for the division judge. For each, the judge spent approximately nine hours over two days in trial.

Civil filings constitute 46% of the Corpus Christi docket. The division judge hears about eighteen civil cases a year, spending approximately six hours over two days in trial. On a yearly basis, combined criminal and civil trials consume 363 hours of judicial time over ninety days of trial.

### (c) Other Factors

Two senior judges presently serve the Southern District of Texas. The court assigns one senior judge in Houston all government collection cases, and this judge accepts other cases from active judges. The senior judge in Galveston accepts 34% of new civil filings in that division.

Vacant judgeship months reached an all-time high in 1989 with 23.8 months, or almost two judgeships for the year. The total vacant judgeship months between 1986 and 1990 was 76, or 6.34 judges, averaging 1.27 judges per year. All these vacancies have been in the Houston division.

The Advisory Group believes five additional judges should bring the district's caseload closer to parity with the national average for judges' caseloads. However, as the docket assessment in Part III reveals, the Southern District probably will still experience greater-than-average filings and pending caseloads for each judge. Assuming one courthouse with all the judges in one location, and using cases filed and pending in statistical year 1990, the Southern District of Texas judges, on average, will still exceed their colleagues nationally by approximately 16% in cases filed and 40% in cases pending.

### 2. Magistrate Judges

#### (a) Assignment

The Southern District of Texas has nine full-time and one part-time magistrate judge, assigned to the following divisions:

| Division | Magistrate Judge |
|---|---|
| Brownsville | 1.5 (part-time) |
| Corpus Christi | 1 |
| Galveston | 1 (converted to full-time 2/91) |
| Houston | 4 |
| Laredo | 1 |
| McAllen | 1 |
| Victoria | 0 |

The Magistrate Judge Division of the Administrative Office is conducting a survey at the court's request to determine additional magistrate judge requirements. The court anticipates a recommendation for at least three additional magistrate judges. In all divisions, except Houston, there is a one-to-one relationship between an Article III judge and the magistrate judge. In Houston, the court has assigned one magistrate judge to two Article III judges.

#### (b) Caseload Statistics and Magistrate Judge Time

By statute, the court assigns all magistrate judges petty offenses, preliminary felony matters, and certain criminal and civil matters.[20] Magistrate judges also are assigned civil consent cases.[21] In Houston, the court rotates a month-long criminal docket among four magistrate judges.

When parties file a civil action, the Clerk notifies them of the right to consent to a magistrate judge to handle the litigation. The Judicial Improvements Act of 1990 amended the law to permit judges and magistrate judges to advise litigants of the option to consent to a trial before a magistrate

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[20]*See* 28 U.S.C. § 636(a)-(b).

[21]*See* 28 U.S.C. § 636(c).

judge.[22] The amendment requires judges and magistrate judges to advise parties of their freedom to withhold consent to a magistrate judge, without fear of adverse consequences.

The district's magistrate judge workload statistics, organized by statutory duties, are attached as Exhibits E1-7 to Appendix C: *Report of the Clerk on the Status of the Docket*. The most significant finding is that during statistical years 1988 - 1990, magistrate judge consent case terminations have increased from nineteen to forty-nine cases, or 157%. The increasing propensity of litigants to consent to magistrate judge jurisdiction and the corresponding increase in ability of magistrate judges to handle a significant portion of the docket should be encouraged and enhanced by all legitimate means.[23]

### C. Support Personnel and Resources

#### 1. Clerk's Office

The Clerk of the Southern District serves as the chief administrative officer for the district court and the bankruptcy court. This consolidated structure exists only in four other districts in the federal system. The Southern District of Texas is one of the largest and most complex of these consolidated districts.

The Clerk has administrative responsibility for judicial officers and their staff, the district and bankruptcy clerk's office, the United States Probation Office, the United States Pretrial Services Office, and court reporting. The Clerk manages financial, administrative, contract, procurement, automated services, and office space. The Clerk also has responsibility for security for court buildings and documents.

The Administrative Office of the United States Courts allocates Deputy Clerk positions based on a formula evaluating case filings, judges, and divisions. Since 1986, staffing has

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[22]*See* Judicial Improvements Act, Pub. L. No. 101-650 § 308(a), 104 Stat. 5112 (1990) (amending 28 U.S.C. § 636(c)(2)). The law previously restricted judicial officers from informing parties of the opportunity to have a civil matter referred to a magistrate judge because of concern that parties would be coerced to accept such references.

[23]*Annual Reports of the Director of the Administrative Office* (1988-90).

been restricted to between 90-98% of authorized positions.[24] Currently, the Clerk's office is 96% staffed, with 130 positions:

| Divisions | Deputy Clerks | Interpreters | Court Reporters |
|---|---|---|---|
| Brownsville | 8 | 2 | 1 |
| Corpus Christi | 9 | 0 | 0 |
| Galveston | 7 | 0 | 2 |
| Houston | 86 | 3 | 9 |
| Laredo | 7 | 2 | 1 |
| McAllen | 8 | 2 | 0 |
| Victoria | 1 | 0 | 0 |

The Administrative Office is studying the present staffing formula. In districts with heavy trial loads, such as the Southern District of Texas, the formula fails to account for the judges' use of case managers to assist with jury selection, swearing-in witnesses, and recording minute entries. These activities detract from the case manager's primary responsibility of assisting with expeditious movement of cases. This is also true for the magistrate judges. A clerical position for each magistrate judge provides all in- and out-of-court support.

2. Probation Office

With the advent of Guideline Sentencing in November 1987, the role of probation officer changed, and defendants now are more likely to object to presentence investigation reports because sentencing is strictly based on stated criteria.

Three trends are discernible concerning the probation office: the number of persons under supervision has increased; the type of offender typically requires more probation officer attention; and court involvement in probation revocation also has increased. A 22% increase in probation violation reports between 1987 and 1990 illustrates these phenomena. The *Report of the Clerk on the Status of the Docket* contains a synopsis of the activities of the probation office and its impact on the criminal docket.[25]

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[24]This is due to budgetary constraints imposed by the Gramm/Rudman/Hollings Act.

[25]*See* Appendix C, Exhibit F. The Probation Office prepared this synopsis for the *Clerk's Report*.

### 3. Pretrial Services Agency

The Pretrial Services Agency for the Southern District of Texas is the largest in the United States. Conditions of pretrial release are becoming more rigid, requiring increased, aggressive supervision. Consequently, more violations are discovered and reported to the court. The Advisory Group also anticipates that mandatory drug testing will increase violation reports and revocation hearings. The *Report of the Clerk on the Status of the Docket* contains a synopsis of the activities of the Pretrial Services Agency and its impact on the criminal docket.[26]

## D. Automation and Other Technical Support

The Southern District of Texas is now part of the federal court Integrated Case Management System (ICMS). All civil cases filed since June 1, 1990, are entered into the CIVIL ICMS database. By January 1, 1992, all civil cases filed prior to June 1, 1990, will have been entered into the database. This program runs on one of four Unisys 9500 computers in Houston and provides electronic docketing and automated case management for the civil docket.

The district is in a pilot stage of PACER (Public Access to Court Electronic Records), a program that permits downloading of docket and index information into a personal computer. The public and bar can then access this information.

The automated docketing program for criminal cases (COUTRAN) is maintained on a digital computer located at the Administrative Office. During fall 1991, criminal dockets will be placed in a NEW CRIMINAL automated docketing program running on a Unisys system in Houston.

The bankruptcy court will automate its docket during summer 1991 through a BANCAP program. This program will offer the same docketing and case management features as the civil automated program and also runs on a Unisys 9500 computer.

The district court completed a project to place personal computers in all chambers for judges and staff. The Clerk's office provides technical support for personal computers. The Clerk's office also maintains automated programs dealing with finance, jury, personnel, property inventory, and attorney admissions.

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[26] *Id.*, Exhibit G. The Pretrial Services Office prepared this synopsis for the *Clerk's Report*.

The heavy criminal docket in the Southern District of Texas has had a dramatic effect on court reporting services. At the end of June 1990, official court reporters for the Southern District had almost as many pending pages of appellate transcripts as the total throughout the rest of the Fifth Circuit. Reporters must devote lengthy in-court hours to criminal arraignments, rearraignments, sentencing, and hearings. Court reporters also are required to prepare a Statement of Reasons to satisfy Sentencing Commission requirements. As a result, court reporters have very little time to prepare appellate transcripts. The Court concluded that the reasons for the appellate court transcript backlog were the high in-court time requirements and the inability of reporters to find additional time to produce appellate transcripts.

In desperation, judges at Laredo, Corpus Christi, Brownsville, and three in Houston requested electronic recording operators on an experimental basis. Since then, Corpus Christi and McAllen have converted exclusively to this system, while Brownsville, Laredo, and Houston primarily use these resources for in-court appearances that produce few requests for transcripts but consume an inordinate amount of available reporter time. By relieving the official reporters from attendance at laborious in-court sessions, the reporters still can produce transcripts and be available for complex trials when the judges and parties were uncomfortable with electronic recording devices.

The Advisory Group notes several advantages from the use of electronic recording services in this district, on an experimental basis. The two courts that converted to complete use of electronic recording devices employ several commercial companies to produce transcripts. This obviously relieves a solitary court reporter of the burden of producing a transcript. Also, the electronic record now automatically generates the Statement of Reasons that the Sentencing Commission and appellate courts require, placing no additional burden on the court reporter. In Houston, electronic recording services have promptly met the needs of magistrate and visiting judges. Therefore, electronic recording greatly assists in criminal cases, relieving court reporters from non-productive, time-consuming in-court appearances at arraignments, rearraignments, sentencings, and related hearings.

### E. Special Statutory Status as a Pilot District

In March 1991, the Judicial Conference of the United States designated the Southern District of Texas one of ten pilot district courts under the Civil Justice Reform Act,

required to submit and implement a civil justice expense and delay reduction plan by December 31, 1991.

## III. ASSESSMENT OF CONDITIONS IN THE SOUTHERN DISTRICT OF TEXAS

### A. Condition of the Docket in the Southern District of Texas

#### 1. The Criminal Docket

##### (a) Condition of the Criminal Docket and Filing Trends

The judges in the Southern District of Texas experienced criminal filings at a rate nearly three times the national average. The nation's war on drugs drives criminal filings in this district. Five areas of the nation have been designated as high intensity drug areas. Two of these areas are located within the borders of the Southern District of Texas. As a result, the Southern District of Texas leads the nation in criminal drug filings.

Congress has allocated increased resources in this district to investigate and prosecute drug dealers. Since 1985, the number of assistant United States Attorneys has doubled. Thirty percent of this increase has been since January 1989. This does not include resources in pending drug legislation.

Last year Attorney General Richard Thornburgh projected that the number and complexity of savings and loan prosecutions in the Southern District of Texas would be overwhelming. In anticipation of the large numbers of prosecutions, the Department of Justice created a Financial Litigation Unit in the district and hired fifteen Assistant United States Attorneys. The resulting prosecutions of complex financial cases will substantially increase the amount of judicial resources needed for criminal matters.[27]

In November 1990, the newly appointed United States Attorney detailed his prosecution philosophy to the court in executive session. He stated that his office would focus on substantial federal issues, screen all cases, and apply selective prosecution to major federal cases. He would further encourage enforcement agencies to focus their investigations to combat serious violations such as money laundering,

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[27]*Report of the Clerk of the Southern District of Texas to the Chief Judge Re: Need for Additional Judgeships* (June 13, 1990).

bank fraud, and organized drug conspiracies. Recently, he announced that a leading priority would be rigorous prosecution of savings and loan violators.

For more than a decade, the criminal docket has increased demands on the court's resources in the Southern District of Texas. Although annual increases were more pronounced in statistical years 1989 and 1990, the number of felony indictments filed has increased each year since 1979.[28] From 1979 to 1990, the number of felony indictments filed annually increased from 1,861 to 2,990, or a 165% change.

Other measures of the criminal docket indicate an increasing impact of the criminal on the civil docket. The burden of a criminal case is proportional to the number of defendants. Thus, as the number of defendants included in each indictment increases, so do the demands on the court's time. In the Southern District, the number of criminal defendants has increased each year since 1981, and dramatically so since 1986, to approximately 3,500 defendants in 1990.[29] Given the nature of local indictments, many of these criminal prosecutions involve complex, multi-defendant cases that by their nature further tax court resources.

The number of felony criminal trials in the district doubled from 1985 to 1990, from 230 to 461 trials.[30] The number of felony indictments, however, decreased by an estimated 29% in the statistical year ending June 30, 1991.[31]

Moreover, changes in criminal procedure during the last ten years now require significantly more time for each criminal case. Statutory changes relating to bail, detention, sentencing procedures, and revocation of supervised release require more of the court's time and additionally burden probation and pretrial agency resources. This increased use

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[28]This is with the exception of minor decreases in 1984 and 1985 (minus 3% each year). *See* Exhibit A at Appendix D: *Report and Recommendations of the Subcommittee on Criminal Docket Impact, Advisory Group for the Southern District of Texas* (Aug. 1991).

[29]*See id.* at Exhibit B.

[30]*See id.* at Exhibit C.

[31]There were 2,124 criminal indictments in statistical year ending June 30, 1991.

of court resources occurs whether the criminal case is resolved by a negotiated plea or trial.

### (b) Impact of New Legislation on the Criminal Docket

The Sixth Amendment to the United States Constitution has recognized, since 1791, the right of an accused in all criminal proceedings to a speedy and public trial. In 1944, the Federal Rules of Criminal Procedure directed that "Preference shall be given to criminal proceedings as far as practicable."[32]

In 1972, Congress amended the Federal Rules of Criminal Procedure to require each federal district court to "prepare plans for the prompt disposition of criminal cases . . ." District court plans were to include unspecified time limits for the pretrial, trial, and sentencing phases of criminal proceedings.[33] Current Federal Rule of Criminal Procedure 50 still directs the district courts to give preference to criminal proceedings and to prepare plans to conform to the Speedy Trial Act.[34]

Congress enacted the Speedy Trial Act in 1974.[35] The federal judiciary phased in this comprehensive law over a six-year period. Tne statute's basic provisions require that any information or indictment be filed within thirty days of an alleged offender's arrest and that the criminal trial of an accused person must begin within seventy days of the filing of an information or indictment.[36]

In 1984 Congress passed the Comprehensive Crime Control Act.[37] This expansive revision of federal criminal law brought activities such as terrorism within the scope of federal criminal jurisdiction. Among other things, this legislation

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[32]*See* Fed. R. Crim. P. 50(a).

[33]*See* Fed. R. Crim. P. 50(b).

[34]*See* Fed. R. Crim. P. 50(a)-(b).

[35]*See* 18 U.S.C. §§ 3161-3174 (1988).

[36]*See* 18 U.S.C.§ § 3161(b),(c)(1).

[37]*See* Pub. L. No. 98-473, 98 Stat. 1837 (1984).

increased penalties and fines, redefined the insanity defense, and provided for forfeiture of gains from criminal activity.

This Act also included the Bail Reform Act.[38] The Bail Reform Act generally made it more difficult to obtain bail and required the court to hold a detention hearing within strict time limits to determine "whether any condition or combination of conditions . . . will reasonably assure the appearance of such person . . . and the safety of any other person and the community."[39]

Another far reaching provision of the Comprehensive Crime Control Act was the Sentencing Reform Act.[40] This law, among other things, abolished parole and substituted court supervised release; established a narrow range of punishments for each offense (the Sentencing Guidelines); and formalized the content and presentation of probation presentence reports.[41] This has required a substantial increase in judicial time. In recent years, Congress has enacted a number of mandatory sentencing provisions. Persons convicted of certain drug trafficking offenses, use of a firearm in a violent felony or drug trafficking offense, and certain recidivists who possess a firearm are subject to mandatory jail sentences without parole.

The Anti-Drug Abuse Act of 1988 is the most recent example of Congressional enhancement of penalties under the drug laws. The Act establishes mandatory minimum sentences and substantial fines for possession with intent to sell heroin, cocaine, cocaine base, phencyclidine (PCP), LSD, P2P, methamphetamine, or marijuana.[42] The statute enhances penalties if death or serious bodily injury result from the use of the substance or if the offender has prior drug

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[38]*See* 18 U.S.C. §§ 3141-3156.

[39]*See* 18 U.S.C. § 3142(f).

[40]*See* Pub. L. No. 98-473 §§ 212-239, 98 Stat. 1987-2039 (1984).

[41]The provisions of this law became effective November 1, 1987.

[42]*See* 21 U.S.C. §§ 841(b)(1) and 960(b)(1) (1988). The mandatory minimum sentences for possession with intent to sell are five to ten years, depending on the quantity of the drug.

convictions.[43] The law also makes available higher fines for organizations.[44]

Statutes now require that an individual who uses or carries a firearm during the commission of a felony crime of violence or drug trafficking offense shall be sentenced to five years in prison without parole, consecutive to any other sentence.[45] Persons with three prior violent felony or serious drug convictions shall be sentenced to at least fifteen years and no more than life without parole.[46]

While we do not have the data to quantify the impact of these legislative changes in criminal law and procedure, it is obvious that these statutory provisions have had a dramatic impact on criminal dockets in the United States generally, and in the Southern District of Texas particularly.

The high volume of criminal cases in this district is influenced by the fact that Texas is disproportionately affected by three of our society's most pressing problems: illegal drugs, illegal immigration, and illegal financial practices. The Southern District of Texas, as described in Part II, is geographically large and shares an expansive border with Mexico. This geography plays a significant role in criminal activity within this district. Clearly, the high volume of criminal cases in the Southern District of Texas limits the court's resources available to handle civil litigation promptly.

Not only has criminal law revision in the last twenty-five years had an impact on criminal dockets, but the Advisory Group anticipates that other Congressional criminal legislation will further tax the court's resources available for civil litigation. The Federal Sentencing Guidelines, enacted under the Sentencing Reform Act of 1984, are a prime example of the impact of legislation on the court's criminal docket. As noted in the United States Probation Office's report to the Advisory Group, prior to the guidelines the average time from adjudication of guilt to the imposition of sentence was approximately thirty days. Today, under guideline sentencing, this time has lengthened to approximately seventy days. The Probation Office report further notes that

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[43] *See* 21 U.S.C. §§ 841(b)(1), 960(b)(1).

[44] *Id.*

[45] *See* 18 U.S.C. § 924(c).

[46] *See* 18 U.S.C. § 924(e).

"with each annual cycle of amendments to the guidelines and daily appellate decisions on various guideline issues, the complexity of guideline application increased." The sentencing hearing that used to take a few minutes prior to the guidelines may now take hours to resolve disputed issues.

Although we do not yet have statistical data, it was the uniform opinion of judges and attorneys involved in criminal litigation that the sentencing guidelines and mandatory minimum sentences have had a chilling effect on plea bargaining. This, in turn, increases the number of criminal trials.

The Pretrial Services Agency report to the Advisory Group addressed another area where new legislation is increasing demands on court resources. Under the Bail Reform Act, Pretrial Services must prepare reports to assist the court in determining whether to release or detain persons awaiting trial. Pretrial Services anticipates that it will have to prepare more reports. Furthermore, increased supervision and monitoring of individuals out on bail will likely result in more violation reports. The Pretrial Services Agency also anticipates that mandatory drug testing will result in a substantial increase in violation reports, warrants, and hearings to consider revocation of release conditions.

The Advisory Group also suggests that the abolition of parole under the 1984 Sentencing Reform Act had a significant impact on the court's criminal docket. Prior to the Act, the United States Parole Commission handled parolees who violated conditions of their parole. In place of parole, Congress authorized "supervised release" and the court must now handle violations of post-custody supervision.

Thus, the Advisory Group believes it is clear that Congress's enactment of new legislation affecting criminal substantive and procedural law has greatly increased demands on the court's resources through the criminal docket. Given the priority of the criminal dockets, meaningful improvement in the civil dockets can be achieved only by giving the courts adequate resources to handle the civil dockets after the increased burdens of the criminal dockets have been met. The criminal dockets should be studied to see whether legislative changes can be made to alleviate the burden on the courts without sacrificing policy goals.

## 2. Condition of the Civil Docket[47]

### (a) Measurement of the Civil Docket

To assist the Advisory Group in formulating an approach to differentiated case management, the *Docket Assessment Subcommittee* reviewed statistics supplied by the Federal Judicial Center, the Administrative Office of the United States Courts, and the Clerk's Office of the Southern District of Texas. Data reflecting annual case filings and terminations and pending caseloads for the district and the nation were gathered and compared with authorized judgeships and active judges. The subcommittee also examined the prevalence of different types of civil cases in southern Texas compared to national averages. The units used in judicial statistics--"cases"--can vary widely in significance. One multidefendant civil conspiracy case can consume more judicial resources than a hundred or more student loan cases. The Group, therefore, examined a variety of measures of the court's docket.

One significant measure of the civil docket in the Southern District of Texas is the pending caseload. For the year ended June 30, 1990, the district had 5,983 new civil cases filed, 5,878 civil cases closed, and 8,185 civil actions pending. It placed fifth among the ninety-four district courts in terms of cases pending. Of these, 13.2% had been on the docket over three years.[48] In contrast, on the same date in 1985, the district had 9,483 civil actions pending, of which only 5.5% had been pending over three years.[49]

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[47]*See generally* Appendix C, *Report of the Clerk on the Status of the Docket* (Apr. 29, 1991). *See* Judicial Improvements Act, Pub. L. No. 101-650 § 102, 104 Stat. 5089 (1990); 28 U.S.C. § 472 (c)(1)(A) & (B) (requiring Advisory Groups to complete a thorough assessment of the civil docket, to determine the condition of the docket, and to identify trends in case filings). Professor William R. Kelly, Department of Sociology, University of Texas at Austin, consulted with the Group on statistical analysis of the relevant data.

[48]*See Annual Report of the Director of the Administrative Office, Twelve Month Period Ending June 30, 1991*, Appendix 1, Detailed Statistical Analysis, at 50-51.

[49]*See Annual Report of the Director of the Administrative Office, Twelve Month Period Ending June 30, 1985*, Appendix 1, Detailed Statistical Analysis, at A-48-49.

The Advisory Committee analyzed data on the activity of the court from 1974 to 1991. It also compared the activity of the Southern District over time to the activity of the entire civil docket for the nation as a whole.

The trend in new case filings in the District shows a steady increase from 1974 to the mid-1980s, the period when case filings peaked at around 7,700. Between 1974 and 1986, filings rose by nearly 200%. After the mid-1980s, new case filings declined, averaging approximately 5,780 during the period from 1987 to 1991. In relative terms, cases filed between 1986 and 1991 declined by 24%. *See* Appendix F, Exhibit A.

The trend in terminations follows a pattern similar to that for new filings. Terminations rose fairly steadily from 1974 to 1986, increasing by nearly 230%. Terminations reached a peak of 7,871 in 1988 and then dropped to an average level of nearly 6,000 during the years 1987 to 1991. Terminations declined a modest 7.5% over this period. *See* Appendix F, Exhibit A.

The trend in pending cases also follows the trend of the prior two indicators of court activity. Pending cases rose during the decade of the 1970s and then experienced a substantial jump between 1982 and 1983, a one year increase of 35%. Pending cases then peaked in 1985 at 9,483. Between 1974 and 1985, the number of pending cases rose by 237%. After 1985, pending cases declined by 23%, reaching the lowest level (7,313 in 1991) since the early 1980s. *See* Appendix F, Exhibit A.

One way to assess the extent to which the long-term trends in filings, terminations, and cases pending in the Southern District are typical or atypical is to compare the trends in the same indicators for the U.S. as a whole. With regard to filings, the trends for the U.S. are comparable to those for the Southern District. Filings increased consistently from 1974 to 1985. However, the relative (percentage) increase is significantly lower for the nation as a whole (164%). From 1986 to 1991, civil filings declined by a comparable 24%. *See* Appendix F, Exhibit A.

Case terminations also followed a similar trend, rising during the 1970s to a peak of 269,848 in 1985. This represents a percentage increase of 152%, a much lower percentage increase compared to the Southern District. Once again, terminations then declined steadily from 1986 to 1991, reaching a nine year low in 1991 of 211,713. This decline

represents a 21% drop, a figure quite comparable to the activity in the Southern District. *See* Appendix F, Exhibit A.

Not surprisingly, cases pending increased every year from 1974 to 1985, the year in which pending cases peaked at 254,114. It is important to note, however, that the relative increase in pending cases was substantially higher in the Southern District over this period (237% compared to 160% for the nation). After 1985, the trend is one of fairly consistent decline, with 1991 having the lowest level since 1984. However, this decline was quite moderate in relative terms (3.8%) and well below the comparable figure of 23% for the Southern District. *See* Appendix F, Exhibit A.

Another way to assess the activity of the Southern District is to compute the cases filed, terminated, and pending for the Southern District as a percentage of cases filed, terminated, and pending for the nation as a whole. This will permit a determination of how the Southern District compares in terms of its share of national filings, terminations, and cases pending. With regard to the Southern District's share of filings, terminations, and cases pending over time, the basic conclusion is that while there is some year-to-year fluctuation, the trends are reasonably stable, not systematically increasing or decreasing over time. If any conclusion is warranted, it is that compared to the 1970s, in the 1980s the Southern District had a larger share of national filings, a larger share of national cases pending, but also a larger share of terminations. However, it is important to emphasize that the differences in the 1970s compared to the 1980s are relatively small. *See* Appendix F, Exhibit B.

The ratio of pending cases to annual terminations is recognized as a good indicator of whether a court is staying abreast of its docket. The Advisory Committee computed the ratio of pending cases to cases terminated for the Southern District and for the U.S. as a whole for the years 1974 to 1991. The trend for the U.S. is one of somewhat larger ratios in the mid- to late-1970s, indicating that the federal courts taken as a whole were falling behind. However, throughout the 1980s and the early 1990s, the ratios are quite stable. In fact, during that period, values average 1.03, indicating that the courts were staying abreast. *See* Appendix F, Exhibit C.

The levels and trends for the Southern District indicate a different picture. First of all, the values for the ratios are considerably larger than 1.0 for every year of the series, indicating an excess of pending cases to those closed. Over the period 1974 to 1991, the ratios for the Southern District average 31% higher than the ratios for the U.S. Similar to the trend for the U.S., the values of the ratios for the

Southern District are generally higher in the mid-1970s compared to later years. The ratios then stabilized for the years 1979 through 1983, indicating that the court was staying abreast. The ratios then declined somewhat from 1984 through 1987, suggesting the court was gaining ground. Over the next three years (1988, 1989, and 1990), the ratio of cases pending to terminations generally increased, demonstrating that the court was losing ground. Finally, the value of the ratio declined fairly dramatically between 1990 and 1991. However, it is difficult to draw any conclusion regarding the change in one year. *See* Appendix F, Exhibit C.

The data presented above describing changes in court activity for the Southern District indicate that the court has become increasingly crowded, not only in absolute terms, but also relative to the condition of the courts nationwide. Perhaps the most persistent evidence of this situation is the excess in cases pending in the district, an excess that has increased in recent years. While filings and terminations increased in the 1970s to the mid-1980s, pending cases rose somewhat more.

Looking at these trends differently indicates that compared to the nation as a whole, the Southern District experienced a larger increase in filings, but also a larger increase in terminations. The District's increase in pending cases over the period from 1974 to the mid-1980s outpaced by a considerable extent the increase for the nation.

Another comparison of the Southern District to nationwide statistics indicates that while the Southern District was increasing its share of civil cases filed in the U.S. as well as its share of terminations, the District had a larger relative share of cases pending. Again, the increases are moderate, but nonetheless are indicative of an increasing burden on the Southern District. *See* Appendix F, Exhibit B.

Finally, trends in the ratio of cases pending to terminations indicate that for much of the period, the District was not staying abreast. In fact, the District's ratios were considerably above the national average, often exceeding it by 25%, 30%, 40%, and more. Moreover, the most recent data suggest that the court has been losing ground in the post-1987 period, with the exception of 1991.

The *Subcommittee on Docket Assessment* reported that the district civil docket included a greater-than-national average of certain kinds of civil cases: contract actions, personal injury claims, non-prisoner civil rights actions, RICO cases,

tax, patent, and copyright lawsuits.[50] For example, contract actions comprise approximately 25% of all civil actions in the district.

Not surprisingly, statistical analysis confirms that the Southern District's dockets are clogged with criminal cases and the time to civil case disposition is unacceptably long. Our judges have been carrying heavier caseloads and a disproportionate number of more demanding types than others around the country.[51] The district has been chronically short of the number of judges necessary to deal with its ever-increasing tasks.

Despite the rising caseload during the 1970s to the mid-1980s and despite a comparatively lower decline in terminations, the court has performed exceptionally. Perhaps this is best evidenced by the relatively greater decline in cases pending for the District in recent years (23%) compared to

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[50]*See* Exhibits B-1 through B-4, Appendix C: *Report of the Clerk on the Status of the Docket* (Apr. 29, 1991). These graphs illustrate comparative statistics for so-called Type 1 and Type 2 civil cases. Type 1 civil cases include government collection cases, social security appeals, prisoner civil rights lawsuits, habeas corpus petitions, bankruptcy appeals, land condemnation cases, and asbestos product liability actions. Type 2 cases include contract, civil rights, personal injury, ERISA, RICO, labor, tax, and securities cases. Exhibit B-1 reflects the District's civil filings as a percentage of Type 1 and 2 cases in comparison to national average and each division. Exhibits B-2 through B-4 reflect the civil filings by nature of suit for the District compared to the national average for each judge.

[51]In August of 1991, during the course of this analysis of the civil docket, the Panel on Multidistrict Litigation ordered all pending asbestos litigation nationwide to be consolidated in the federal district court for the Eastern District of Pennsylvania. The Southern District of Texas transferred its 512 asbestos cases, 368 of which were pending over three years. This represents 38.7% of the district's cases in that age category. *See* Computer Cases Pending Report (all cases filed on or before June 30, 1988, pending as of June 30, 1991). It should be noted that, while this action will have little impact on judicial resources, in that all asbestos product liability cases have been managed by a special master since 1985, these cases will remain a burden on the Clerk's office in the Southern District of Texas because of continued filing and docketing and additional status reporting responsibilities.

that for the nation as a whole (3.8%). And while the ratio of pending cases to terminations has remained high in the District compared to the nation and has increased in recent years, the court has made significant efforts to compensate for the crowded docket. Each judge in the District has annual closings consistently well above the national average.

The Clerk of the Court in his report aptly characterized the performance of the judges of the Southern District.

> The pending caseload per authorized judgeship has not increased; however, there has been an increase from 783 to 889 pending cases per actual judge representing an increase of 13.5% since 1987. It is interesting to note that the increase in the pending caseload per actual judge (13.5%) is not proportional to the increase in total filings per actual judge (28.9%). This phenomenon is explained by the herculean efforts of the active judges to dispose of cases as manifested in their exemplary case terminations per judge.[52]

### (b) Impact of New Legislation on the Civil Docket

In gazing out over the ocean of federal legislation and being asked to assess the impact of new federal legislation on the civil docket, the Advisory Group was reminded of the fisherman's prayer: "Oh Lord, thy sea is so vast and my boat is so small."

Unlike the *Criminal Docket Impact Subcommittee*, the *Civil Docket Assessment Subcommittee* was unable to isolate any particular federal legislation that had disproportionate impact on the Southern District civil docket. As previously mentioned, the district does have higher-than-national-averages of certain civil statutory actions: civil rights, RICO, tax, patent, and copyright cases. The higher civil rights filings most probably (though not exclusively) are the result of the large prisoner population in the jurisdiction. The prevalence of tax, patent, and copyright cases may be explained by Houston's role as a metropolitan commercial center. RICO cases may be accounted for by the disproportionate impact

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[52]*See* Appendix C: *Report of the Clerk on the Status of the Docket*, *id.* at 5. Exhibits D-1 through D-9 of the Clerk's report depict the pending civil cases by nature of suit for the district and each division in comparison to the national average for judge caseloads.

on Texas of the collapse of energy prices and financial institutions.

It is clear that federal legislation taken cumulatively over time has dramatically increased the burden on the civil docket. The Group endorses the Federal Court Study Committee recommendation that the judicial branch advise Congress on the effect of proposed legislation on the judiciary, as well as on "legislative drafting matters likely to lead to unnecessary litigation."[53] Matching resources to tasks in the future is crucial, if the problems created by overburdening the courts is not to recur or persist.

### B. Status of Delay and Cost Factors in the Southern District of Texas[54]

#### 1. Findings and Supporting Evidence Relating to Delay

In evaluating delay and cost factors in the Southern District of Texas, the Advisory Group (1) conducted a survey of 153 closed cases based on the model suggested by the Federal Judicial Center, with questionnaires sent to attorneys and their clients; (2) conducted a review of the docket sheets in the 153 case sample for evidence of factors contributing to excessive delay; (3) conducted a survey of a small sample of cases tried between January 1, 1991, and May 30, 1991, with questionnaires sent to approximately thirty lawyers involved in those trials; (4) interviewed the judges and magistrate

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[53]*See Report of the Federal Courts Study Committee, supra* n.1 at 89 ("An Office of Judicial Impact Assessment should be created in the judicial branch to advise Congress on, inter alia, the effect of proposed legislation on the judicial branch and legislative drafting matters likely to lead to unnecessary litigation."). In making this recommendation, the Committee stated: "The committee believes the judiciary should do more to assist Congress in assessing the impact of legislation on the courts and in calling its attention to problems in draft legislation that might cause unnecessary or unintended litigation." *See also Agenda for Civil Reform in America, supra* n.3 at 27 ("All proposed laws should undergo a 'litigation hazards' review to insure that poor drafting of legislation does not create unnecessary litigation").

[54]*See* 28 U.S.C. § 472(c)(1)(C), directing advisory groups to "identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation. . ."

judges; (5) consulted informally with practicing colleagues and discussed the issues in the Advisory Group; and (6) examined Administrative Office and court statistics relating to the docket.[55]

### (a) Attorney and Litigant Questionnaire Responses; Court Statistics

The attorney-litigant survey was valuable in giving the Group general data on the opinions of attorneys and litigants but was not designed to give valid statistical data on disposition.

There was a wide variation in the types of cases included in the survey. The most common were torts (15%), followed by breach of contract (11%), labor disputes (10%), "other statutes" (9%), personal injury (9%), and civil rights violations (9%). These cases comprised 63% of all cases in the sample.

Over 50% of the cases in the sample were disposed of through voluntary dismissal (53%). Nine percent went to trial, 8.6% were disposed of through summary judgment procedure, and 6.6% were remanded to state court.

The Clerk's assessment of the surveyed cases indicated that no continuances were granted in 72% of the cases. In nearly 13% of the cases one continuance was granted, in 5% two were granted, and in nearly 10% three or more continuances were granted.

The Advisory Group examined disposition time in relation to the nature of the suit and the method of disposition.[56]

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[55]The Advisory Group surveyed 153 closed cases. As of August 8, 1991, when the Clerk issued the Final Report on Attorney Questionnaire Responses, the court received 164 attorney responses, or 46.99% of the mailed surveys. The court received 95 litigant responses, or 18.38% of the mailed surveys. Because court records do not contain party addresses, the court directed attorneys in each case to forward the survey questionnaire to the litigants. A copy of the attorney-litigant questionnaire, a tabulation of the responses, and a copy of the judge interview protocol is on file in the Clerk's office.

[56]In order to facilitate analysis of disposition time, variables were collapsed into the following categories: disposition time: 0-11 months; 12-17 months; 18-23 months; 24-29 months; 30-35 months; and 36+ months. Types of cases

(continued...)

Not surprisingly, the more continuances the court granted, the longer the disposition time tended to be. Over seventy percent of cases involving no continuances were disposed of within twenty-three months. Over 50% of cases with no continuances granted were disposed of within seventeen months. On the contrary, 83% of cases involving the granting of two continuances required at least two years for disposition and 25% required over three years. Eighty-seven percent of the cases involving three or more continuances took over three years to disposition. However, the number of cases with two, three, or more continuances was relatively small, constituting approximately 4.5% of the sample. We have no basis to determine whether the continuances were the cause of delay in a given case--e.g., dilatory handling--or the effect of the peculiar difficulty or circumstances of the case.

Cases disposed of through summary judgment had a much lower disposition time. Seventy-seven percent were disposed of within two years. Cases that went to trial took longer. Seventy-one percent of cases that went to trial required between twenty-four and thirty-six months or more to disposition.

Cases that were remanded to the state court were disposed of quickly. Nearly seventy percent were disposed of within seventeen months. Cases disposed of through lack of prosecution, default, or judgment on pleadings were out of court quickly. The vast majority (85%) were disposed of within seventeen months. Again, it is important to note that these cases constituted only 31% of all cases. The most common method of disposition was voluntary dismissal, comprising nearly 54% of all dispositions. However, there was no relationship between this method and disposition time. Approximately 54% of the voluntary dismissal cases were disposed of within two years. The remaining 46% required more than two years.

The Advisory Group, through its questionnaire, attempted to gain rough data on the level of the court's active involvement in case management. In more than a quarter of the responses, attorneys indicated that minimal or no case

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[56](...continued)
were collapsed as follows: contract, torts, property; statutory actions; civil rights; labor; other category. Methods of disposition were categorized as follows: motion for summary judgment; trial; voluntary dismissal; settlement or agreed judgment; remanded to state or other transfer; lack of prosecution, default, or judgment on the pleadings; and other. The number of continuances granted included 1, 2, 3 or more.

management occurred. Slightly more than half the attorneys indicated that the level of case management was low or moderate. Taken together, almost 75% of the survey cases involved little or moderate court management. Approximately 15% of attorneys answered that the court used high or intensive case management techniques in their lawsuits.

The most commonly used case management technique was to set and enforce time limits on allowable discovery. This occurred in approximately half the cases. In approximately 46% of the sample, the judges held pretrial activities to a firm schedule and ruled promptly on pretrial motions. In about 30% of cases the judges narrowed issues through conference or other methods, and set firm and early trial dates. In just over one-fifth of the cases, the judges conducted or facilitated settlement discussions. Among the least used management techniques was referral of the case to alternative dispute resolution. In only approximately 4% of cases did judges refer the litigation to other dispute resolution auspices.

The Advisory Group found some "negative" management statistics equally interesting. For example, about half the respondents indicated that the court did not conduct or facilitate settlement discussions or narrow issues through conferences or other methods. In about 40% of cases, the court failed to set an early and firm trial date. In approximately 27% of cases, the judges did not hold pretrial activities to a firm schedule or rule promptly on pretrial motions. About a fifth of the responding attorneys indicated that the court had not set and enforced time limits on allowable discovery. And in about 12% of cases, the lawyers believed that the court had not exerted firm control over the trial itself.

Finally, the two most commonly perceived reasons for a long disposition time were the late entry, or non-entry, of scheduling orders and the court's failure to rule promptly on motions. The evaluation of the docket sheets revealed that the scheduling order problem was evident in twenty-one cases, and the delay in ruling on motions evident in twenty cases. Moreover, delay in ruling on motions was a problem in nine cases when multiple reasons existed for delay, although it was not the primary reason. The docket sheets suggested that a problem in seventeen cases was "no proper case management." Other reasons for delay noted were "the court is mainly a criminal court"; "the case was transferred between judges"; "failure to exercise judicial control"; and finally "too many continuances."

The Advisory Group additionally collected information from the sample on the numbers of depositions and days spent

in depositions, compiled by case types and duration. For all sample cases, the lawyers took an average six depositions and spent an average seven days taking depositions. The greatest average number of depositions were in contract cases lasting thirty months or more.[57]

### (b) Attorney Trial Questionnaire

The *Subcommittee on Trial Procedure* investigated delay factors relating exclusively to the trial portion of litigation. To accomplish this, the Clerk's office developed a small sample of ten cases tried between January 1, 1991, and May 31, 1991. These cases varied by the nature of the lawsuit and complexity. Because each case involved multiple attorneys, the subcommittee sent surveys to a total thirty-three attorneys involved in these trials and received fifteen responses.[58]

The survey sought to elicit information concerning the length of trial; numbers and duration of depositions; voir dire; the pretrial hearings relating to evidence and the conduct of the trial; the use of witnesses, including expert witnesses; and the jury charge. The survey also elicited the attorneys' subjective assessment whether the trial took longer than necessary to complete.

The subcommittee learned that in a majority of the cases for which attorneys responded, the court had used a questionnaire during jury selection. The lawyers universally viewed these questionnaires as helpful. Five of seven respondents expressed a desire to increase attorney participation in the voir dire process. Based on the limited response in these cases, the jury selection process does not appear to be causing problems; all the attorneys indicated that the jury selection process did not create undue delay during trial.

In about half the responses the court held a pretrial hearing to determine the admissibility of evidence; in all cases except one, exhibits were pre-marked before trial. Twelve of fourteen attorneys responded that they had adequate

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[57]The average number of depositions in contract cases lasting 30 months or more was 10.8; the average days spent taking these depositions was 16.5. *See Final Report on Attorney Questionnaire Responses* (Aug. 8, 1991), on file in the Clerk's office.

[58]Since several of the cases were non-jury cases, many of the questions were inapplicable. Also, several respondents failed to answer all the questions.

time to present their case. Even in cases where the court imposed time limits on counsel, these time limits did not present a problem for case presentation. Eleven of twelve responding attorneys thought that expert testimony was not repetitive.

The subcommittee's survey concededly was an unscientific and impressionistic review of recent trials in the district. Nonetheless, the subcommittee reported its sense that litigating attorneys do not view the trial process as a major cause of delay in civil litigation. The survey response and other fact finding efforts convinced the subcommittee that there was overall satisfaction with trial procedure. The reason most cited for delay during civil trials was interruptions caused by the criminal docket.

The subcommittee also examined Administrative Office statistics for the district relating to the number and length of trials. During the last two years, the district has experienced more trials of longer duration, consuming a greater total number of trial days. For the statistical year ending June 30, 1989, the district conducted 314 trials taking an estimated total 699 days. The average number of days per trial was 1.67. For the twelve-month period ending June 30, 1990, the court conducted 410 trials over 1,007 days, for an average of 1.83 days per trial.

A substantial percentage of cases are tried in one day. For example, in 1989, 56% of cases tried took one day and in 1990 this statistic rose to 62%. Also, the number and percentage of longer trials decreased. In 1989, 25% of trials took two or three days, while 18% of trials took four or more days. In 1990, 21% of trials took two or three days, while 16% took four or more days. In both years, over 80% of cases were tried in three or fewer days. The district does not appear to labor under the burden of a higher percentage of egregiously lengthy trials. In both years, only 1% of cases tried took twenty or more days, and just over 2% of cases tried took from ten to nineteen days.

### (c) Judicial Officer Responses

In order to further identify and assess the factors contributing to cost and delay in civil litigation, the Advisory Group sought the views of the district's judicial officers. Currently there are twenty-five judges, magistrate judges, and senior-status judges in the Southern District of Texas. Advisory Group members interviewed all the judicial officers during May 1991. Advisory Group members conducted these interviews according to a uniform interview protocol. (On file in the Clerk's office.)

Advisory Group members sought the judges' views in four broad areas: (1) the judge's analysis of the court's procedures, (2) the judge's assessment of how litigation practices and procedures contribute to delay and expense, and what might be done to improve the situation, (3) the impact of new legislation or legislative inaction, and (4) the adequacy of personnel and facilities.

In particular, Advisory Group members solicited information concerning the current status of each judge's docket; problem areas with that docket; causes of cost and delay; what the judge has done to cut cost and delay; what steps the judge believed would lessen delay and expense; what procedures the judge had tried and rejected; and how the judge used magistrates and ADR procedures.

As an initial matter, a number of judges pointed out that when they were first appointed to the bench their dockets had a caseload in the range of 800 - 900 cases, but that they had been able to reduce that load to approximately 600 cases.[59] Often the judges identified case management techniques they used to reduce their backlog. Those judges nevertheless expressed concern at the intractability of the current caseload. Many judges articulated the somewhat frustrated sentiment that while they currently work long and hard hours, they felt they would not incrementally reduce their caseload by working even longer and harder hours.

One judge made the cautionary point that court statistics often do not reflect the realities of the time and preparation needed to dispose of the caseload. In particular, this judge cited the example of probation revocation and supervised-release hearings. The judge suggested that these proceedings often require as much attorney, witness, and court time as do prisoner claims, but the probation and supervised release proceedings do not qualify as a court statistic.

Four major themes dominated the judges' comments concerning factors relating to delay. Not surprisingly, almost every judge pointed to the impact of the criminal docket on the civil docket. Second, many of the judges raised concerns about inadequate court resources and the concomitant effect that the lack of resources had on their ability to deliver civil justice. Third, many judges identified problematic federal legislation as a factor contributing to cost and delay in the district. And fourth, many Houston judges reiterated the theme that assigning each judge a magistrate would greatly enhance their efficiency. Some magistrates are now perceived

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[59]Other judges reported caseloads in the 600 case range, reduced during their tenure to a current 400 range.

as under-utilized or undervalued. Some judges suggested that having to share magistrates creates or contributes to this situation because a judge cannot depend on the availability of the magistrate at any given time.

In addition to these broad themes, the judges pointed to a number of particular problems or procedures in their courts, or made generalized statements about lawyering practices, such as abusive discovery. Some judicial officers also identified and distinguished delay factors by regional differences. These themes and miscellaneous observations are discussed below.

*Impact of the Criminal Docket on the Civil Docket.* Almost universally, the judges stated that the criminal docket in the Southern District of Texas delays the civil docket. One judge suggested that the dockets in the district were unmanageable because of the sheer weight and numbers of criminal cases, coupled with the requirements of the Speedy Trial Act, which "bump" civil cases in favor of criminal trials. The judges recited the demographic factors that exist in southern Texas and contribute to the overwhelming problem of the criminal docket. The judges also pointed to a collection of federal statutes they believed had complicated criminal procedure, used more judicial resources, and therefore contributed to further delay on the civil docket. Among problematic changes in criminal procedure the judges identified the new mandatory minimum sentencing requirements and hearings for revocation of probation and supervised release. Some judges said that more of their time is now consumed by reviewing pre-sentencing investigation reports and sentencing proceedings. At least one judge thought a disproportionate amount of judge time was consumed by excessive motion practice in criminal cases.

Regional differences among the divisions surfaced in discussions with the judges. One judge stated that the Corpus Christi criminal caseload drives the civil docket, and that until the checkpoint cases originating in Brooks and Kenedy Counties are reassigned to the new federal judges in the Valley, the civil cases cannot be handled timely. This judge stated that the linchpin to reduction of civil case delay is seating those judges and transferring criminal cases to them. Another judge also opined that in view of regional differences, it was important that the court not impose "a Laredo solution to a Houston problem, or a Houston solution to a Laredo problem."

*Inadequate Court Resources.* Almost all the judges in the Southern District raised concerns about the chronic shortage of basic court resources, ranging from insufficient personnel

to inadequate space. The judges identified the lack of resources as a factor contributing to delay: inadequate court resources frustrate the ability of judges to carry out their work as easily and expeditiously as they might with enhanced resources.

First and foremost, the judges identified the chronic judicial understaffing, coupled with the failure of the district's judicial nominees to be moved forward in the appointment process, as the most compelling personnel shortage contributing to docket congestion. The judges noted that the district had been adversely affected by the long duration of the judicial vacancies. Added to this, the judges listed other personnel shortages: insufficient magistrates, law clerks, secretaries, courtroom attendants, bailiffs, file clerks, and docket clerks. Currently the courtroom clerk is often not in the courtroom but instead is outside dealing with pending files and communicating with attorneys. Thus, judges who do not have bailiffs must swear in their own witnesses and even mark and handle their own exhibits. Some judges urged better training at minor functional staff levels. Some judges thought their courtrooms and office space inadequate; and more than one magistrate judge believed that their potential effectiveness was hampered by crowded, unattractive quarters. As one magistrate put it, parties were often "turned off" by having their judicial proceeding conducted in a cramped cubbyhole of a cubicle.

*Problematic Federal Legislation.* A number of the judges identified problematic federal legislation as a contributing factor to civil justice delay in the district. This assessment took many forms. As previously noted, the judges almost universally commented on recent changes in criminal substantive and procedural law and the impact of this legislation on the criminal and civil dockets. But further, a number of judges expressed apprehension about a perceived trend in Congress to federalize all crimes without adequate thought being given to the impact of such legislation on the federal judiciary. Some judges noted that they were seeing more claims under FIRREA and ERISA that might otherwise be in state court. A number of judges noted concern about the increased caseload that would be brought about by the ongoing investigation into the savings and loan crisis in Texas.

Some of the judges had generalized comments about "inartfully drawn" legislation. Illustrations were the RICO statute and the failure of Congress to provide a clear definition of proscribed insider trading under securities laws. In a similar vein, the judge pointed to the failure of the Texas legislature to provide a clear statement of proscribed activities under the Texas Deceptive Trade Practices

Act, which created interpretative difficulties for judges sitting in federal diversity jurisdiction.

*Under-Utilization of Magistrate Judges.* Most of the Houston judges, where magistrates are shared by two judges, agreed that a factor contributing to delay in the district was either under-utilization, or under-valuing, the district's magistrate judges. Some of the judges work extensively with their assigned magistrates and where an efficient working relationship has been established, these judges typically favor enhanced responsibility for magistrate judges. A significant number of the district judges favor increasing the number of magistrates to permit every judge to have an assigned magistrate.

A number of judges suggested enhancing magistrates' roles by adjusting the docket to permit more routine case assignment to magistrates. One judge suggested that the court might consider a "magistrate's docket." Another judge noted that he believed that there was insufficient sequencing of projects for the magistrates. Expanding the role of magistrates was a uniform theme across the district. One judge, who spoke at length about the magistrates, suggested that magistrates should have cases assigned to them up to and, with the consent of the parties, through trial. This judge thought it was inefficient to assign a motion to compel discovery, for example, to a magistrate thereby requiring the magistrate to "read a convoluted file," and then prevent that magistrate from making other rulings in the case once the magistrate developed a "learning curve" on the case. The judge added that efficiency would be enhanced if magistrates were permitted to rule on pretrial motions and discovery schedules up to trial. The judge also suggested that magistrates could easily be assigned twenty-five cases in order to dilute the motion practice requirements on the district judges.[60]

While there seemed to be a widespread sentiment that magistrates could be used more effectively to help reduce delay, the judges recognized that some of their colleagues do not make heavy use of their magistrates. One judge who felt less sanguine about his experience with magistrates suggested

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[60]This judge noted that in two jurisdictions (Oregon and Southern Mississippi) magistrates are included in the initial random draw for judges when a case is filed. Frequently, once a magistrate has effectively handled pretrial requirements and the parties are comfortable with the magistrate's abilities and knowledge of the case, the parties will then consent to have the matter tried by a magistrate rather than a district judge.

that the magistrates need supervision and that over time this judge had reduced the number of cases the judge referred to the assigned magistrate.

The magistrate judges universally expressed the belief that they could and should be assigned more responsibility. Most of the magistrates indicated a good working relationship with their judges, but a few felt under-valued. A common concern among the magistrate judges was a perception of inadequate, second-rate physical facilities. A number of magistrates thought that their usefulness was diminished by poor facilities and that parties who might otherwise consent to a magistrate are dissuaded when they encounter crowded conference cubicles and small, cramped courtrooms.

*Other Factors Contributing to Delay.* In addition to these four broad, recurring themes, the judges raised a number of discrete points relating to delay. In some instances more than one judge identified the same problem, but in many others a judge raised an issue peculiar to that judge's experience.

*Lack of Uniform Case Management Procedures.* One judge noted that the district had no uniform case management rules and that the Houston division's eight judges--soon to be ten--did not follow a common case management method. The judge pointed out that each judge had an individual method for scheduling cases, calling cases for trial, setting hearings, and courtroom operations. Therefore, a trial lawyer has to learn eight different ways of preparing for settlement or trial. The judge thought this lack of uniform standards created a problem for lawyers and litigants. Other judges noted this lack of uniform rules and procedures in the district.

On the one hand, some judges were dubious about the imposition of a uniform set of procedural rules. For example, one judge stated that docket rules and judicially determined docket control orders were counterproductive. This judge believed that status conferences with the parties should be used to develop docket control orders by mutual consent. Another judge stated that there simply were too many cases for the judges to conduct Rule 16 pretrial conferences routinely.

On the other hand, some judges expressed willingness to try a new system of more uniform procedures. A judge indicated that he thought there were essentially two types of cases: the simple and the complex. He ventured that the court should distinguish these two case types and manage them accordingly. Another judge favored early hearings to encourage settlement.

As a corollary to case management, one judge noted that Congressional "institutionalization and bureaucratization" of administrative process was counterproductive to efficient case management. For illustration, the judge pointed to the separation of the Department of Pretrial Services from the Probation Department.

*Motions Practice; Pleadings.* Some judges suggested that oral motions practice was very time consuming and that the judges should be able to dispose of more motions on briefs. Another judge stated that summary judgment motions take a great deal of time and contribute to delay on the docket. Some magistrate judges thought that another contributing factor was the requirement that they prepare written memoranda for the disposition of motions the judges assign to them.

One judge thought a factor contributing to delay was the federal rule permitting "vague notice pleadings." This judge thought that emphasizing fact pleadings would accelerate the initial and discovery stages of a case.

Related somewhat to motions practice, one judge thought that a further factor contributing to delay was the use and misuse of venue rules. The judge stated that attorneys often file in an inappropriate district when the case belongs elsewhere. This improper venue selection then necessitates a ruling on a venue motion and transfer of the case, which all contribute to delay.

Moreover, another judge pointed to a practice of judges taking cases under advisement, and then not ruling for substantial periods. In this judge's view, some judges in the district did not want to look at some cases because they were "unduly complex or unpleasant."

*Discovery Abuse.* A number of the judges offered generalized comments on discovery abuse and, as one judge put it, "a federal judiciary that permits unlimited discovery." Many judges acknowledged that some lawyers do engage in discovery abuse. One judge noted that in complex cases there tend to be too many depositions that go on for too long. None of the judges singled out discovery problems as a factor contributing to delay on their own docket. A substantial number of the judges believed that parties ought to work out discovery among themselves, without court interference. One judge stated that discovery is a "bog down," but a "necessary evil."

*Alternative Dispute Resolution Referral.* While employed by some judges, ADR referral is not a general practice in the Southern District of Texas. The judges were split concerning whether failure to use alternative dispute resolution was a

contributing factor to delay on the docket. Some judges thought that more cases ought to be referred to ADR; other judges expressed skepticism. Many judges indicated a lack of familiarity with all available ADR techniques but expressed a willingness to learn more about ADR referrals. Many judges strongly urged that ADR not be used at the expense of litigants' jury trial rights.

*Lack of Communication Among Judges.* One judge identified, as an element contributing to delay on the docket, the simple fact that the judges in the district "don't understand or appreciate what other judges are doing."

*Non-Problems.* Although the judges identified a wide variety of factors contributing to delay, the judges thought that the actual trial of a case was not a major cause of delay in the civil docket.

### 2. Findings and Supporting Evidence Relating to Cost

The Advisory Group attempted to assess the "principal causes of cost"[61] in the district's civil litigation, but a methodological caution is appropriate. In performing this task, the Advisory Group felt particularly constrained by time, resources, and lack of data. The Group used the attorney-litigant questionnaire as its means of collecting information relating to cost but recognized the limitations of this survey instrument as a sophisticated social science tool.[62] In particular, the survey was not calculated to

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[61]This was part of the Advisory group's statutory charge. *See* 28 U.S.C. § 472(c)(1)(C) & (D).

[62]The Advisory Group quickly encountered methodological problems in data collection and analysis, especially relating to assessing cost factors. There were 153 cases in the survey sample, but questionnaires were sent to a larger number of attorneys who were counsel in these cases. In some instances, multiple attorneys on a particular case responded to the questionnaire, but for some cases there was no attorney response. Thus, the court received 164 responses to the set of questions relating to costs. However, the court received only 115 complete responses to question 10 of the survey, giving rise to inconsistent percentage tallies for average costs to clients for attorney fees. Other such inconsistencies and anomalies were apparent to the Advisory Group, generating great reluctance to make any definitive statements or conclusions about survey data relating to cost.

permit Advisory Groups to draw causal inferences between the data collected and the "principal causes of cost."

The Advisory Group recognizes that Congress's intention in requesting that the Group assess the costs of litigation in the district was to focus attention on questions relating to how the current civil justice system compensates parties; how much recovery actually reaches parties' pockets; the public costs of litigation; and the transaction costs borne by litigants. These are complex questions that have been studied in depth by the Rand Institute for Civil Justice and the Federal Judicial Center, as well as other institutional law reform organizations.[63]

Of 164 attorneys who responded to the Advisory Group's questions relating to the costs of litigation in their case, attorneys' fees averaged approximately 64% of total litigation costs for clients. By percentage estimates, the attorneys identified litigation activities that accounted for costs. The lawyers attributed the highest percentage of costs to discovery activities, including discovery motions. The second highest litigation cost was the lawyer's preliminary investigation of the case, including drafting the complaint or answer. The third most "costly" lawyering activity was motions practice, including summary judgments and temporary restraining orders. This was followed by cost involved in settlement negotiations or other stipulated disposition. Finally, status conferences, actual trial, and "other" activities accounted for very small percentages of total litigation costs.

Of the 164 attorneys who responded, 107 used an hourly rate fee arrangement. Twenty-eight reported contingency fee arrangements, and twenty-three identified "other fee arrangements." Only three lawyers reported a set fee or "hourly-rate-with maximums" fee arrangement. Furthermore, of this same sample, 114 responded that the fees and costs the client incurred were "about right"; while twenty-one thought

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[63]*See, e.g.*, J. Kakalik & N. Pace, *Costs and Compensation Paid in Tort Litigation* (Rand, The Institute for Civil Justice 1986); Kakalik, *et al.*, *Costs of Asbestos Litigation* (Rand, The Institute for Civil Justice 1983); J. Kakalik & A. Robyn, *Costs of the Civil Justice System: Court Expenditures for Processing Tort Cases* (Rand, The Institute for Civil Justice 1982); L. Levin & D. Colliers, *Containing the Cost of Litigation*, 37 Rutgers L. Rev. 219 (1985).

that fees and costs were "much too high" and an equal number thought that costs and fees were "slightly too high."[64]

Litigants also offered some raw data relating to their assessment of the costs of litigation. The Advisory Committee received 95 responses from clients, representing approximately an 18% return of mailed surveys. Of this group, about 58% were defendants, 39% were plaintiffs, and 3% did not indicate their litigation alignment.

Approximately 57% of litigants answered that the fee arrangement resulted in a reasonable fee being paid to the attorney; 16% thought not; and 17% responded that they did not know. About half the clients thought that the costs to the client were "about right," while 32% answered that the costs were "much too high," and 13% thought costs were "slightly too high." Defendants were more likely than plaintiffs to state that the fee arrangement resulted in a reasonable fee.

The Advisory Group does not have an adequate statistical base to draw conclusions relating to the costs of litigation in the district. The Advisory Group had insufficient evidence to conclude that as a general proposition over the diverse spectrum of cases on the docket that the costs of litigation are too high, slightly too high, or about right. It was impossible to draw any correlational relationships between the available data and the "principal causes of cost." It is clear, however, that many types of litigation are expensive, and there is extensive anecdotal evidence that particular cases were handled in an inefficient or excessively costly fashion.

### 3. Principal Causes of Delay and Cost

The Advisory Group, in its attorney-litigant questionnaire, sought information concerning the principal causes of delay. In those instances where a case took longer than the attorney believed necessary, the attorney was asked to identify those factors which contributed to delay. Twenty-seven percent of responding attorneys stated that the backlog of cases on the court's calendar was the principal cause of delay in the case. Thirteen percent identified dilatory actions by counsel, and twelve percent noted the failure of the court to rule promptly on motions. Approximately ten percent of attorneys thought that inadequate case management and dilatory actions by litigants contributed to delay in the case. No attorneys identified excessive case management as a factor contributing to delay.

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[64]Eight lawyers had other responses outside the survey categories.

With regard to the entire 153 case sample, a Clerk's office examination of the docket sheets in these cases sought to identify the principal causes of delay by reviewing actions by the lawyers and parties during the course of the litigation. In particular, the Clerk's office searched for patterns of motion practice and scheduling orders; transfer of the case among courts or judges; and other evidence of case management, such as setting of firm trial dates. The Clerk's review of the docket sheets identified two significant causes of delay as the court's failure to rule promptly on motions and insufficient case management.[65] Poor scheduling contributed to delay in approximately 16% of the cases, and insufficient judicial involvement was a factor in approximately 10% of cases. In about 9% of the sample, delay was caused by too many continuances or transfer of the case among judges due to vacancies, recusals, and new judges. In at least 6% of cases, the parties contributed to excessive delay through dilatory actions.

The Advisory Group's questionnaire also elicited narrative comments from the attorneys on the subject of delay. Not surprisingly, many of these narrative comments paralleled those of the district judges. In their comments, many attorneys complained about the backlog on the docket and identified this as the principal cause of delay. Repeatedly, the attorneys recognized that the principal cause of delay in the Southern District of Texas was the crowded criminal docket. One lawyer simply stated that there are too many drug cases on the docket. The lawyers also noted the various personnel shortages in the district and recommended expedited filling of bench vacancies. Some attorneys advocated an

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[65]*See Southern District of Texas Advisory Group Review of Case Docket Sheets (153 Cases) From Closed Case Sampling For the Year Ending May 31, 1991* (on file in the Clerk's office). The percentage of cases in which motion disposition and insufficient case management was a factor contributing to delay was 21.57%. In 22.22% of the sample, there was no comment on the case, or the disposition time was thought acceptable. In 2.61% of the cases, delay was caused by special circumstances (for example, a group of asbestos cases).

Where quick disposition was evident, this was traceable to good case management (3.27% of the sample); expedited ruling on motions (1.96% of the sample); referral to a magistrate judge (0.65% of the sample); and actions by the parties (0.65% of the sample).

increased number of judges and enhanced magistrate intervention in cases.

A repeated theme related to motions practice. Many lawyers thought excessive motions practice was a principal cause of delay and stated that motions practice ought to be limited. One lawyer stated that the judges ought to eliminate frivolous motions on issues without substance. Moreover, one lawyer thought there were excessive briefing requirements on pretrial orders and suggested that the court reduce these briefing requirements. A widespread, repeated sentiment was that judges do not rule quickly on substantive motions and that the lawyers and parties need prompt rulings on motions. In addition, some attorneys felt that they need better access to the court concerning pending motions. A few attorneys suggested using telephone conferencing for status and minor motion conferences. Another lawyer indicated that a principal cause of delay was that too many multi-theory or multi-claim cases are allowed to survive motions for partial summary judgment. The lawyer believed that cases could be simplified and expedited by dismissing insupportable claims earlier in the litigation.

A number of the lawyers commented on aspects of pretrial procedure. Some attorneys suggested that the judges ought to limit discovery further and impose discovery sanctions for discovery abuse. One attorney discussed the need for firm pretrial discovery orders, firm deposition schedules, and firm pretrial orders. This attorney stated that the key element in dealing with excessive delay is discovery management. Other attorneys recommended the setting of firm trial dates, while some advocated the court hold early settlement conferences. A number of attorneys believed that their cases could have been resolved earlier through court-ordered mediation or arbitration. One lawyer noted the practice of cases being transferred because of removal or judicial personnel problems. This lawyer urged that complicated cases ought to remain with one judge throughout the course of litigation.

Finally, some attorneys thought that the court ought to expedite the trial of cases which are ready for trial. A few lawyers urged earlier trial dates, with no postponements. And some attorneys thought a principal cause of delay was the expansive scope of federal jurisdiction, and therefore recommended that Congress further restrict federal jurisdiction. The judges who spoke about federal jurisdiction, in contrast, uniformly believed that federal diversity jurisdiction ought not to be further restricted or abolished. Many judges indicated that they appreciated the range of cases that federal diversity jurisdiction brought to the court.

## IV. ADVISORY GROUP RECOMMENDATIONS AND BASIS FOR THOSE RECOMMENDATIONS

### A. Introduction

The Civil Justice Reform Act requires that the Advisory Group, in its Report to the court, "recommend[ed] measures, rules, and programs" for its civil justice expense and delay reduction plan.[66] In carrying out this task, the statute requires the Advisory Group to explain how the "recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys,"[67] and how the recommendations "take into account the particular needs and circumstances of the district court, litigants in such court, and litigants' attorneys."[68] Moreover, the Advisory Groups were asked to explain how the Group's recommendations include, as the statute requires of pilot courts, the six "principles and guidelines of litigation management and cost and delay reduction" contained in the Civil Justice Reform Act.[69] Finally, the Advisory Group is required to describe how the Group's proposed *Plan* complies with the statute's requirement that the Group considered the statute's techniques of litigation management and cost and delay reduction.[70] The Advisory Group's proposed measures, rules, and programs are set forth in section B.

The Advisory Group has organized this section of its *Report* by listing its proposals, the basis for each recommendation, and how the recommendation comports with the statute's various requirements. The Advisory Group believes that presentation of its proposals is enhanced if each proposal is followed with an explanation of the proposal's basis and a description of how the proposal comports with the statute.

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[66] *See* 28 U.S.C. § 472(b)(3).

[67] *Id.*, § 472(c)(3).

[68] *Id.*, § 472(c)(2).

[69] *Id.*, § 473(a).

[70] *Id.*, § 472(b)(4).

## B. Recommended Measures, Rules, and Programs

### 1. Differentiated Case Management

#### (a) Proposed Measure

The Advisory Group endorses the concept of differential case management. Differential case management is defined as the process of determining the appropriate level of court and attorney attention that will move a case to disposition in a just and efficient manner. It involves creation of a predictable system that sets expectations for lawyers, litigants, and the court and helps assure that judicial officers take required action to bring about an early and just disposition of civil litigation.

#### (1) Differentiated Case Tracking

Prior to enactment of the Judicial Improvements Act of 1990, the Southern District of Texas had a partial differential case management system in place.[71] The Advisory Group recommends expanding the existing system to permit further tracking of cases by case types and levels of case complexity.[72]

To implement a differential case management system, the Advisory Group recommends adoption of a new administrative procedure to effectuate the district's system. The Advisory Group recommends that the Clerk's office enter a form order requiring a Discovery/Case Management Plan in each new case filed, excluding prisoner civil rights and habeas corpus cases, asbestos cases, social security appeals, bankruptcy and administrative agency appeals. This form order would direct attorneys to meet together within 140 days of filing a complaint or notice of removal and to prepare a case management/discovery plan.

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[71] *See* Appendix E, Chart, Current Differential Case Management Practice in the Southern District of Texas, from Findings and Recommendations of the Subcommittee on Court Resources, Advisory Group for the Southern District of Texas (Aug. 1991). (The entire subcommittee report is on file in the Clerk's office.)

[72] *See id.*, Proposed Additional Differential Case Management Practices in the Southern District of Texas. This flow chart, prepared by the Clerk's office, sets forth the Advisory Group's recommended scheme for differential case management for the district.

### (2) Elements of the Differentiated Management System

In addition to recommending, at the administrative level, a new differential case management order to implement the system, the Advisory Group identified certain fundamental elements of an effective case management system:

**Court Supervision of Case Progress:** This includes the early examination of cases and determination of an appropriate case management track followed by continued supervision and adjustment in the case progress. This allows early court assessment of each case and screening for levels of complexity based on established criteria.

**Judicial Leadership and Commitment:** The Advisory Group believes that the development and adoption of a case management process that the lawyers, judges, and litigants understand and accept entails judicial leadership in both adopting and implementing that plan.

**Communication With the Bar:** Implementation of an effective system of differentiated case management will involve enhanced communication with attorneys involved in a case. This communication is important to assist the court in identifying management problems and to facilitate steady case progress. Increased communication will further facilitate enforcement of time limitations and regulate motion practice.

**Case Flow Information System:** The Advisory Group concluded that the court needs to develop an effective case flow information system that will generate the necessary reports to allow judicial evaluation of each case on the docket. Such a system will permit the continuous court monitoring of case progress and adherence to deadlines.

**Accurate Trial Scheduling; Firm Trial Dates:** The Advisory Group concluded that the concept of differentiated case management included accurate scheduling of trials, with date certainty. Such scheduling is primarily a case management requirement that ensures court supervision and control of continuances. Such scheduling should include time limitations for litigation events, tailored for each case management track. Given the median-time-to disposition of twenty-three months that currently exists for cases in the district which already strains current resources, the Advisory Group concluded it was not feasible to recommend a blanket rule requiring a firm trial date for all cases within eighteen

months of filing a complaint.[73] However, the Advisory Group endorses and recommends that, in implementing a differentiated case management plan, the court include a requirement of an eighteen month firm trial date for case tracks where this is both appropriate and feasible.[74]

### (b) Significant Contributions and Particular Needs

The effective development and institution of a sophisticated system of differential case management in the Southern District contemplates significant contributions from lawyers, litigants, judicial officers, and support personnel. Lawyers must be educated concerning the new system of case tracking and must assist in facilitating case management through enhanced communication with the court. Litigants must be educated concerning the system, the implications of differential tracking, and of the possibility of referral to a magistrate or to alternative dispute resolution under the proposed local ADR rule. The judges need to make a commitment to assist in developing and implementing the program. Support personnel, chiefly through the auspices of the Clerk's office, will contribute through administrative supervision of the new differential case management system.

Differential case management should help to meet the particular need in the district to more effectively identify and segregate simple and complex cases and to expedite disposition of civil litigation through more applied case management techniques. In interviews and questionnaire responses, lawyers, litigants, and judicial officers commonly suggested that a lack of sufficient case management as one of the principal causes of delay in the district. The Advisory Group anticipates that an effectively designed and implemented differential case management system will help to meet this need.

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[73] *See* 28 U.S.C. § 473(a)(2)(B).

[74] *See id.* The Advisory Group contemplates that the differential case management system the district court formulates will comply with the requirements of 28 U.S.C. § 473(a)(2)(B)(i) and (ii) that a judicial officer certify those cases in which a firm trial date cannot be set within eighteen months from complaint either because of complexity of the case or the number and complexity of pending criminal cases. In the instance of the Southern District of Texas docket, the second condition should be especially easy for the court to certify.

### (c) Compliance With the Statute

The Advisory Group's proposal for differential case management contemplates instituting a system for classifying cases by tracks, by nature of the suit, and the level of complexity. The differential case management system also contemplates applied case management techniques during the course of the litigation, including enhanced supervision of scheduling, discovery, and motions practice, discussed below.

The proposed differential case management system complies with various sections of the statute relating to the content of a civil justice expense and delay reduction plan.[75] In particular, the Advisory Group's proposal implements the specific statutory recommendations for differential treatment of civil cases[76] and for the early and ongoing control of the pretrial process through the involvement of a judicial officer in assessing and planning the progress of a case.[77] The recommended new form order requiring a discovery/case management plan is an example of this compliance. The Advisory Group's differential case management system also satisfies the statute's requirement for early and firm trial dates; the Group's plan requires this in categories of cases where feasible, and for judicial certification where this is not feasible.[78]

## 2. Court Resources

The Civil Justice Reform Act requires that Advisory Group's expense and delay reduction plan include a provision for systematic, differential case management.[79] The statute, however, also provides that such differential case management plans be tailored, among other things, to the "*resources required and available for the preparation and disposition of the case.*"[80]

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[75]*See* 28 U.S.C. § 473(a).

[76]*Id.* § 473(a)(1).

[77]Id. § 473(a)(2)(A).

[78]*Id.* § 473(a)(2)(B)(i) & (ii).

[79]*Id.* § 473(a).

[80]*Id.* § 473(a)(1) (emphasis added).

The Advisory Group, in recognition of this statutory directive, concluded that effective implementation of a differential case management system in the district will require, in addition to the education of participants, the commitment of substantial court resources. Thus, it is essential that the district have the necessary support staff to manage, administer, and perform the fundamental ministerial functions in effective case flow management. The best plans for effective case management will be of little value without the resources to implement and execute the plans.

### (a) Proposed Measures

The Advisory Group's *Subcommittee on Court Resources* identified those resource requirements in its *Report*.[81] The Advisory Group considered these recommendations for enhanced resources and endorses the following recommendations:

#### (1) Staff Attorneys

Currently the Southern District of Texas operates a program known as the *Pro Se* Attorney Program. Two attorneys and their secretary are part of the Clerk's staff and this unit supports court management of prisoner civil litigation. The unit, under the court's direction, designs, implements, and expedites procedures used to screen and file prisoners' cases. The attorneys clarify factual and jurisdictional bases for prisoner complaints or petitions. This assists the court in taking prompt and appropriate action in these cases. The initial screening, contact with the *pro se* litigant, and recommendation to the court results in 85% of all such matters being disposed of prior to pretrial hearings. The effectiveness of this *pro se* screening is reflected in a well-managed *pro se* docket.

The Advisory Group recommends that the use of staff attorneys be expanded to effectuate the district's differential case management system. The Advisory Group anticipates that the Clerk's office will need three staff attorneys for initial review of case filings leading to the efficient disposition of certain categories of cases: for example, removed cases, social security, bankruptcy appeals, *pro se* plaintiffs, certain agency actions, and jurisdictional designations. These staff attorneys would be located in the Houston division, but would handle case filings for the entire

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[81]This Report contains graphs, flow charts, and statistics contrasting the existing system in the district with the proposed system. (On file with the Clerk's office.)

district. The staff attorneys, though located in the Clerk's office and supervised by the Clerk, would serve the judges assigned to cases. It is anticipated that the staff attorneys, therefore, would function as supplemental law clerks to the judges and enhance and relieve the judges' current staff of law clerks.

The staff attorneys would need two legal secretaries to manage the volume of paperwork associated with implementation of the differential case management plan. These additional legal secretaries would also serve as an overload secretarial pool, would relieve overflow work from judges' chambers during critical periods, and would have flexible hours to meet court needs.

### (2) Magistrate Judges

Based on workload statistics and responses from judges, magistrate judges, and lawyers, the Advisory Group concluded that the division offices, where each judge currently is assigned a magistrate, effectively use their magistrates. The Advisory Group also observed that procedures in the Houston division did not permit or encourage consistent, optimum use of magistrate judges. The Advisory Group further notes the repeated finding that the role of magistrate judges in this district should be enhanced.

The Advisory Group, therefore, recommends that the Houston division adopt a policy in which each judge will assign five to ten percent of that judge's new case filings to the judge's assigned magistrate. The magistrate would handle all pretrial responsibilities in the case and, if the parties consent, try the case. In assigning magistrate judges civil cases, the court should consider the total workload of each magistrate judge--including the criminal docket, civil trials, scheduling conferences, and other assigned tasks. However, the court should endeavor at all times to assign each magistrate judge approximately fifty civil cases under the magistrate's management.

### (3) Courtroom Attendants

Presently, each judge is assigned only one courtroom deputy. That deputy must manage and calendar cases, ensure that motions and petitions are processed efficiently, and perform all courtroom support functions. In addition, the courtroom deputy serves as liaison with the attorneys of record in cases assigned to the judge's docket. Therefore, as previously noted, a busy trial judge must either choose to have sufficient support in the courtroom during trial or allow the courtroom deputy to leave in order to perform all out-of-court administrative functions. A frequent consequence

is that neither the judge nor the attorneys are able to maintain an effective liaison through the courtroom deputy.

Communication with the judges and the lawyers is a fundamental element in an effective differential case management system. This is essential to alert the court to procedural problems that might contribute to excessive delay, such as discovery disputes or dilatory motion practice. In response to the survey questionnaire, lawyers in the district expressed a desire for enhanced communication with the court concerning management of their cases.

Therefore, the Advisory Group recommends that each judge have a deputy district clerk serving as a courtroom attendant. This deputy clerk would perform courtroom support duties and thereby relieve the case manager from these responsibilities. The case managers could then concentrate on integrating the economic, efficient movement of civil cases within the constraints of superseding criminal cases. For the district judges, the courtroom attendants would be additional personnel. For the magistrates, existing personnel can perform these functions. However, three case managers would have to be added for magistrate use throughout the district. These additional case managers would be located in Houston and the Clerk's office would pool the case managers to assist with the magistrates' dockets.[82]

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[82]In January 1985, the Administrative Office selected this court and three others to pilot a program which allowed courtroom attendants (at reduced grades) to perform all the traditional courtroom support functions including swearing of witnesses, management of jurors, recording of the minute orders, and receipt of exhibits. The case manager was permitted the opportunity to monitor the progress of cases, prepare reports for the court, and stay in constant contact with the attorneys in each of the cases in order to enforce that case's management plan. In this fashion, the district closed an unprecedented number of cases and managed at least two complete judgeless dockets that were left by the resignation of one judge and the death of another. In November 1985 the Director of the Administrative Office proposed that the Judicial Conference expand the program nationwide. The severe constraints of the Gramm/Rudman bill killed the program. The district also has proved the efficacy of teaming a courtroom attendant with a case manager in its management of its huge bankruptcy dockets. Using this technique, the district has been one of the top five case-closing performers in what was previously considered an impossible docket.

### (4) Law Clerks and Secretaries

A careful examination of the docket and interviews with the judges suggested that the judges' effectiveness would be greatly enhanced with the addition of a third law clerk or secretary. Some judges in the district could use a third law clerk; other judges desire additional secretarial support.

The Advisory Group, therefore, recommends that each judge have discretion to decide whether an additional law clerk or secretary would best enhance the judge's managerial style and that Congress authorize personnel to meet this need. The Advisory Group recognizes that authorization for additional law clerks would require Congressional approval but feels strongly that Congress should enact such legislation.

### (5) Alternative Dispute Resolution Clerks

As will be discussed below, the Advisory Group is recommending a new local rule on Alternative Dispute Resolution. The Advisory Group contemplates that implementation of this program will involve not only normal case management supervision, but additional reporting requirements to accomplish an ongoing evaluation of that program. This will include preparation, distribution, and evaluation of a questionnaire at the conclusion of each ADR process. These results will be published and maintained for inspection as an incentive to expand the ADR option.

With the institution of the program, the Clerk's office will need additional support staff to assist with the local rule's various technical requirements. The ADR provider list, the ADR response information, and other clerical duties that the ADR program contemplates require additional staff.

The Advisory Group, therefore, recommends that the court hire two additional ADR clerks to serve the district-wide ADR program. These ADR clerks would be located in Houston.

### (6) Electronic Court Reporters

The Advisory Group has recognized a need to increase the number of magistrate civil trials. Throughout the nation each district judge is provided one court reporter. With the expansion of magistrate judges' jurisdiction, however, very little provision was made for preservation of the record before magistrate judges. In magistrate proceedings, much of the record is electronically recorded, often by personnel not fully trained in proper use of the equipment and who frequently are distracted by other courtroom duties. When a magistrate conducts a trial or hearing on the record, the

Clerk must assign a district court reporter or attempt to find a contract reporter in the community.

The Judicial Conference has endorsed, following extensive study, the use of electronic recording equipment as an alternative method of making a court record. Since 1979, this district has exclusively used this system with great success for the extremely busy bankruptcy courts. However, the accuracy and quality of the electronic record depends on the operator's training and qualifications. For that reason, magistrate judges should be provided with trained operators, as the magistrates' proceedings become courts of record.

Therefore, the Advisory Group recommends the addition of four electronic recording operators to serve magistrate judges in the district.[83]

### (7) Other Supporting Personnel

The United States Probation and Parole Department and the United States Pretrial Services Office are integral parts of the court's resources. Personnel strengths or deficiencies in these agencies have a direct bearing on the court's ability to handle the criminal docket and thus an indirect bearing on the court's ability to meet the demands of the civil docket. After consultation with the Chiefs of these agencies, the Advisory Group reports that these personnel resources currently are adequate and makes no recommendations for increased personnel at this time.

However, the Advisory Group wishes to note a problem these ancillary services identified. This problem concerns the long time between identifying the need for a new employee and the actual starting date of that employee. The allocation, selection, and full field F.B.I. background investigation can take thirty months. After beginning duties, a new officer may require up to a year of training to be fully productive.

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[83]The Judicial Conference has provided funding for two electronic recording operators to provide service for twelve magistrate judges. That ratio is totally inadequate and should be increased to one electronic operator for each two magistrate judges. This will increase the current complement of authorized electronic recording operators by four, for a total of six. This ratio, though not ideal, will permit the comfortable scheduling of civil cases without the delay often caused by attempting to locate a contract court reporter with either electronic or traditional training.

### (8) Final Observations Regarding Resources

The Advisory Group concluded that although there were some complaints about facilities, particularly from magistrate judges, physical facilities throughout the district presently are adequate. Changes currently are underway that will accommodate the new additional judges.

The Advisory Group also wishes to note that while civil filings have been relatively stable in previous years, the district has experienced periodic fluctuations in criminal filings. During the past year, criminal filings dropped 33% overall. The most dramatic reductions are in the border divisions where civil filings are lowest. Changes in prosecutorial philosophy, as well as alternative management of smaller cases, have magnified filing reductions. The current downturn in filings is considered temporary and is directly affected by prosecutorial discretion. The opening of a new federal prison in the district, the anticipated wave of savings and loan prosecutions, and the increased volume of prosecutions expected from the additional attorneys is expected to place greater demands on the Southern District in the near term.

Personnel allocations to the court are based on projections arising from case filing history over the previous year. If the present filing trend continues and then reverses as expected, the court will be losing support positions at a time when the court most needs additional resources.[84]

### (b) Significant Contributions and Particular Needs

The Advisory Group's recommendations with regard to resources contemplates significant contributions chiefly from the district's judicial officers and the Congress. Obviously, Congress is called upon to authorize new positions where requested and to appropriate funds to staff these positions. Congress also is called upon to staff supporting personnel expeditiously and to assist the district in implementing its new differential case management system and local alternative dispute resolution rule.

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[84]The Advisory Group endorses the statement from the Subcommittee on Court Resources Report to the effect that Congress should be sensitive to the need for funding additional support resources identified in its Report. That Report concluded that new positions in the district are justified on the basis of current needs and should be funded and staffed without delay.

The Advisory Group contemplates a significant contribution from the Houston division judges in assisting to effectuate a policy of more effective use of magistrate judges in the district. Full utilization of magistrate judges in the Houston division has not been a reality historically; however, in recent months a trend towards more full use of magistrate judges has developed and is producing good results. Judges now more routinely refer pretrial matters to magistrates than in the past, and magistrates have concluded 48 consent trials, compared with 15 for a similar period in 1988. The Advisory Group urges that effective utilization of magistrate judges will depend a great deal on the commitment of the division's judges to support this change.

Finally, the Advisory Group expects a significant contribution from lawyers and litigants in supporting the enhanced role of magistrates in the district. By developing a systematic program of magistrate referral, the Advisory Group hopes confidence in the quality of magistrates will be instilled in the legal community. The Advisory Group hopes the increased caseload responsibility for magistrate judges will bring about an increased awareness of another means by which litigation cost and delay can be alleviated.

#### (c) Compliance With the Act

The Advisory Group's recommendations with regard to court resources comply with the statute's requirement that in formulating a cost and reduction plan, a differential case management system be tailored to available resources within the district, as well as identify additional resource needs.[85] The Advisory Group's recommendations have carefully considered available resources and made recommendations based on identified needs.

### 3. Pretrial Procedures

#### (a) Proposed Measures and Rules

##### (1) Modified Local Rule 8 on Initial Pretrial Conference

The Advisory Group recommends that the court modify current Local Rule 8 on initial pretrial conferences and scheduling orders, to read as follows:

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[85] *See* 28 U.S.C. § 473(a).

### Rule 8. Initial Pretrial Conference; Scheduling Orders

> Within 140 days after a party files a complaint or notice of removal the judge to whom the case is assigned will conduct an initial pretrial conference under Fed. R. Civ. P. 16 and enter a scheduling order, except in the following types of cases: (a) prisoner civil rights actions; (b) state and federal habeas corpus actions; (c) student and veteran loan actions; (d) social security appeals; (e) bankruptcy appeals; and (f) complaints to forfeit seized assets.
>
> A judge may in his discretion conduct an initial pretrial conference and enter a scheduling order in any of the types of cases excepted.

The purpose of this changed local rule is to provide an early, fixed date for an initial pretrial conference during which the judicial officer must enter a scheduling order. The Advisory Group recommends modifying the local rule in order to comply with the statute's general mandate for early and ongoing judicial involvement in the case and to facilitate the proposed differential case management system. The proposed modification also is offered to comport with the Advisory Group's proposed alternative dispute resolution rule, which requires early determination of a possible ADR referral. The modified local rule on the initial pretrial conference will now provide an early, fixed time when the court will make a possible ADR referral decision.

The modification to Local Rule 8 takes into account the Federal Rule of Civil Procedure time requirements for service of a complaint, which currently is 120 days, Federal Rule Civil Procedure 4(j), except when a longer period is permitted under Federal Rule Civil Procedure 4(e). The Advisory Group believed that setting the initial pretrial conference at 140 days from the time of filing the complaint supplies the needed period for defendant's answer. Fed. R. Civ. P. 12. The modified local rule does not take into account the possibility of motions for extension of time in which to file an answer. However, the court in its discretion can reschedule where all defendants have not appeared.

### (2) Discovery

The Advisory Group discussed the general problem of discovery abuse and considered the various measures for regulating discovery suggested in the Civil Justice Reform Act. The Advisory Group notes that the Southern District of Texas already has two local rules regulating and limiting

discovery, permitting videotaped depositions with leave of court, and requiring certification of a good faith attempt to resolve discovery disputes before seeking court intervention.[86] These local rules, therefore, already establish the district as in compliance with certain requirements of the Civil Justice Reform Act.

The Advisory Group could not reach consensus concerning the true nature and scope of discovery abuse, largely because some of the Group were troubled by the lack of systematic, empirical research and evidence available. The "evidence" of discovery abuse, of which the discovery group is aware, is largely anecdotal information. The existing studies of which it is aware are methodologically limited. However, the Advisory Group with the time and resources available could not scientifically and empirically study discovery abuse in the district. Therefore, the Advisory Group could not determine the best means of dealing with the problem.

It was clear, however, that discovery reforms need to be linked with differential case management. Discovery occurs in fewer than 50% of all civil cases, and there are actually very few discovery "events" in most simple cases.[87] Imposing new burdens through discovery reform in cases where no or limited discovery is occurring could increase, rather than diminish costs.

Nonetheless, the Advisory Group acknowledges the public perception that discovery is the most abused portion of the civil litigative process, the perception that discovery is the aspect of civil litigation that most contributes to cost and delay, and that discovery is the pretrial activity most susceptible to reform.[88] Further, there is undoubtedly a universe of cases where discovery abuse occurs: cases where discovery is being used defensively to force settlement through attrition; cases where discovery is being used to generate fees either from a private client, or for the purpose of achieving a larger fee award from the court in a class action or under a statute awarding fees to a prevailing

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[86]*See* Local Rules 5 and 6 of the Local Rules for the United States District Court for the Southern District of Texas.

[87]*See Judicial Controls and the Civil Litigative Process: Discovery* (Federal Judicial Center 1978).

[88]*See, e.g.*, Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31B Vand. L. Rev. 1295 (1978).

plaintiff; or where excessive discovery occurs because of the limited competence of the lawyers. In addition, there are undoubtedly substantial efficiencies to be achieved in discovery in general. The Advisory Group, therefore, recommends the following measures for enhanced court supervision of discovery in civil litigation:

*Discovery/Case Management Order.* As indicated above in the *Report*'s recommendation for a differentiated case management system, the court should develop a Discovery/Case Management order to be entered when each case is filed with the court. Ideally, this order will suggest a discovery timetable tailored to the nature and complexity of the lawsuit.

*Discovery Scheduling Order; Initial Case Conference.* The Advisory Group recommends that at the initial case conference under a modified Local Rule 8, the court discuss with the attorneys the nature and scope of anticipated discovery and a timetable for completion of that discovery. Prior to the conference, the attorneys by mutual discussion and consent should formulate a discovery plan acceptable to the parties and lawyers. If the attorneys fail to agree on a discovery timetable, the judge should actively participate in setting such a timetable. The court should also refresh counsel's understanding of the measures available to ensure compliance with a reasonable discovery timetable, including sanctions under existing Federal Rules.

*Complex Case Discovery.* The Advisory Group believes that the differential case management system instituted in the district will identify complex cases for differential management on a separate tracking system. For complex cases so identified, the Advisory Group recommends implementation of a series of discovery conferences that will, according to the statutory language, "carefully and deliberately" monitor the discovery process. The Advisory Group, in general, endorses and recommends the approach to complex case discovery delineated in the *Manual for Complex Litigation, Second*,[89] also approved by the Federal Courts Study Committee.[90] This system of discovery regulation for complex cases entails a series of

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[89]*See Manual for Complex Litigation, Second* § 21.421 (West 1985) (sequencing or "wave discovery").

[90]*See Report of the Federal Courts Study Committee, supra* Part I, n.1 at 99.

discovery conferences with the judge[91] and the sequencing of discovery in "waves."

*Voluntary Disclosure.* The Advisory Group discussed the possibility of a discovery rule based on the voluntary exchange of information among litigants and their attorneys and the use of cooperative discovery devices. Although this proposed procedure had great superficial appeal, the Advisory Group ultimately was concerned about instituting a universal voluntary disclosure requirement in absence of more thorough-going empirical research into the experience of courts where existing local rules require such voluntary disclosure.[92]

However, the Advisory Group does recommend to the court that in a minimum twenty cases for each judge, identified under the differential case management system, the judges require the parties to exchange information on a voluntary disclosure basis. The District should use, as its model, the current draft of the proposed federal rule on voluntary disclosure.[93] The Advisory Group recommends that the experience in voluntary disclosure cases be assessed after one year trial. The court could then consider the possibility of further expansive use and such modifications as experience justifies.

*Extension of Deadline for Discovery Cutoff.* The Advisory Group recommends that the court institute a policy whereby the request of any attorney for an extension of a deadline for completion of discovery be signed by the attorney and the party making the request. In the event that it is infeasible for the attorney to obtain the written consent of her or his client, the attorney should certify to the court the reasons that she or he was unable to secure written consent.

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[91]*See Manual for Complex Litigation, Second, supra* n.25.

[92]*See* Mullenix, *Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. Rev. 795 (1991).

[93]*See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, Rule 26, pp. 87-106 (Aug. 1991). The Advisory Group should also investigate the experience under local rules currently requiring voluntary disclosure. *See* S.D. Fla. R. 14; C.D. Cal. R. 6.1.1 to 1.4; D. Guam R. 235-5; and D.S.C. R. 7.05-7.13.

### (3) Motions Practice; Time Extensions

The Advisory Group noted that the problem of frivolous motion practice, coupled with excessive delay in ruling on motions, were consistent complaints among the litigating bar in the district. Of course, the overburdened condition of the Southern District's dockets impedes efficient disposition of motions. To address problems relating to dilatory motion practice to the extent feasible, the Advisory Group makes the following recommendations, consistent with the Civil Justice Reform Act:

*Motions Deadlines; Initial Pretrial Conference.* At the initial pretrial conference to be conducted under a modified Local Rule 8, the Advisory Group recommends that the judge, at that conference, set deadlines for the attorneys for filing motions in the litigation.

*Page Limitations.* The court should establish page limitations for motions and supporting briefs. As a general rule, 50 pages should be adequate for opening briefs on dispositive motions, with reply briefs limited to 25 pages. Consideration should be given to setting page limits for other categories of motions.

*Time Framework for Disposition.* At the initial pretrial conference to be conducted under a modified Local Rule 8, the Advisory Group recommends that the judges set forth the time framework for disposition of those motions by the judges.

*Extension of Time for Postponement of Trial.* The Advisory Group recommends that requests for a postponement of trial be signed by the attorney and the party making the request. In the event that the attorney finds it is infeasible to obtain the party's written consent, the attorney should certify to the court the reasons that she or he was unable to secure written consent.

### (b) Significant Contributions and Particular Needs

The proposed modifications to existing pretrial procedure contemplate significant contributions from lawyers, litigants, and the judges. Attorneys in the district will now be required to be prepared to discuss and agree on a reasonable discovery schedule at an early initial pretrial conference. In a selected number of cases, attorneys will be asked to comply with a new voluntary disclosure system. Lawyers also will be required to secure client consent for extensions of time to delay closure of pretrial proceedings or to postpone

trial. Lawyers also will be given a timetable for motions practice.

Litigants will contribute through participation in the voluntary disclosure system, in those cases chosen for experimental use of this procedure. Litigants also will be required to take a more active role in determining the duration of discovery and whether to proceed with trial.

Judges in the district, under these modified rules, will have to take a more managerial stance with regard to supervising discovery. A modified local pretrial conference rule will provide the opportunity for the judges to take early control over setting a discovery schedule. This conference also provides judges with the opportunity to educate lawyers about professionally responsible conduct of discovery and the consequences of the lawyers' failure to conduct their discovery in accordance with these standards. In complex cases, the judges are being asked to use techniques suggested by the *Manual on Complex Litigation, Second* with regard to discovery sequencing. Finally, under the Advisory Group's recommendations, the judges are required, at the initial pretrial conference, to indicate disposition times for motions filed in the litigation.

### (c) Compliance With the Act

The Civil Justice Reform Act makes numerous proposed recommendations with regard to early pretrial conferences, discovery, and motions practice.[84] The Advisory Group for the Southern District of Texas considered all these proposals and, through its *Report* and *Plan*, has recommended implementation of all the statute's proposals, either in whole, or in part on an experimental basis.

## 4. Trial Procedures

Although civil litigation in the United States district courts has been burdened by rising costs and repeated delays, the trial phase of litigation itself does not appear to be a significant cause of the problem. Interviews, investigations, and data analysis indicate that trials in the Southern District of Texas are relatively efficient. During the twelve-month period ending June 30, 1990, the average civil trial required 1.83 days for completion. This figure was only

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[84] *See* 28 U.S.C. §§ 473(a)(2)(C)-(D); (a)(3)(C)-(D); (a)(4); (a)(5); §§473(b)(1) and (b)(3) (proposed recommendations relating to discovery and motion practice; pretrial conferences).

1.67 days for the preceding twelve-month period.[95] In fact, the majority of trials in the Southern District are completed in one day; figures for the district are skewed upward by a handful of trials that lasted in excess of twenty days.

While the trial phase has been relatively efficient, the *Subcommittee on Trial Procedure* identified several areas for possible reform. In weighing the merits of various reforms, the subcommittee considered not only reduction of cost and delay, but also the maintenance of the jury system and the guarantee of a fair trial, which must remain the paramount concerns of our justice system. The trial procedure subcommittee concluded that "the federal courts should not seek to stampede cases through the system without regard to the rights of litigants."

### (a) Proposed Measures and Rules

The Advisory Group recommends the following proposals as an attempt to balance the dual goals of efficiency and fairness in trial procedure:

#### (1) Development of Some Standard Rules of Trial Procedure

At the present time, several of the judges in the Southern District maintain rules of practice for their courts. Some basic rules for all judges would increase continuity and make trial preparation more predictable and efficient.

All courts' rules should contain provisions for pre-marking of exhibits and exchange of exhibits before trial. Additionally, all rules should provide for a ruling on the admissibility of documentary evidence before trial, if feasible. Another worthy provision would be the compulsory use of an overhead projector for all documentary exhibits. This will not only decrease delays caused by the distribution of exhibits but will aid witnesses and the jury in following counsel's reference to exhibits.

#### (2) Bifurcation

Judges should consider making greater use of bifurcation as provided by Federal Rule of Civil Procedure 42(b) where appropriate. Bifurcation, the practice of dividing trials into outcome-determinative and damage-determinative segments, can significantly shorten trial time where the damage and

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[95] *Reports of the Director of the Administrative Office of the United States Courts* (1989 & 1990).

liability cases are not inextricably intertwined. It may encourage more settlements during trial. Ordinarily, the jury decides liability first during trial and then hears the issue of damages contingent upon the outcome of the first trial. Bifurcation prevents lengthy testimony on the issue of damages until the jury establishes liability.

In other situations, particularly in cases involving questionable damages and strong liability, reverse bifurcation, trying damages before liability is more efficient. The determination of damages facilitates settlement, often negating the need for trial on liability.[96]

### (3) Jury Education

In certain cases, the court could use innovative techniques to enhance jury understanding. In complex cases, opposing parties could develop an objective, factual narrative of the dispute which the judge could read to the jury at the beginning of trial. When the case involves technical issues, the court could require joint development of a glossary of significant terms for reference by the jury.

The use of interim argument by counsel may save time and enhance jury comprehension in complex cases.[97]

Advances in computer graphics and video technology can also make the jury's job easier. The court could use tutorial videos to explain complex concepts which are at issue in the trial. Also, the use of videotape taken at a site or location might be more useful than photographs and could achieve the benefits of a jury view. The courts should also have the discretion to compel use of video depositions for certain witnesses offering routine evidence where this procedure would not be financially burdensome to the parties.

### (4) Jury Selection and Voir Dire

The court should implement changes in jury selection with the goal of streamlining the process while maintaining attorney participation. The Southern District should consider adopting a standardized written questionnaire requiring prospective jurors to provide basic information such as name,

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[96]See Warren F. Schwartz, *Severance - A Means of Minimizing the Role of Burden and Expertise in Determining the Outcome of Litigation*, 20 Vand. L. Rev. 1197 (1967).

[97]Honorable Robert Parker, *Streamlining Complex Cases*, 10 Rev. Litig. 547 (to be published 1991).

address, education, employment, spouse, children, and so on. The court would then provide counsel with the completed questionnaires so that the attorneys could resolve many of the challenges for cause before voir dire.

The judge should conduct the initial voir dire according to a standardized list of questions. Each juror should then answer a short list of pre-determined questions to allow counsel to listen to individual jurors. Counsel should be provided a limited period to conduct voir dire and probe specific topics. Counsel should also have the opportunity to present a brief synopsis of the case without arguing the case.

### (5) "Timing" Orders

As part of pretrial procedure, several courts at the state and federal level have imposed "timing" orders on the length of time counsel may examine a witness or present the entire case. This practice has shown promise for reducing unnecessary and repetitive direct and cross-examination. Judges implementing "timing" orders believe the restrictions force counsel to eliminate repetitive, unnecessary witnesses and documentary evidence and to focus on the issues which are the basis of the dispute.

The use of timing orders should remain optional in the Southern District. However, the court should be encouraged to exercise sufficient judicial control, including increased reliance on stipulations and summaries of evidence, to eliminate these delays. The rules should specifically endorse the use of timing orders if it appears necessary in a given case. This optional approach would provide greater flexibility and alleviate the impression of arbitrary time limits.

### (6) Limitation of Expert Witness Testimony

Expense and delay during trial could be reduced by imposing limitations on expert testimony. The use of experts is often necessary to inform the trier of fact about particular issues; however, experts sometimes emphasize arguments or offer repetitive testimony. To prevent overuse of experts, counsel should be required, before trial, to provide the court with a list of expert witnesses as well as a summary of their expected trial testimony. The judge could then determine if the expert's testimony is repetitive or inappropriate for other reasons and should thus be precluded. The judge should also exercise discretion to limit expert testimony to certain subjects or issue timing orders to focus and streamline the testimony.

### (b) Significant Contributions and Particular Needs

Clearly, the proposed changes in trial procedures involve contributions from lawyers, judges, the court, and to a lesser extent, litigants. Under the proposals, lawyers are being asked to accept limitations on case presentation, such as the duration of witness examination and unbounded use of experts. Judges are being asked to consider more extensive use of bifurcated trials and to take a more active role in jury selection. The court is being asked to consider developing uniform trial procedure rules and to think innovatively about applying new technology to aid in jury comprehension. And finally, litigants are requested to consider the possibility of private adjudicators to try cases outside the auspices of the federal court system.

### (c) Compliance With the Statute

The Civil Justice Reform Act concentrates on pretrial procedure and, therefore, contains few provisions relating to trial reform. The Advisory Group considered and approves the Act's single recommendation regarding enhanced use of bifurcated trial staging.[98] The Advisory Group has suggested other possible trial procedure reforms under the general statutory delegation permitting Advisory Groups to include "such other features"[99] of civil litigation reform the Group deems desirable.

## 5. Alternative Dispute Resolution

### (a) Proposed Local Rule

The Advisory Group recommends the use of alternative dispute resolution to offset the often costly and time-consuming process of litigation. Successful dispute resolution requires that the parties involved approach ADR settlement procedures voluntarily and that the court be actively involved in the referral process.[100]

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[98] *See* 28 U.S.C. § 473(a)(3)(B).

[99] *See id.* § 473(b)(6).

[100] The Civil Justice Act requires the Advisory Group and district court to consider "[in appropriate cases, having a judicial officer] explore[] the parties' receptivity to, and the propriety of, settlement . . ." and "authorization to refer appropriate cases to alternative dispute resolution (continued...)

The Advisory Group proposes the following ADR referral plan based upon comments and suggestions from Southern District judges, alternative dispute resolution providers,[101] and Advisory Group subcommittee members who, among other things, researched the mechanisms used in other courts.

**Proposed Local Rule on ADR**
**Local Rule ____. ALTERNATIVE DISPUTE RESOLUTION**

**This court recognizes that alternative dispute resolution procedures may facilitate settlement or narrowing of issues in certain civil actions. Therefore, the court adopts the following ADR procedures:**

**A. Timing of the ADR Decision**

1. **Before the initial pretrial conference in a case, counsel shall discuss the appropriateness of ADR in the litigation with their clients and with opposing counsel.**

2. **At the initial pretrial conference the parties shall advise the court of the results of their discussions concerning ADR. At that time and at subsequent conferences, if necessary, the court shall explore with the parties the possibility of using ADR.**

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[100](...continued)
programs that--(A) have been designated for use in a district court; or (B) the court may make available, including mediation, minitrial and summary jury trial." *See* 28 U.S.C. § 473(a)(3)(A) & (a)(6). The Act also requests that Advisory Groups consider the possibility of "a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation." *See* 28 U.S.C. § 473(b)(4). The Advisory Group considered the possibility of an early neutral evaluation program and discussed the experiences of the Northern District of California and the District of Columbia with their pilot programs. The Advisory Group again concluded that based on the lack of fully developed experience with these programs, the district would instead prefer to experiment with a new ADR rule to implement the spirit of these sections of the statute.

[101]The Subcommittee on Alternative Dispute Resolution held a hearing and provided an opportunity for comment with Texas and national ADR providers. *See* Appendix B at 14-15.

B. **ADR Referral.** The court may refer a case to ADR on the motion of any party, on the agreement of the parties, or on its own motion. If the parties agree upon an ADR method or provider, the court will respect the parties' agreement unless the court believes another ADR method or provider is better suited to the case and parties. The authority to refer a case to ADR does not preclude the court from suggesting or requiring other settlement initiatives.

C. **Opposition to ADR Referral.** A party opposing either the ADR referral or the appointed provider must file written objections with the court within ten days of receiving notice of the referral or provider, explaining the reasons for any opposition.

D. **ADR Methods Available.** The court recognizes the following ADR methods: mediation, mini-trial, summary jury trial, and arbitration. The court may approve any other ADR method the parties suggest or the court believes is suited to the litigation.

E. **List of Providers.** The court shall have a standing panel on ADR providers. The court will appoint three members and designate one member as chairperson. The panel will review applications from providers and annually prepare a list of those qualified under the criteria contained in this rule. A provider denied listing may request a review of that decision.

1. To be eligible for listing, providers must meet the following minimum qualifications:

   a. Membership in the bar of the United States District Court for the Southern District of Texas;

   b. Licensed to practice law for at least ten years;

   c. Completion of at least forty hours training in dispute resolution techniques in an alternative dispute resolution course approved by the State Bar of Texas Minimum Continuing Legal Education Department.

2. A provider must submit a completed application which contains:

   a. The ADR method(s) in which the provider seeks to be listed;

b. A concise summary of the provider's training, experience, and qualifications for the ADR method(s) in which the provider seeks to be listed;

c. The subject matter area(s) in which the provider has particular expertise;

d. The providers fee schedule;

e. A commitment to accept some cases for no fee or a reduced fee.

3. Annually after listing the provider must participate in at least five hours of ADR training.

4. Each provider shall remain on the list for five years. After a five-year term the provider may apply for relisting.

5. The court may approve any other provider the parties agree upon even though the provider is not listed.

**F. Attendance; Authority to Settle.** Party representatives with authority to negotiate a settlement and all other persons necessary to negotiate a settlement, including insurance carriers, must attend the ADR session.

**G. Fees.** The provider and the litigants will determine the fees for the ADR. However, the court may on its own motion or the motion of a party review the reasonableness of fees.

**H. Binding Nature.** The results of ADR are non-binding unless the parties agree otherwise.

**I. Confidentiality; Privileges and Immunities.** All communications made during ADR procedures are confidential and protected from disclosure and do not constitute a waiver of any existing privileges and immunities.

**J. Disqualification.** All providers are subject to disqualification pursuant to 28 U.S.C. § 455 (1988).

**K. Conclusion of ADR Proceedings.** At the conclusion of each ADR proceeding the provider, parties, and the court will take the following action:

1. The ADR provider will send the court clerk a memorandum stating the style and civil action number of the case; the names, addresses, and telephone numbers of counsel; the type of the case; the method

of ADR proceeding; whether ADR was successful; and the provider's fees.

2. The court clerk shall submit a questionnaire to the parties and will require counsel and their clients to complete and return the questionnaire for reference by the court, attorneys, and public.

3. The court clerk annually shall tabulate, analyze, and report on the disposition of ADR proceedings. The clerk shall keep on file the questionnaire from closed ADR proceedings.

**L. Sanctions.** The sanctions available under Federal Rule of Civil Procedure 16(f) shall apply to any violation of this rule.

[End of Text of Proposed Rule]

* * *

**(b) Significant Contributions and Particular Needs**

The Advisory Group felt that the district's needs to alleviate the heavy burden of pending cases would be served by its proposed voluntary ADR program. In discussing the significant contributions of the various participants in accomplishing a successful ADR program, the Advisory Group reached the following conclusions:

Attorneys should discuss ADR options with their clients and with each other early in the litigation. Thus, in cases that may be suited to ADR, the court should hold an initial pretrial conference after the case is filed to help the parties explore these options. Inquiries at subsequent conferences keep discussions open.

The court's role in resolving disputes is more than adjudicatory. If it believes the parties may reach a settlement through ADR, the court should refer the case. Parties' views on ADR methods and providers are important. Their input assists the court in its choice of method and provider.

Successful dispute resolution requires that the parties involved approach ADR settlement procedures voluntarily and that the court be actively involved in the referral process. Therefore, the parties may object to the referral or the appointed provider. The court in its discretion, however, may order ADR over the objections of the parties.

Lawyers practicing in the Southern District are familiar with the methods described in the rule because of the recent Texas state rule on ADR. The rule allows other methods.

Listed ADR providers offer the court and the parties the providers' legal background and ADR experience and training to assist in resolving disputes. A listed provider's application contains information useful in determining which provider best suits the parties and their litigation.

There are cases in which the parties cannot afford provider fees. Therefore, listed providers must agree to accept some cases for no fee or a reduced fee.

The provider's listing lasts five years. Application for relisting allows the court and parties to determine the provider's (a) interest in continued service and (b) current qualifications and training.

The parties may believe a provider not listed can best assist them in resolving their dispute. The court may approve the parties' provider choice for the litigation in which the parties agree to use the non-listed provider.

Ideally, the parties settle their dispute in the ADR session. Therefore, someone with settlement authority must attend. The rule does not except governmental entities. A governmental entity representative must be able to bind the entity subject only to final approval.

The provider and litigants should be able to agree upon appropriate ADR fees. However, the court reserves the right to approve fees. In some cases, the court may order referral without fees or with reduced fees. If the court believes it should refer a case without fees or with reduced fees, it should determine the number of no fee or reduced fee referrals the provider has received. The court should distribute no fee or reduced fee referrals fairly among all listed providers.

The parties' option for court adjudicated resolution of their dispute remains open because the results of ADR are nonbinding unless the parties agree otherwise.

ADR discussions must be open and honest. Thus, the rule allows confidentiality as in other settlement negotiations while preserving existing privileges and immunities.

The provider serves as an adjunct to the court and is disqualified under the same standards applicable to justices, judges, magistrate judges, and bankruptcy judges.

Statistical information on the quality and success of ADR procedures is important. It allows the court to determine ADR effectiveness in ending litigation. Attorney and client questionnaires afford the court, attorneys, and public an opportunity to evaluate methods and providers.

The rule is more than aspirational. The court may impose sanctions for rule violations.

### (c) Compliance With the Statute

The Advisory Group's proposed new local rule on alternative dispute resolution complies with all applicable sections of the Civil Justice Reform Act requiring or recommending institution of alternative dispute resolution techniques in the pilot district courts.[102]

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[102]*See supra* note 124.

## V. CONCLUSION

With the submission of this *Report* and *Plan*, the Advisory Group for the Southern District of Texas begins the discharge of its statutory duty. The Civil Justice Reform Act requires that after developing and selecting a cost and delay reduction plan, the district courts must continue to assess their dockets on an annual basis, to determine additional appropriate actions the court may take to improve litigation management techniques. We regard this *Report* as merely a start. To accomplish civil justice reform in the Southern District of Texas and to fulfill its role as a Pilot District, the court must both be willing to experiment and to capture in a useful way the results of its efforts. The Group makes two concluding recommendations.

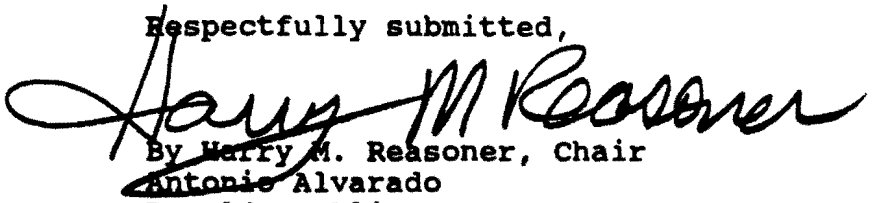
The Group felt repeatedly hampered by lack of data, time, and resources, or in understanding the true nature and scope of alleged problems such as discovery abuse. While it was easy to speculate anecdotally about problems of civil justice delivery, there are, in fact, few methodologically sound empirical studies documenting either litigation problems or the sources of litigation problems. Wholesale procedural reform in the absence of concrete data about causes and effects is at best a very risky exercise.

Therefore, the Advisory Group would urge Congress or the judicial branch to develop a more detailed method of data collection concerning areas of perceived abuse in civil litigation. The Advisory Group found that while the statistics that the Administrative Office and the Judicial Center currently collect are valuable and informative, they do not supply much of the information to support determinations Congress requires the Advisory Groups to make in their assessment of the principal causes of cost and delay. Advisory Group members suggested that the federal courts, locally, through the use of exit questionnaires or surveys, could monitor civil litigation more closely and provide a more useful data base than now exists for law reformers. The data collection should not be limited to lawyers. Litigants themselves should be given the opportunity to offer their opinions.

Second, the Advisory Group recommends that the court, through its Advisory Group, make a special effort to communicate with the judges, court personnel, lawyers, and general community concerning reform efforts. The Advisory Group is convinced that the success of meaningful reform is tied to

effective communication with and education of the various constituent groups in this district.

Respectfully submitted,



By Harry M. Reasoner, Chair
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French Anne Young

*Ex Officio*

Chief Judge James DeAnda

Reporter
The Honorable Jesse E. Clark,
Clerk of the Court

Co-Reporter
Professor Linda S. Mullenix

# APPENDIX A

## MEMBERS OF THE ADVISORY GROUP
## UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF TEXAS

## APPENDIX A: MEMBERS OF THE ADVISORY GROUP UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

JAMES DEANDA of Houston, Texas, Chief Judge of the United States District Court for the Southern District of Texas, served *ex officio* to the Advisory Group. He was appointed to the federal bench in 1979 and is a graduate of Texas A&M and the University of Texas Law School. Judge DeAnda was in private practice for almost thirty years in Corpus Christi, Texas, associated with several law firms in that city. He is a member of the American Bar Association; the American Judicature Society; and the State Bar of Texas.

JESSE E. CLARK of Houston, Texas, the Clerk of the Court, served *ex officio* as Reporter for the Advisory Group. A graduate of Sam Houston State University and a former student at the Southwestern Baptist Theological Seminary, Mr. Clark began his career with the Texas Department of Corrections where he developed the Texas Pre-Release Program. He subsequently served as the Supervising United States Probation Officer for the District Court for the Southern District of Texas, and as a faculty member of the Federal Judicial Center in Washington D.C. training new probation officers. He was promoted to United States District Court Clerk in 1977. As the District Clerk of the largest consolidated office in the nation, Mr. Clark is responsible for administrative support for thirty-six district judges, magistrate judges, and bankruptcy judges. He presently is Chairman of the Financial Procedures Committee of the Advisory Council of the Administrative Office of the United States Courts. He also co-chairs the Integrated Information Subcommittee of the Budget Decentralization Program.

LINDA S. MULLENIX of Austin, Texas, served *ex officio* as Co-Reporter for the Advisory Group. She is Bernard J. Ward Centennial Professor of Law at the University of Texas Law School. She did her undergraduate work at the City College of New York, and holds masters and Ph.D degrees from Columbia University. She received her law degree from Georgetown University Law Center and was in private practice with the Washington D.C. firm of Pierson, Ball & Dowd. She has been a college and law professor since 1974. During 1990-91 she served as a Judicial Fellow at the Federal Judicial Center in Washington, D.C. She is a member of the American Law Institute and Associate Reporter on the *Restatement of the Law Governing Lawyers*. Ms. Mullenix is a contributing author to *Moore's Federal*

*Practice* and writes generally on federal civil procedure, federal courts, complex litigation, and conflicts of law.

HARRY M. REASONER of Houston, Texas, served as Chair of the Advisory Group. He is a senior partner and management committee member in the firm of Vinson & Elkins, in Houston. He is a graduate of Rice University and the University of Texas School of Law, where he was editor of the law review, and a member of Order of the Coif and Chancellors. He served as a law clerk to Judge Charles E. Clark of the Second Circuit. He has taught antitrust law as a visiting professor at the University of Texas School of Law, the University of Houston School of Law, and Rice University. He is a fellow of the American College of Trial Lawyers, the International Academy of Trial Lawyers, the International Society of Barristers, the Texas Bar Foundation, and the American Bar Foundation. He is a member of the American Law Institute and the American Board of Trial Advocates. He also holds numerous professional and civic memberships in bar associations, committees, and councils. His principal areas of practice include general, antitrust, and securities litigation.

ANTONIO ALVARADO is a sole practitioner in Laredo, Texas. Prior to setting up his own practice, Mr. Alvarado was a member of various law firms in Laredo, including Fansler, Reese, Palacios & Alvarado; and Alvarado, Salinas and Barto. He also served as an Air Force JAG Officer. He is a graduate of the University of Texas at Austin and its law school. He is an active member of numerous Texas state bar associations and committees, including service as an Advisory Director of the State Bar of Texas, a member of a district grievance committee, a founding member of the Laredo Young Lawyers Association, and the district director of the Texas Young Lawyers Association. He is past president and director of the Laredo Legal Aid Society, a charter member and director of the Laredo Volunteer Lawyers Program, and a committee member of the Laredo Plan for Legal Representation of Indigent Criminal Defendants. He also has served on the admissions and grievances committee for the Southern District of Texas and on the United States Magistrate Selection Panel. His areas of practice include real estate, probate, employment, and business law.

RONALD G. BLISS of Houston, Texas, is a graduate of the United States Air Force Academy with a degree in engineering. He was a fighter pilot in the United States Air Force from 1964 to 1973. He flew combat over North Vietnam where he was shot down, captured, and held prisoner for more than six years. He graduated from Baylor University School of Law in 1976 and became associated with Fulbright & Jaworski in Houston, Texas. As a partner in the firm, he has managed the firm's Intellectual Property and Technology Department for all offices since 1987. Mr. Bliss is heavily involved in negotiations for international trade, including the transfer of technology. He advises and represents clients in various types of litigation including patent, trademark, and copyright infringement; anti-counterfeit matters; and misappropriation of trade secrets. He is a member of the American Bar Association, the Texas Bar Association, the American Intellectual Property Law Association, the Houston Intellectual Property Law Association, the Houston Bar Association, and the Licensing Executive Society. He has authored articles and lectured on areas relating to his practice.

RICHARD D. CULLEN of Victoria, Texas, was admitted to practice before the Supreme Court of Texas in 1952. He currently is a partner in the law firm of Cullen, Carsner, Seerden & Cullen, in Victoria, Texas. Both his undergraduate and legal education were at the University of Notre Dame. He has been in the active practice of law since 1953, with the principal portion of his practice devoted to insurance defense work. He is a member and past president of the Victoria County Bar Association; the American Bar Association; the International Association of Defense Counsel; the Defense Research Institute; and the American College of Trial Lawyers. He is a life fellow of the Texas Bar Foundation and a member and past director of the Association of Defense Counsel.

ROLAND E. DAHLIN II of Houston, Texas, is the Federal Public Defender for the Southern District of Texas. A Dallas native, Mr. Dahlin is a graduate of the University of Texas and its law school. After college, he studied graduate economics at the University of Michigan and served in the United States Army before joining Morgan Guaranty Trust Company in New York City. He served again in the Army during the Berlin Wall crisis. Mr. Dahlin is a former Assistant District Attorney for Harris

County, Houston, Texas. He is a retired Lieutenant Colonel in the United States Army reserve.

WAYNE FISHER is a founding partner in the law firm of Fisher, Gallagher & Lewis in Houston, Texas. An honors graduate of Baylor University and its law school, Mr. Fisher is a past president of the State Bar of Texas. Mr. Fisher is a member of numerous bar associations and professional groups of litigators. The offices he has held include Secretary-Treasurer, Board of Directors and Dean of the International Academy of Trial Lawyers; President, Houston Trial Lawyers Association; Board of Governors of the Association of Trial Lawyers of America; and Secretary and Board of Directors of the Texas Bar Foundation. He is a fellow of the Inner Circle of Advocates; the American College of Trial Lawyers; and the American Board of Trial Advocates. In addition, Mr. Fisher has participated in many civic, community, and academic activities. Baylor University honored Mr. Fisher by naming him Lawyer of the Year and awarding him its Distinguished Alumni Award. Mr. Fisher has published articles and delivered lectures at numerous law schools, universities, and legal associations throughout the south and southwest.

PATRICIA GRAY is a partner in the five-member firm of Yarbrough, Jameson & Gray in Galveston, Texas. Prior to joining the firm, Ms. Gary was a sole practitioner. She was an honors student at Mississippi State University, received a Master's degree from the University of Texas at Austin, and obtained her law degree from South Texas College of Law. She has served on a peer committee and the committee on admissions of the State Bar of Texas; and is a member of the Texas Trial Lawyers Association as well as the ABA sections on family law and legal economics. She was a past secretary and director of the Galveston County Bar Association, and is President for 1990-91. Ms. Gray is a fellow of the Texas Bar Foundation, and has been recognized by the Galveston Women's Hall of Fame and the Foundation for Women's Resources Leadership Texas. Her practice includes collection of delinquent ad valorem taxes, general civil litigation, family law, and some criminal practice. She also has done federal civil rights litigation and criminal defense litigation. She is becoming qualified as a mediator.

WILLIAM R. KELLY of Austin, Texas, served as consulting statistician to the Advisory Group. He is a Professor

in the Department of Sociology at the University of Texas at Austin. He received his Ph.D. degree from Indiana University in 1978 in sociology and econometrics.

CHARLES W. MATTHEWS is the Associate General Attorney for Exxon Company U.S.A. and formerly the General Counsel and Director of Petroleum Casualty Company and Exxon Risk Management Services in Houston, Texas. Since 1989, he has coordinated the litigation arising out of the grounding of the *Exxon Valdez*. Mr. Matthews joined the litigation section of Exxon's Law Department in 1971 and has represented Exxon in a variety of lawsuits. For a number of years he served in the Southeastern and Southern Region marketing offices, responsible for the management of legal issues affecting marketing operations. In 1981 he became Associate General Attorney and represented Exxon in antitrust, tort, and oil and gas litigation throughout the United States. Mr. Matthews is a graduate of the University of Texas, and he received his law degree from the University of Houston. He is an active member of the American, Texas, and Houston Bar Associations and a Fellow of the Texas and Houston Bar Foundations. For the State Bar of Texas, he has served as vice-chairman for the Committee for the Administration of Justice and as the corporate counsel liaison for the Litigation Section. He is a member and committee chairman of the International Association of Defense Counsel; and a member of the Economics Effects Advisory Committee for the Institute for Civil Justice.

M. COLLEEN McHUGH is a shareholder in the law firm of Matthews & Branscomb in Corpus Christi, Texas. She did her undergraduate work at Southern Methodist University and her law degree at St. Mary's University School of Law. She is a Texas Board certified specialist in labor law, and her practice centers on employment and labor law. Ms. McHugh is a member of the Board of Directors of the State Bar of Texas and a fellow of the Texas Bar Foundation. Her efforts for the State Bar of Texas include service as past chairperson of the Alternative Methods of Dispute Resolution Committee and as past vice-chairperson of the Continuing Education Committee. She also is a past president of the Corpus Christi Bar Association. Ms. McHugh has been an author and speaker on labor law and alternative dispute resolution for the State Bar of Texas and other organizations, and is a contributing author to editions of the state bar

*Handbooks on Alternative Dispute Resolution*. She has been a recipient of the Certificate of Merit for Outstanding State Bar Service.

JAMES F. MOORE is the Director of Risk Management for the American General Corporation in Houston, Texas. He did his undergraduate work in philosophy at Loyola University, Chicago. He then served in the United States Army as an active first lieutenant, and subsequently as a reserve captain. For more than twenty years he was employed by Allstate Insurance Company, ultimately as Regional Vice President for south Texas. Since 1976 he has worked as a corporate risk manager for American General, a consumer and financial services organization headquartered in Houston.

ERIC H. NELSON is an attorney with the two-member firm of Nelson & Locke, in Houston, Texas. He has been actively engaged in the practice of labor law since 1970. A graduate of the University of Texas, he did his legal education at the University of Houston. He is a Texas Board Certified Specialist in labor law, a past chair of the labor law section of the State Bar of Texas, and past program chair for the Texas State Bar Labor Law Institute. Mr. Nelson has served as a member of the American Bar Association's Committee on Individual Rights and Responsibilities in the Work Place (Section of Labor and Employment Law); and is a member of the Industrial Relations Research Association and formerly on the Labor Advisory Commission of the Texas Board of Legal Specialization. He has lectured about labor law and arbitration at law schools and before the National Academy of Arbitrators. He also is a co-author and contributor to *Texas Employment Law*.

FRANK E. PEREZ is a partner in the law firm of Royston, Rayzor, Vickery & Williams in Brownsville, Texas. A native of San Diego, Texas, he earned both his undergraduate and law degrees from the University of Texas at Austin. After graduation from law school, Mr. Perez was a law clerk to United States Magistrate Hon. William Mallet and Hon. Fidencio G. Garza, Jr. He also served as law clerk to United States District Judge Ricardo H. Hinojosa. He is a member of the Cameron County Bar Association and the State Bar of Texas and has taught business law at the University of Texas, Brownsville.

ALAN E. RIEDEL is a senior vice president for administration and director of Cooper Industries, Inc. in Houston, Texas. He is an honors graduate of Ohio University and received his law degree from Case Western Reserve University School of Law, where he was elected to the Order of the Coif. He was associated with the law firm of Squire, Sanders & Dempsey in Cleveland, Ohio, for five years. Mr. Riedel subsequently joined Cooper Industries as a general attorney and has served as secretary and general counsel; vice president for industrial relations; and vice president for law and employee relations. In 1973 he was elected senior vice-president for administration and in 1981 was elected to the Board of Directors. He currently is a member of the Board's executive committee. He is responsible for employee relations, organizational development and compensation, legal matters, corporate secretary and shareholder relations, benefits, public affairs, and aviation. Mr. Riedel is active in numerous business, professional, and civic organizations in Houston. He has served as past chairman of the Human Resources Council of the Manufacturers Alliance for Productivity. He also is a director of the Lawyers for Civil Justice; the Standards Products Company; Arkwright Insurance; and Creekwood Capital Corporation.

ROEL R. TREVINO, a resident of Pharr, Texas, practices with the law offices of Roel R. Trevino, P.C. Born in San Juan, Texas, he did his undergraduate work at the Pan American University and earned his law degree from St. Mary's University School of Law. He is a member of Phi Delta Phi, the John M. Harlan Society, the American Bar Association, and the State Bar of Texas.

JACK TROTTER manages personal investments in Houston and is an inactive partner of McClure & Trotter, a Washington, D.C. law firm. Formerly, he was a partner of Trotter, Childs, Fortenbach & McClure and a partner in T.B. Trotter Co. He serves on the Boards of Directors of First Interstate Bank of Texas, Houston Lighting & Power Co., Howell Corp., Weingarten Realty Investors, and Zapata Corp. Mr. Trotter attended Rice University, the University of Texas at Austin, and the University of Houston College of Law. He is a certified public accountant and an attorney. He is an active trustee at Rice University, Baylor College of Medicine, and the Texas Heart Institute. Mr. Trotter also is a member of the University of Texas M.D. Anderson Cancer Center Board of Visitors and is a member of the boards of several

private foundations. In addition, he is active with respect to the financial affairs for the University of Texas System.

RONALD G. WOODS of Houston, Texas, is the United States Attorney for the Southern District of Texas and a statutory appointee to the Advisory Group. A native of Utah, Mr. Woods is a graduate of the University of Texas Law School. A former special agent and legal instructor for the Federal Bureau of Investigation, Mr. Woods also served as an assistant district attorney and chief prosecutor for Harris County. From 1976 through 1985 Mr. Woods was an assistant United States attorney for the Southern District of Texas, serving variously as chief of the narcotics, public integrity, and fraud divisions. He also served as senior litigation counsel to the Department of Justice. He is a member of the Houston and American Bar Associations; the State Bar of Texas; the Texas Criminal Defense Lawyers Association; and the National Association of Criminal Defense Lawyers. He has taught and been a speaker at the University of Texas Law School; Federal Criminal Law Seminars; and the Houston Bar Association.

FRENCH ANNE YOUNG of Houston, Texas, served as a layperson on the Southern District Advisory Group. Ms. Young received her undergraduate and master's degrees from the University of Texas at Austin. She taught high school English and was a resource teacher. She is an active volunteer in the Houston Independent School District; has served as chairman of several fund raising events, and as President of the PTO at Briargrove Elementary School. She served on the Houston Independent School District Restructuring Committee in 1990-91 and is presently serving on the Houston Independent School District Advisory Committee.

# APPENDIX B

# SOUTHERN DISTRICT OF TEXAS ADVISORY GROUP: AUTHORITY, STRUCTURE AND PROCEDURES

## APPENDIX B: SOUTHERN DISTRICT OF TEXAS ADVISORY GROUP: AUTHORITY, STRUCTURE AND PROCEDURES

### 1. Creation of the Southern District of Texas Advisory Group

In February 1991 Chief Judge James DeAnda of the Southern District of Texas, in consultation with the other judges of the district court, appointed an Advisory Group to carry out the legislative mandates of the Civil Justice Reform Act.[1/] By statute, this group is required to be balanced and to include "attorneys and other persons who are representative of major categories of litigants"[2/] in the court.

The Advisory Group for the Southern District of Texas consists of attorneys drawn from large, small, and solo practice, representing both plaintiffs' and defense bar. These attorneys variously engage in civil and criminal practice embracing civil rights, maritime, personal injury, and intellectual property litigation. The attorneys include corporate in-house counsel and commercial corporate practice. Lay persons represented industrial concerns as well as the insurance, educational, and banking communities. The Federal Public Defender and the United States Attorney were also appointed.

Chief Judge DeAnda served *ex officio* to the Advisory Group. The Clerk of the Court, the Honorable Jesse E. Clark, also served *ex officio* and as Reporter for the project. Finally, the Advisory Group appointed Professor Linda Mullenix from the University of Texas Law School to provide expertise on federal court issues and to draft significant portions of the Group's *Report*.

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[1/] *See Order* by James DeAnda, Chief Judge, Southern Dist. of Texas, *Re: Appointment of District Court Advisory Group Under The Civil Justice Reform Act of 1990* (Feb. 22, 1991); *see also* 28 U.S.C. § 478(a) (Supp. 1991) (requiring appointment of advisory groups within ninety days after enactment of Title I of the Judicial Improvements Act of 1990). A descriptive list of the membership of the Southern District Advisory Group is included as Appendix A.

[2/] *See* 28 U.S.C. § 478(b) (Supp. 1991). The statute also required that the United States Attorney for the district, or the U.S. Attorney's designee, be a permanent member of the advisory group for the district. *See* 28 U.S.C. § 478(d) (Supp. 1991).

In March 1991, the Judicial Conference of the United States designated the Southern District of Texas one of ten pilot district courts under the Civil Justice Reform Act, required to submit and implement a civil justice expense and delay reduction plan by December 31, 1991.[3/]

As a pilot district, the Southern District of Texas Advisory Group proceeded under the legislative mandate to comply with all the applicable provisions of the statute for creation of a civil justice expense and delay reduction plan, including as part of its plan "the 6 principles and guidelines of litigation management and cost and delay reduction"[4/] identified in the Act. The Advisory Group recognizes that as a pilot district, the expense and delay reduction plan the district court implements must include the six principles and guidelines of litigation management and cost delay reduction described in the Act for at least three years.[5/]

### 2. Organization and Structure

To review and comply with the intricacies of the legislative mandates incorporated in the Civil Justice Reform Act, the Advisory Group divided into seven subcommittees. The

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[3/]*See* Pub. L. No. 101-650, § 105(b)(1), 104 Stat. 5097 (1990); *see also* memorandum from Wm. W. Schwarzer, Federal Judicial Center, to All Chief Judges, U.S. District Courts Re: Civil Justice Reform Act of 1990 (Jan. 16, 1991). The Judicial Conference's Committee on Court Administration and Case Management has primary oversight responsibility for implementation of the Act. A subcommittee of that committee developed criteria for selection of the ten pilot district courts. The full committee met on January 3-4, 1991 and approved the subcommittee's recommendations for ten pilot districts. In addition to the Southern District of Texas, the other pilot districts are the Southern District of California, the District of Delaware, the Northern District of Georgia, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania, the Western District of Tennessee, the District of Utah, and the Eastern District of Wisconsin.

[4/]Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 105(b)(1), 104 Stat. 5097 (1990).

[5/]*Id.*, § 105(b)(3).

subcommittee structure derived from the statute's functional requirements for developing and implementing a cost and delay reduction plan. The Advisory Group Chair appointed subcommittee chairs and members. Members volunteered to serve on subcommittees based on interest in the subcommittee's assigned tasks:

*The Subcommittee on Docket Assessment* was assigned the task of collecting data and assessing the condition of the civil and criminal dockets. This subcommittee also undertook the statutory requirement of identifying trends in case filings.[6/]

*The Subcommittee on Court Resources* was delegated the task of assessing the demands being placed on the court's resources, and the principal causes of cost and delay in civil litigation. The subcommittee also addressed the problem of the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts.

*The Subcommittee on Criminal Docket Impact* undertook the assignment of assessing the impact of criminal statutes on prosecutorial decisions and evaluating the effects of the criminal docket on the civil docket. Although the Civil Justice Reform Act did not itself suggest the creation of this subcommittee, the consensus of the Advisory Group at its initial organizational meeting was that a separate subcommittee on criminal docket impact was appropriate in the Southern District of Texas due to the heavy criminal caseload and changes over time in prosecutorial policies.

*The Subcommittee on Pretrial Practice* was assigned the task of reviewing existing local rules with regard to pretrial practice and developing recommendations, plans, or new local rules to conform to the requirements of the Civil Justice Reform Act concerning pretrial procedure.[7/] In particular, this subcommittee was asked to consider pretrial options concerning differential case management; early and ongoing judicial case management, including

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[6/]*See* 28 U.S.C. § 472(c)(1) (Supp. 1991).

[7/]*See* 28 U.S.C. § 473(a)(1)-(5) & (b)(1)-(3) (Supp. 1991).

firm trial dates; various management procedures for the greater regulation of discovery and motions practice; and enhanced use of settlement conferences.

*The Subcommittee on Trial Procedures* was created to evaluate local and general federal rules relating to trial procedure, and to make recommendations concerning proposals to enhance more efficient, speedy, and inexpensive disposition of cases that come to trial in the district. Although the Act's specifications for the contents of a pilot district's plan focus almost exclusively on pretrial procedure, the Advisory Group in the Southern District of Texas felt it appropriate to create a subcommittee to consider and address problems relating more broadly to the efficient management of actually litigated cases, as well.

*The Subcommittee on Alternative Dispute Resolution* was requested to consider and make recommendations regarding the array of alternative dispute resolution options delineated in the Act,[8/] to consider the possibility of a neutral evaluation program for the district,[9/] and to consider recommendations for enhancing settlement.[10/]

*The Subcommittee on Coordination and Drafting the Report* was created to oversee composition of the district's *Report* and *Plan*. The Chair of the Advisory Group, the chairs of the subcommittees, the Clerk of the Court as Reporter for the project, and the Group's academic advisor comprised this subcommittee.

Although the Advisory Group for the Southern District of Texas carried out its statutory tasks primarily through its subcommittees, the Advisory Group met as a committee of the whole on a regular basis at the federal courthouse in Houston, Texas. The Advisory Group's organizational meeting was on April 30, 1991, and the Group met on May 30, June 18, July 9, July 24, August 9, and October 11. In addition to regular meetings of the Advisory Group, the various subcommittees frequently convened at the federal courthouse in Houston. The

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[8/] *See* 28 U.S.C. §473(a)(6) (Supp. 1991).

[9/] *See* 28 U.S.C. § 473(b)(4) (Supp. 1991).

[10/] *See* 28 U.S.C. § 473(b)(5) (Supp. 1991).

geographical dispersion of Advisory Group members throughout a very large territorial district made it more efficient for various subcommittees to carry out their work by conference calls.

### 3. Process and Public Access

The Advisory Group for the Southern District of Texas has sought diligently to fulfill the statutory tasks Congress conferred on this citizen body. At its initial organizational meeting, all Advisory Group members recognized that problems of cost and delay justified reforms in the civil justice system.[11/]

The Group sought to implement the aspirational goal of the statute's legislative history that civil justice reform come from "the bottom up" and that reform be accomplished through extensive consultation with all people having an interest in civil justice. To this end, the Advisory Group engaged in various efforts to ascertain locally the concerns and recommendations from all segments of the community concerning civil litigation within the district.

The scope of this outreach was extensive, beginning with the court system itself. The Advisory Group members interviewed every judge and magistrate within the district, according to a uniform interview protocol. Presently, there are thirteen active judges, two senior judges, nine full-time and one part-time magistrate, so Advisory Group members interviewed twenty-five judicial officers. Advisory members

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[11/] *See Minutes of Meeting of the Advisory Group*, United States District Court for the Southern District of Texas (May 30, 1991). *See generally* Burger, *Delivery of Justice--Proposals for Changes to Improve the Administration of Justice* (1990); Solomon and Somerlot, American Bar Association, Task Force on Reduction of Litigation Cost and Delay, Judicial Administration Division, *Caseflow Management in the Trial Court, Now and For the Future*, (1987) [hereinafter cited as *Caseflow Management*]; American Bar Association, Division for Judicial Services, Lawyers Conference Task Force on Reduction of Litigation Cost and Delay, *Defeating Delay--Developing and Implementing a Court Delay Reduction Program* (1986); Federal Courts Study Committee, *Report of the Federal Courts Study Committee* (Apr. 2, 1990).

also interviewed personnel in the clerk's office to secure information relating to docket assessment and court resources.

With respect to the practicing bar, the Chair of the Advisory Group notified various local bar organizations of the creation of the Advisory Group and its statutory mandate. In addition to serving notice of the project, the Chair sought the advice of these organizations and their membership. The local Houston groups contacted were the Houston Bar Association, the Houston Chapter of the Federal Bar Association, the Houston Chapter of the American Board of Trial Advocates, the Houston Regional Directors and Vice President of the Texas Association of Defense Counsel, and the Houston Chapter of the Texas Trial Lawyers' Association. Other attorneys on the Advisory Group contacted similar bar groups in divisions outside the Houston area.

Because the criminal caseload plays such a prominent role in the Southern District of Texas, the *Subcommittee on Criminal Docket Impact* focused early efforts on eliciting the views of criminal defense attorneys in the district. On behalf of this subcommittee, the Federal Public Defender sent a letter to approximately thirty practicing criminal lawyers to apprise them of the existence of the Advisory Group and its statutory mandates, and to seek their advice concerning the Advisory Group's tasks. This core of criminal litigators served as an Advisory Group resource for information, opinion, and comment relating to criminal justice matters in the district. Among the lawyers contacted were the current President of the Texas Criminal Defense Lawyers' Association; the current Director of the National Association of Criminal Defense Lawyers; a current Texas board member of that organization; two former presidents of the Texas Criminal Defense Lawyers' Association; a former Chair of the State Bar of Texas Penal Code and Code of Criminal Procedure Committee; three former United States Attorneys; two former Fifth Circuit law clerks; one former part-time United States Magistrate; and a former Harris County District Attorney. These criminal lawyers are dispersed across the district as well as the state, with practices located in Brownsville, Corpus Christi, Dallas, Houston, Laredo, and McAllen.

Most of the attorneys the Advisory Group initially contacted represented institutional organizations of lawyers. The Advisory Group additionally recognized the need to elicit information from practitioners. Therefore, the Advisory Group conducted a "closed case" survey to ascertain the views of attorneys and their clients concerning the civil litigation

process, particularly with regard to assessing the reasons for cost and delay within the district. The Clerk of the Court supervised this survey of 153 sample cases. Under the methodological guidance of the Federal Judicial Center in Washington, D.C.,[12] the Clerk's Office designed a survey instrument which the Advisory Group modified and approved for distribution. As of August 8, 1991, the court received a 46.99% attorney response[13] and an 18.38% litigant response to the mailed survey.[14] While the questionnaire contained a structured series of questions relating to civil case management, cost, delay, and alternative dispute resolution, the survey also permitted attorneys and clients to provide narrative reactions to their experience with civil litigation in the Southern District of Texas.

The *Subcommittee on Trial Procedure* similarly contacted a number of trial practitioners to secure information about trial procedure in the district, and to assist in generating ideas for possible reform. Through its Chair, the subcommittee solicited comments regarding trial procedures from various large law firms in Houston. The subcommittee also conducted a survey of lawyers who had recently tried cases in the district. This sample consisted of cases tried between January 1, 1991, and May 31, 1991.

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[12]See Memorandum to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990 (May 29, 1990) (including questionnaires and forms developed by the Southern District of Florida and the Research Division of the Federal Judicial Center).

[13]This represents a total 164 responses to mailed surveys. At the end of July 1991, the Clerk's Office and Advisory Group members contacted non-responding attorneys by telephone to encourage response to the committee's questionnaire.

[14]This represents a total of 95 responses to mailed surveys. Because litigant addresses and phone numbers are not typically indicated on court records, the court requested the attorneys in the closed case sample to send the litigant questionnaire to the actual parties in the case. The Advisory Committee and the Clerk's Office were not satisfied that this was the optimal method of securing litigant reactions to their experience with the civil justice system, but limitations imposed by current district court data collection required that the committee proceed in this fashion.

In addition to court personnel and lawyers, the Advisory Group took steps to reach beyond the legal community and litigants. Lay persons as well as attorneys serving on the Advisory Group were requested to serve as liaison with constituent groups in the business and education communities. At the Advisory Group's initial organizational meeting, letters expressing business community concerns with regard to civil justice reform were circulated to Advisory Group members. Continuing liaison with the business community during the course of the Advisory Group's work elicited comments from the Lawyers for Civil Justice and the Products Liability Council, Inc., on proposals the Advisory Group was considering for inclusion in its local plan.

The academic advisor to the Advisory Group consulted with a number of academic colleagues serving as reporters or consultants to other district courts. These contacts produced extensive bibliographic resources on judicial administration and assisted the Advisory Group in keeping abreast of current parallel rule reform efforts by the Advisory Committee on Civil Rules.

Advisory Group members with extensive state practice provided insight into comparative state civil justice problems and procedures. This was particularly useful concerning the statutory requirement that the Advisory Group consider alternative dispute resolution techniques for implementation in the district. An Advisory Group member who served on the state bar committee drafting and implementing the state ADR provision[15/] provided the Group with first-hand knowledge of the state's experience with statutory alternative dispute resolution techniques.[16/]

The *Subcommittee on Alternative Dispute Resolution* contacted various alternative dispute resolution providers concerning the Civil Justice Reform Act and invited the providers to a hearing to present suggestions for specific

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[15/]See *Tex. Civ. Prac. & Rem. Code Ann.* §§ 152.001 *et seq.* (Vernon Supp. 1991).

[16/]*See also* Evans & Kovach, *Dispute Resolution in Texas*, 24 Hous. L. Rev. 6 1986); Phil Ritter, *Mediation in Texas: Defining the Issues*, 50 Tex. B.J. 846 (1987). The Advisory Committee also was greatly assisted by the expertise of Judge Sim Lake in formulating its ADR proposal.

procedures to be included in a proposed local rule on alternative dispute resolution. The providers were requested to submit written statements, as well. The subcommittee contacted the following providers: the American Arbitration Association, the Texas Association of Mediators, the Association of Attorney Mediators, the Houston Dispute Resolution Center, the Federal Mediation and Conciliation Service, the Judicial Arbitration and Mediation Service, the State Bar of Texas Alternative Methods of Dispute Resolution Committee, and the A.A. White Dispute Resolution Institute. Almost all these organizations either sent a written submission to the subcommittee, or a representative to a hearing conducted on July 3, 1991.

The Advisory Group made two other efforts to ensure openness in its proceedings, to reach out broadly to community citizens, and to educate new professionals. The Advisory Group's meetings were open to media representatives. On August 16, 1991, the Advisory Group took advantage of the federal court's New Attorney Admissions Workshop to inform several hundred new district court admittees of the existence of the Advisory Group, its efforts at civil justice reform in the district, and to inspire new federal practitioners to heightened standards of professionalism. Speaking on behalf of the Advisory Group were the United States Attorney, the Federal Public Defender, and one of its lay members representing clients within the system.

4. Report and Plan

Consistent with the statutory requirements that advisory groups submit to the district court both a report[17/] and a recommended plan,[18/] the Advisory Group for the Southern District of Texas drafted both a *Report* and a separate *Plan*. The *Report* conforms to all requirements delineated under the Act that Advisory Groups must perform in their duties. The *Report* not only describes the district, assesses the condition

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[17/] *See* 28 U.S.C. § 472(b) (Suppl. 1991).

[18/] *See* 28 U.S.C. § 472(b)(2) (the advisory committee report shall include "the basis for its recommendation that the district court develop a plan or select a model plan"); 28 U.S.C. § 472(b)(3) ("recommended measures, rules and programs;") and 28 U.S.C. § 472(b)(4) ("an explanation of the manner in which the recommended plan complies" with the requirements of the statute).

of the docket, and makes recommendations for a civil justice reform plan, but provides the basis for these detailed recommendations. The Advisory Group's *Plan* is set forth in Appendix P. This *Plan* is a distillation of Advisory Group's recommendations in its *Report* to the court.

The *Plan* for the Southern District of Texas resulted from the study and deliberations of the committee of the whole Advisory Group. The *Report* of the Advisory Group was distilled and written from subcommittee reports submitted to *Subcommittee on Coordination and Drafting of the Report*. Subcommittee chairs circulated all subcommittee reports to the entire Advisory Group for review, discussion, and revision. Drafts of the *Report* and *Plan* were submitted to the entire Advisory Group for review, discussion, and revision. The final Advisory Group *Report* and *Plan*, therefore, represents the consensus of the Advisory Group. Where applicable, the *Report* notes the views of dissenting members.

# APPENDIX C

# REPORT OF THE CLERK
# ON THE STATUS OF THE DOCKET
# FOR THE
# UNITED STATES DISTRICT COURT
# SOUTHERN DISTRICT OF TEXAS

## APRIL 29, 1991


# Report of the Clerk

# on the

# Status of the Docket

# for the

# United States District Court

# Southern District of Texas

## Prepared for

## Court Advisory Group
## Under The Civil Justice Reform Act of 1990

## April 29, 1991

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# I. TRENDS IN DEMANDS PLACED ON COURT RESOURCES

## A. Geographic, Demographic and Economic Factors.

The following geographic, demographic and economic factors serve to continue the increase in volume and complexity of litigation in the Southern District of Texas.

This district is composed of 43 counties in South and Southeast Texas consisting of 14,108 square miles, something less than one-fifth the area of the State of Texas. It lies, in general, in a belt approximately 150 to 200 miles wide along the Texas Gulf Coast, beginning on the east at a point approximately 50 miles west of the Louisiana border, and extending in a southwesterly direction, roughly parallel to the Gulf Coast, to the point of intersection with the Rio Grande River. It includes about 250 miles of common border between the United States and Mexico.

This district points to inherent geographic factors associated with distance between divisional offices, requiring complex management of clerical and judicial time. For instance, there are seven divisional offices of the court, including Houston (as headquarters), Galveston (58), Corpus Christi (250), Victoria (120), Brownsville (375), McAllen (350), and Laredo (320). The distances in miles from Houston to each of these points are indicated in parentheses by the listed division.

There are diverse caseloads peculiar to districts similar to the Southern District of Texas which are affected by the geographic factors. In addition to normal litigation expected in cities of such size, Houston, Corpus Christi, Galveston and Brownsville are deep water ports, and each, particularly the first three named, have a large number of admiralty longshoremen, personal injury and cargo damage cases. In addition to this complex civil litigation, we have found more multi-district litigation has found its way to the Houston Division in the form of complex antitrust suits. On the other hand, the Brownsville, McAllen and Laredo Divisions extend generally along the Mexico border with each of these cities being located on a main arterial highway leading to Monterrey and Mexico City. These divisions are burdened with extremely heavy criminal caseloads, which include drug smuggling and immigration cases. The Corpus Christi Division is also feeling the impact of increased civil litigation and continues to receive intense criminal activity being filtered through the border division en route north through Border Patrol Checkpoints located in Brooks and Kennedy Counties. The Department of Defense has announced that Corpus Christi has been selected as a "home port" for naval operations. This award is expected to have significant impact on the civil and criminal filings. All of the misdemeanor immigration cases and many felony, which are filed as misdemeanors, are handled by the U. S. Magistrate Judges in the border divisions, bringing some relief to the court's

docket. The continued press of the Speedy Trial Act increased filings and the previous zero tolerance policy in drug cases result in a delay in civil case management in the border divisions.

Houston remains the nation's fourth most populous city and is the largest in the south and southwest. The Houston-Galveston-Brazoria Consolidated Metropolitan Statistical Area (CMSA) ranks ninth in population growth among the nation's metropolitan areas and is the largest in the south and southwest. Dun & Bradstreet reports the Houston metro area is home to 10,313 companies which recorded total sales of $1 million or more in 1988. The CMSA is the nation's eleventh-ranking metropolitan area in retail sales volume, with this volume projected to increase 42.9% between 1988 and 1993. Houston is a major international city, nationally ranking third in number of foreign trade offices, fifth in number of foreign consulates, and sixth in international air passengers. Houston is the base of operations for the international energy industry, with 623 firms headquartered in 51 nations that have representation here. There are 574 domestic firms in Houston with branch operations in 108 foreign countries, and 766 firms or organizations in Houston which are involved in some phase of international business, but do not have branch offices abroad. Houston's leading position in the international field has been recognized by 57 foreign governments which maintain consular offices in the city, making Houston's consular corps the largest in the south and southwest. Twenty-eight foreign governments maintain trade, investment, and tourism offices in Houston, and the city has 29 active foreign chambers of commerce and trade associations. Houston ranks third among U. S. Ports in total tonnage and second in foreign tonnage. Four major rail systems operate 14 lines of mainline track radiating from the city. Approximately 600 common carrier truck lines operate daily schedules serving the southwestern distribution center and provides routes throughout the state and nation.

The Houston area is one of the nation's most important oil and gas transmission centers. Of the nation's 25 largest pipeline companies that move natural gas, 11 are headquartered in Houston. The area airports handled 23,754,904 domestic passengers while international traffic was 1,939,286 passengers. The passenger traffic at Houston Intercontinental Airport ranks 18th in domestic service and 8th in international service nationwide.[1] It is suffice to say that the Houston-Galveston area has become the aerospace center for the nation. All this activity augurs itself to a sustained level of complex and multi-faceted litigation.
Further retarding the case management efforts in the Houston-Galveston divisions is the fact that approximately 54% of the some 40,000 state prisoners are housed within Texas Department of Corrections' facilities which are located within the

[1] Greater Houston Chamber of Commerce, **Houston Facts, 1990**.

jurisdiction of these two divisions. The voluminous prisoner litigation comes primarily through the filing of Title 1983 complaints currently comprising a pending caseload of approximately 558 cases. In addition, there are currently pending 338 habeas corpus cases. Since most prisoners file as pro se litigants, a tremendous amount of time is required in screening and processing these "non-professional cases". In January, 1991, the Federal Bureau of Prisons opened the Three Rivers Federal Correctional Institution, a 1,300 inmate facility in Live Oak County within the jurisdiction of the already beleaguered Corpus Christi Division.

B. Judicial Officers

1. Article III Judges

a. Assignment

Presently there are 13 active judges and two Senior Judges in the District assigned as follows:

| Division | Active Judges | Senior Judges |
|---|---|---|
| Brownsville | 1 | |
| Corpus Christi | 1 | |
| Galveston | 1 | 1 |
| Houston | 8 | 1 |
| Laredo | 1 | |
| McAllen | 1 | |
| Victoria | 0 | |

The Biennial Judgeship Survey for 1990[2] identified the need for an additional seven Judges in the District based upon the increased criminal filings and consumption of judicial time associated with these cases. The Judicial Conference of the United States Courts recognized the need for seven additional judges and approved the request embodied in the judgeship survey. Congress, however, in the Judicial Improvement Act of 1990, authorized an additional five judgeships for the District whose places of abode have been designated by the Judicial Council of the Fifth Circuit as follows:

1 Judgeship at Brownsville
1 Judgeship at Laredo
1 Judgeship at McAllen

[2] Biennial Judgeship Survey for the Southern District of Texas, October, 1989.

2 Judgeships at Houston

Sitting in Executive Session on November 27, 1990, the Court for the Southern District of Texas resolved that all of the new judges would be subject to having cases assigned to them from other Divisions so that their docket would be equal to the average caseload in the District. Furthermore, Brooks and Kennedy County cases will be transferred to the McAllen and Brownsville Divisions from the Corpus Christi Division. There is an immigration checkpoint in each of these counties which contribute significantly to annual criminal case filings. The Victoria Division cases will be served by the Corpus Christi Division.

b. **Caseload in Relation to Authorized Judgeships/Actual Judgeships and National Averages** [3]

(1) Total civil and criminal filings per authorized judge caseload has increased 13.05% since 1987 and filings per actual judge, for the same time period, has increased 18.9%. Terminations per authorized judge decreased 4.5% but terminations per actual judge for the same period increased 8.9%. The Southern District of Texas ranks fourth among all Districts in terminations per authorized judge. Exhibits A-1 through A-4 compare individual judgeship activities for the District as compared to national judgeship average.

(2) Weighted filings per judgeship has increased 3.5% and weighted filings per active judge for the same time period increased 18.4%. The Southern District of Texas ranks seventh among all Districts in weighted caseload per authorized judge.

(3) Civil filings per authorized judge increased 5.7% and civil filings per actual judge has increased 20.5%. The District experiences greater than national average Type 2 cases (contract, personal injury, non-prisoner civil rights, patent/copyright, RICO, tax, etc.) which follow varied paths for disposition.[4] Exhibit B-1 reflects the District's civil filings as a percentage of Type 1 and 2 cases in comparison to national average and each Division. Exhibits B-2 through B-4 reflect the civil filings by nature of suit for the District compared to the national average per judge.

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[3] **Federal Court Management Statistics** for period ending 6/30/90.

[4] Guidance to Advisory Groups Appointed under the Civil Justice Reform Act of 1990, February 1991, P. 10.

(4) Criminal felony filings for the same four year period increased 37.1% per authorized judge and 56% per actual judge. Correspondingly, the number of defendants in each criminal case has increased 139% per authorized judgeship and 171% per actual judgeship. Drug-related cases generally are more complex than most criminal cases, because they tend to involve multiple defendants, multiple transactions, and complicated factual and legal issues. As a result, they require more judicial time and supporting staff time than any other cases. In addition, most drug related cases require the use of interpreters further increasing the need for more court resources. A comparison of the criminal filings for the year ending March 31, 1991 with the year ending March 31, 1990, however, reveals a district wide decline in criminal filings of 23% which reflects the prosecution philosophy of the new U.S. Attorney not to pursue petty drug offenses. Exhibits C-1 and C-2.

(5) The pending caseload per authorized judgeship has not increased; however, there has been an increase from 783 to 889 pending cases per actual judge representing an increase of 13.5% since 1987. It is interesting to note that the increase in the pending caseload per actual judge (13.5%) is not proportional to the increase in total filings per actual judge (28.9%). This phenomenon is explained by the herculean efforts of the active judges to dispose of cases as manifested in their exemplary case terminations per judge. Exhibits D-1 through D-9 depict the pending civil cases by nature of suit for the District and each Division in comparison to the national average per judge caseloads.

c. Caseload in relation to distinctive regions. An analysis of the caseloads throughout this District reveals three distinct regional dockets.[5]

(1) Brownsville, McAllen and Laredo Divisions (Border Region): Over the last three years the war on drugs and the flood of illegal aliens combined to push the felony filings for the Border Region to 56% of their total filings. During this time period criminal matters consumed 90% of the total judicial time in the Border Region.

[5] Report from Chief Judge DeAnda, dated November 16, 1990, Re: Duty Station and Docket Assignments for the Five Additional Judgeships.

On average, 74% of the criminal filings are felonies, of which 42% are drug cases, 33% are immigration cases and 8% are fraud cases. The judges predominantly manage the felony filings with the Magistrate Judges managing most of the misdemeanor filings.

The Judges in the Border Region dispose of 95% of the felony defendants before trial. The small percentage of defendants that go to trial result in an average of 58 criminal trials per judge. The judges in the Border Region expend 6.36 hours and 1.87 days per criminal trial. Combined with the 9.11 hours and 2.5 days for each of their 5 civil trials, the judges in the Border Region devote on average a total of 414 hours and 120 days to trials

(2) Houston, Galveston, and Victoria Divisions. - the Houston Region. The Houston Region provides a stark contrast to the Border Region. The war on drugs pushed criminal felony filings to 8% of the total docket. Despite the relatively small percentage of criminal filings, criminal matters consumed 40% of the Houston Division's total judicial time. The type of criminal filings and the disposition of defendants explain the disproportionate amount of time consumed by the criminal filings.

Felony cases comprise 92% of the annual criminal filings in the Houston Region, of which 22% are drug cases, 24% are fraud cases and 10% are weapons cases.

The difference in type of felony filings translates into a different judicial requirement to dispose of defendants. With 16% of the defendants going to trial, the judges in the Houston Region average 14 criminal trials a year. The judges in the Houston Region devote an average of 19.05 hours and 4.48 days to each criminal trial. This contrasts dramatically with the Border Region average of 6.36 hours and 1.87 days per criminal trial.

Civil filings provide the most striking distinction between the Houston Region and the Border Region. In the Houston Region, civil filings equal 92% of the docket of each judge. This compares to an average of 24% civil filings per judge in the Border Region. The judges in the Houston Region conduct an average of 25 civil trials per year consuming 13.92 hours and 3.15 days of judicial time per trial. In total, the judges in the Houston

Region spend an average of 520 hours and 119 days in trial, compared to 414 hours and 120 days in trial for the judges in the Border Region.

(3) The Corpus Christi Division. Criminal cases comprise 54% of the docket, of which 89% are felonies. Drug cases account for 86% of the felony cases filed in this Division.

During the last three years, 26% of the Corpus Christi defendants were dismissed, 68% plead and 6% went to trial. The small percentage of defendants tried results in an average of 28 criminal trials per year. Each trial consumed 8.68 hours and 1.95 days.

Beyond the demand of the criminal filings, the Corpus Christi Region receives substantial civil filings. With civil filings comprising 46% of the docket, the Corpus Christi Region struggles under the strain of speedy trial deadlines and pressing civil needs. The substantial civil docket translates into 18 trials per year and requires 6.37 hours and 1.97 days per trial. In total, trials consume 363 hours and 90 days of judicial time.

d. Vacant judgeship months reached an all-time high in 1989 with 23.8 months or almost 2 judgeships for the year. The total number of vacant judgeship months between 1986 and 1990 was 76 or 6.34 judges averaging 1.27 judge per year. All of these vacancies have been in the Houston Division.

e. Senior Judges. Presently there two Senior Judges serving in this District. One Senior Judge in the Houston Division is assigned all government collection cases and accepts other cases from the active judges. The Senior Judge in the Galveston Division accepts 34% of the new civil filings in the Division.

f. **Impact of 5 New Judgeships**. The addition of the new Judges will serve to bring the caseload closer to parity with the National average per Judge caseload; however, the Southern District will still experience greater than average filings and pending caseloads per judge. Assuming one courthouse, with all the Judges in one location, and applying the number of cases filed and pending in statistical year 1990, the Southern District of Texas Judges would still exceed their colleagues nationally on an average per Judge basis by 16.4% of cases filed (463 to 387) and by 40% of cases pending (563 to 420). Exhibit A-1.

2. Magistrate Judges

a. Assignment

Presently there are nine full-time and one part-time Magistrate Judge in the District assigned as follows:

| Division | Magistrate Judge |
|---|---|
| Brownsville | 1.5 (Part-time) |
| Corpus Christi | 1 |
| Galveston | 1 (Converted to full-time 2/91) |
| Houston | 4 |
| Laredo | 1 |
| McAllen | 1 |
| Victoria | 0 |

The Magistrate Judge Division of the Administrative Office is conducting a survey at the request of the Court to determine additional Magistrate Judge requirements. It is anticipated that a recommendation will be made for at least three additional Magistrate Judges. In all of the Divisions, except Houston, the Magistrate Judges are directly supervised by the resident Article III Judge. In the Houston Division, one Magistrate is assigned to two Article III Judges in accordance with the annual Order for Division of Work.

b. Caseload

All Magistrate Judges are assigned petty offenses, preliminary felony matters under 28 U.S.C. Section 636(a), criminal and civil matters under 28 U.S.C. Section 636(b), and most of the Magistrates are assigned some civil consent cases under 28 U.S.C. Section 636(c).

In the Houston Division, a month-long criminal docket is rotated among the four Magistrate Judges in which all petty offenses and preliminary felony matters are considered by the presiding Magistrate Judge.

All parties are notified by the Clerk at the time a civil action is filed of their right to consent to disposition of a civil case by a Magistrate Judge.
The Judicial Improvements Act of 1990 significantly amended 28 U.S.C. Section 636(c)(2) to permit Judges and Magistrate Judges to advise court litigants of the option to consent to trial by a Magistrate Judge. Judicial Officers were previously restricted from informing parties of the opportunity to have a civil matter referred to a Magistrate Judge because of concerns that parties would be coerced to accept such references. The amendment attempts to safeguard the rights of litigants to trial by an Article III Judge by requiring Judges and

Magistrate Judges to advise parties of their freedom to withhold consent to Magistrate jurisdiction without fear of adverse consequences. Exhibits E-1 through E-7 reflect the workload of the Magistrate Judges for calendar year 1990.

Terminations of consent cases by Magistrate Judges have increased from 19 cases to 49 cases or 157% during statistical years 1988 through 1990, indicating a propensity by litigants to consent to Magistrate jurisdiction and a growing disposition capacity by the Magistrate Judges.[6]

C. Supporting Personnel.

1. Clerk's Office. The Clerk of this district serves as the chief administrative officer for the District Court and Bankruptcy Court. This consolidated structure is unique to only four other districts in the federal court system, and the Southern District of Texas is one of the largest and most complex of these consolidated districts.

The responsibilities of the Clerk of Court extend across the full spectrum of the District Court whose components include judicial officers and staff, district and bankruptcy court clerk's office and staff, United States Probation Office, United States Pretrial Services Office and court reporting services. The court-wide authority exercised by the District Court Clerk includes financial management, administrative management, automated information services management, space acquisition and modification oversight, contract development and management, procurement oversight and execution of statutorily defined process. The District Court clerk also is tasked with the responsibility for the security of the court's physical facilities and of all official court records -- those accessible to the public as well as those deemed sensitive and to which access has been proscribed by order of the court. In addition, the District Court Clerk now bears responsibility for working directly with all judicial officers to develop and implement courtwide techniques of aggressive case management and disposition to maximize the role of the court in adjudicating disputes.

Deputy Clerk positions are allocated to the Office of the Clerk from the Administrative Office of the United States Courts in accordance with a staffing formula which factors case filings, number of judges, divisional locations, etc., to personnel requirements. Due to budgetary constraints associated with the Gramm/Rudman/Hollings Act, the staffing level of the

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[6] Annual Reports of the Director of the Administrative Office, years ending June 30, 1988, 1989, and 1990

United States Courts since 1986 has been restricted to between 90% and 98% of authorized positions. Needless to say, this restriction on recognized staffing requirements has not had a positive effect during a time when there are increasing case processing requirements associated with an increasing caseload.

Since November, 1990, staffing allocations have been at 100% and the Clerk's Office is presently authorized 126 positions assigned as follows:

| DIVISIONS | DEPUTY CLERKS | INTERPRETERS | COURT REPORTERS |
|---|---|---|---|
| Brownsville | 8 | 2 | 1 |
| Corpus Christi | 9 | 1 | 0 |
| Galveston | 7 | 0 | 2 |
| Houston | 86 | 3 | 9 |
| Laredo | 7 | 2 | 1 |
| McAllen | 8 | 1 | 0 |
| Victoria | 1 | 0 | 0 |

The Administrative Office is in the process of conducting a study to determine the adequacy of the present staffing allocation formula which is generally considered to be inadequate. One severe deficiency in the staffing formula is the requirement for courtroom assistance, particularly in courts where there are heavy trial and other in-court requirements such as in this district. Many judges have to rely on the case manager to perform some courtroom assistance; i.e., jury selection, swearing-in witnesses, recording minute entries, etc., all of which detracts from the case manager's primary responsibility of assisting the judge with the expeditious movement of cases through the court.

2. Probation Office. With the advent of "Guideline Sentencing" in November, 1987, the role of the probation officer changed from a neutral to a more adversarial role. This is because the guidelines strictly structure sentencing based upon stated criteria, the existence of which in presentence investigation causes increased objections by the defendant.

Not only are the numbers of persons under supervision increasing, but the type of offender being received for supervision requires more attention of the probation officer and ultimately the court in terms of revocations. The 22% increase in violation reports between 1987 and 1990 is representative of this phenomenon. A synopsis of activities/impact upon the criminal docket prepared by the probation office is attached as EXHIBIT F.

3. Pretrial Services Agency. The Pretrial Services Agency for the Southern District of Texas is the largest in the United States. Conditions of pretrial release are becoming more rigid requiring increased and aggressive supervision consequently resulting in the discovery of more violations which must be reported to the court.

It is anticipated that mandatory testing for drugs with improved random urinalysis will also increase the number of violation reports resulting in revocation hearings. A synopsis of activities/impact upon the criminal docket prepared by the Pretrial Services Agency is attached as EXHIBIT G.

D. Automation and other Technical Support

1. Automation.

a. Integrated Case Management Systems (ICMS). All civil cases filed since June 1, 1990, have been entered in the automated CIVIL ICMS database. This program is running on a Unisys 9500 computer located in the Houston division, and provides electronic docketing and automated case management capabilities for the civil docket.
We are in the pilot stage of PACER (Public Access to Court Electronic Records) which provides for the downloading of docket and index information into a personal computer which the public and bar can access.
The automated docketing program for criminal cases (COURTRAN) is now maintained on a Digital Computer located at the Administrative Office. This fall the criminal dockets will be placed in a NEW CRIMINAL automated docketing program running on a Unisys system in Houston.

The Bankruptcy Court dockets will be automated when the BANCAP program is initiated this summer. This program will offer the docketing and case management features available in CIVIL to be used on the bankruptcy docket.

b. The district has completed a project to place personal computers in the chambers for the use of the judges and all members of the judge's staff. The Office of the Clerk provides technical support to the users of these personal computers.

c. In addition, the Clerk's Office maintains automated programs

dealing with finance, jury, personnel, property inventory and attorney admissions.

2. Court Reporting/Electronic Recording Services. At the end of June, 1990, the official court reporters for the Southern District of Texas totaled almost as many pending pages of appellate transcripts as the total pending number throughout the Circuit. The primary reason rested in the tremendous number of in-court hours required to process criminal arraignments, rearraignments, sentencings and hearings. In addition to these "dead hours", they were required to prepare a Statement of Reasons in order to satisfy the requirements of the Sentencing Commission. There remained very little time for court reporters to prepare the appellate transcripts due to the in-court requirements.

   In desperation, the judges at Laredo, Corpus Christi, Brownsville and three in Houston, requested electronic recording operators on an experimental basis. Since then, Corpus Christi and McAllen have converted to the exclusive use of this system, while Brownsville, Laredo and Houston primarily utilize these resources for heavy in-court requirements for these "dead hours" which produce few requests for transcripts but consume an inordinate amount of available time. By relieving the official reporters from attendance at these laborious in-court sessions, they were able to produce transcripts and still meet the requirements for complicated trials where the judge and parties were uncomfortable with the electronic recording process. The two courts that have converted to total use have found that the available resources for transcript production are much broader and more readily available. For instance, transcribing work can be farmed out to several companies and not confined as a single responsibility for an overburdened official court reporter. Also, the Statement of Reasons required by the Sentencing Commission, as well as the Appellate Court, is now generated automatically from the electronic record with no additional time requirement on a court reporter. In Houston, it has also allowed the added advantage of being able to promptly meet reporting needs for magistrate judges and visiting judges which provides much more flexibility in our court reporter management approach. The reason for any court being burdened with a high appellate transcript backlog can most likely be attributed to high in-court requirements and inability of the official reporter to find time to produce. Electronic recording appears to provide the near perfect solution to high criminal caseload requirements since it relieves the official reporter from the nonproductive, time-consuming in-court requirement of handling arraignments, rearraignments, sentencings and related hearings.

E. Prosecution of Criminal Cases.

The judges in Southern Texas experienced criminal filings at a rate nearly three times the national average. It is the nation's war on drugs that drives the criminal filings in this district. Five areas of the nation have been designated as high intensity drug impacted areas. Two of those areas are located within the borders of the Southern District of Texas. As a result, Southern Texas leads the nation in criminal drug filings. Congress has allocated increasing resources in this district to investigate and prosecute the drug dealers. Since 1985, the number of assistant United States Attorneys has doubled. Thirty percent of this increase has been since January, 1989. This does not include resources provided in the pending drug legislation.

Last year Attorney General Richard Thornburgh projected that the number and complexity of savings and loan prosecutions in this district would be overwhelming. In anticipation of the high volume of prosecutions, the Department of Justice created the Financial Litigation Unit in this district, and staffed it in March, 1990, with fifteen Assistant U. S. Attorneys. The resulting prosecutions will further increase the percentage of judicial time spent on criminal matters.[7]

The newly appointed U. S. Attorney announced his prosecution philosophy to the Court in Executive Session on November 27, 1990, which includes:

1. Focus on federal issues of substance and impact.

2. Screen all cases and apply selective prosecution using available resources on significant federal cases.

3. Encourage enforcement agencies to focus their investigative resources to combat serious violations such as money laundering, bank fraud and organized drug conspiracies.

4. Significant reduction in the number of petty cases with an increase in prosecuting complex criminal cases.

A recent press release cited the rigorous prosecution of savings and loan violations as a top congressional priority and concern.

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[7] Report of the Clerk to the Chief Judge, June 13, 1990,
Re: Need for Additional Judgeships.

## II. COURT PROCEDURES

### A. Assignment Procedures.

1. Methods for assignment of cases at filing.

   a. Civil cases are weighted pursuant the Court Management Statistics (Light, Average, Heavy).

   b. On receipt of a case for filing, the weight of the case will be determined by the nature of suit indicated on the civil cover sheet (JS 44).

   c. In the Houston and Galveston Divisions, a judge is randomly assigned from a weighted deck within the Automated Case Assignment System. In all other divisions the resident judge is assigned all cases.

   d. Each civil deck is made up of a ratio of judges as prescribed in the annual Division of Work Order.

2. Methods for reassignment of cases.

   a. New Judges. Dockets are established by order of the Chief Judge; generally it will require each judge in the division to transfer a number of their cases to the new judge in order to establish an average case load. The cases are randomly selected by the Clerk's Office.

   b. Recusals are made by order of the recusing judge. On receipt of such an order, a new judge is randomly reassigned to the case. The receiving judge then transfers a case of equal import (weight, nature, age, money, number of parties) back to the recusing judge in exchange.

   c. Disqualification. Same as recusal procedure.

   d. Related cases.

      (1) Bankruptcy withdrawals and appeals are assigned to the judge with the earliest district court civil action number (pending or not) arising from the bankruptcy case, if any; otherwise, they are randomly assigned.

(2) Consolidations and other related matters are transferred by order to the judge with the lowest pending case number. Local Rule 6.G.

e. Illness/disability.

(1) New case assignments are suspended.

(2) Pretrial matters are usually referred to the magistrate judge.

(3) All other matters are generally provided for by order of the Chief Judge, including the particulars for reassignment of the docket if necessary.

f. Protracted/complex cases.

(1) Assigned randomly.

(2) Multidistrict Litigation (MDL) cases are assigned to the judge who has the related cases in this district. If there were no related cases in this district, the MDL Panel contacts the Chief Judge for referral of assignment.

B. Time Limits.

1. Monitoring Service of Process/Answers to Complaint. The "Answer" Reports in the "CIVIL" System allow the Court to monitor whether service was returned and if an answer was filed.

2. Enforcing Time Limits. Case manager or law clerk will monitor motion reports/calendar tickler reports and forward delinquencies to the attention of the judge for an order to show cause or other sanctions.

3. Practices regarding extensions.

a. Extensions granted only in extreme/exceptional circumstances.
b. Must be requested sufficiently in advance.
c. May not be considered automatic or as a matter of course.
d. Diligence is expected in meeting deadlines.
e. Motion submission deadlines may be extended by agreement of counsel, but not if the extension violates any other court imposed deadlines.

C. Rule 16 Conferences.

1. Exceptions for categories of cases - Local Rule 8.

   a. Administrative agency appeals (Social Security).
   b. Bankruptcy appeals.
   c. Prisoner Civil Rights.
   d. Habeas Corpus.
   e. Miscellaneous government cases.
   f. Other Miscellaneous matters.

2. Scheduling orders. A variety of methods are utilized and is dependent upon the individual judge's practice.

   a. A scheduling order is prepared every other month with new set of dates. This is given out on each new case (excluding above listed exceptions) as it is filed, and includes all controlling dates for discovery, motions, pretrial, etc. It is accompanied by another order which instructs counsel to serve the scheduling order on the defendants; on their appearance, to confer with defendants counsel regarding deadlines and trial terms; provides instructions regarding complex litigation; and advises the parties that if they agree that the case will be ready prior to the scheduled docket call to contact the case manager.

   b. Issuance of an order, at the time of filing, which orders the plaintiff to serve a copy on the defendant(s) with the summons and complaint; parties to appear at a Rule 16 scheduling conference in order to establish cut-off dates; parties are instructed to work out as many conflicts as possible prior to conference.

   c. At the time of filing a complaint, a blank scheduling order is provided with the judge's procedural manual which instructs the attorneys to agree on their own schedule. If parties cannot agree within 90 days, plaintiff's counsel will advise the court and the court will enter its own docket control order or plaintiff may request a Rule 16 conference setting.

   d. Once issue is joined, the court schedules a Rule 16 conference, at which time cut-off dates are set. Exception: Where a party files Rule 12(b) dismissal, remand or transfer motions, the court will defer setting a conference until it has ruled on the motion.

   e. Once issue is joined, a scheduling order is entered.

3. Use of Magistrate Judges. Judge Kazen (Laredo) and Judge Rainey

(Houston) refer scheduling conferences to the Magistrate Judges Notzon and Stacy, respectively.

D. Discovery Procedures.

1. Use/enforcement of cut-off dates. The judges allow a range of 12 to 20 months for setting case for trial or docket call. Various deadlines controlling the case are set within this time period as outlined in Part C.

2. Volume of Discovery. Local Rule 5.C limits the number of interrogatories which may be served to no more than thirty without leave of court.

3. Use of Magistrate Judges. Discovery conflicts are referred by some of the judges to the Magistrate Judges for disposition.

E. Motion Practice.

1. Scheduling.

a. By written motion practice as prescribed by Local Rule 6.D which states opposed motions will be submitted to the judge twenty days from the date of filing without notice from the Clerk and without appearance by counsel.

b. By oral motion practice as prescribed by Local Rule 6.F.2 which states that counsel will be notified by the Clerk of a date for oral presentation irrespective of submission date.

c. At discretion of the court, or on request of counsel; initially set for written submission, but often heard orally.

2. Monitoring filing of motions, responses; etc., by case managers utilizing automated motions reports or by manual tracking system.

3. Hearing and Calendaring practices.

a. Some judges set aside a week of each month for hearing motions.

b. Others hear motions on a specified time or day (i.e. Monday afternoons). If there is an overflow, they are carried over each day at 4:30 until complete.

4. Method/Timing of Ruling is at the discretion of the judge; the general rule is "as soon as possible".

5. Use of Proposed Orders is required by Local Rule 6.

F. Final Pretrial/Docket Call.

1. Methods are at the discretion of the court.

2. A form Pretrial Order is attached as Appendix A to the Local Rules for those judges who require one.

G. Jury Trials.

1. Method of selection of the venire. Local Rule 12 authorizes civil juries to be composed of 6 members plus alternates.

2. Conduct of voir dire is at the discretion of the judge.

   a. Court conducts the voir dire, then will let the attorneys ask a few of their own questions.

   b. Court requires voir dire questions be written, but allows attorneys to conduct voir dire.

3. Use of jury selection aids. All judges utilize the same juror questionnaires.

4. Use of juror comprehension aids. All judges encourage the use of easels, blow-ups, overhead projectors, seating charts and notebooks for note taking in complex cases.

5. Use of deliberation aids. All judges provide a written charge, jury verdict form, jury note forms. Donuts and coffee are also provided to most juries each day.

6. Assessment of juror costs for late settlement is being imposed by Judge Kent in the Galveston Division. Local Rule 10.

H. Trial Setting.

1. Method for scheduling trials is at the discretion of the judge, usually at docket call or final pretrial conference. All of the judges maintain a form of trailing dockets: 1) one week trailing docket, if not reached, it is rescheduled to another week, 2) two week trailing docket, 3) 1 month trailing docket, 4) 2 month trailing docket, or 5) a trailing docket until reached.

2. Timing for setting date for trial. The average time to trial in this district is 23 months from issue to trial.

3. Adherence to trial dates. The same as practices regarding extension of time (Part B.3).

4. Priorities. Criminal cases are first priority, then preliminary injunctions and older cases.

5. Back-ups for multiple settings. In this district, criminal cases are set first with 3-4 civil cases backing them up.

6. System for "clearing the calendar".

   a. Spears hearings are held on a group (an average of 16-17) of prisoner cases at a time, by a rotating judge.

   b. Asbestos cases are handled by the special master (in all divisions except Corpus and McAllen) through pretrial, then are distributed among the judges for trial.

   c. The miscellaneous docket is rotated to a different judge each month according to the annual Division of Work Order.

   d. Government collection cases are assigned to the senior judge.

I. Review and Dismissal of Inactive Cases.

1. Case are reviewed with the "No Answer" report: 1) if there has not been service, or 2) no answer has been filed and the case has been in default for more than 60 days without a motion for default, the action may be summarily dismissed for want of prosecution. Local Rule 20.

2. Bankruptcy appeals in which no briefs have been filed are dismissed without prejudice.

3. Tickler/calendar system (manual or automated) is monitored and if court's deadlines are not met, the case may be dismissed without prejudice.

J. Use of Case Manager and Other Personnel to Assist Judge.

1. The case manager is assigned to each judge from the Clerk's Office and is responsible for scheduling and monitoring the calendar and deadlines. They serve as liaison between the court and the attorneys and prepare the

judges individual trial, jury, appointment and closing reports for compilation by the data entry clerks.

2. The judge's administrative functions and legal research are performed by the judge's secretary and two law clerks.

3. Magistrate Judges are each assigned a case manager from the Clerk's Office with responsibilities similar to the case manager for an Article III Judge. Each Magistrate Judge has a secretary and one law clerk.

K. **Local Rules**

1. The Local Rules for the United States District Court, Southern District of Texas, were effective May 1, 1988. Local Rule 3J was amended November 21, 1989, limiting the documents to be filed initially in removal actions.

2. The following local rules embody several principles and techniques of litigation management enumerated in 28 U.S.C. Section 473:

a. Local Rule 2B requires the attorney in charge to attend all court proceedings or send a fully informed attorney with authority to bind the court (emphasis added). 28 U.S.C. Section 473 (b)(2). Litigation management techniques.

b. Local Rule 5.A prohibits the filing of discovery with the Clerk, and 5.D limits the number of interrogatories that can be served without leave of court to no more than thirty (counting sub-parts). 28 U.S.C. 473(a)(4). Encouragement of cost-effective discovery.

c. Local Rule 6.A.4 requires all opposed civil motions to contain an averment that the movant has conferred with the respondent and that counsel are unable to agree about the disposition of the motion. 28 U.S.C. Section 473(a)(5). Conservation of judicial resources.

L. **Alternatives to Local Rules**. Most Judges publish a practice manual which details their pretrial procedures and individual requirements regarding lengths of briefs, etc. Most judges require the parties to approve of the entry of a joint pretrial order in the form of Appendix B to the local rules.

M. **Alternative Dispute Resolution**. The local rules contain no authorization to refer appropriate cases to alternative dispute resolution. Section 473(a)(6). Although some judges in the Houston Division have been sending cases to ADR, there is no court policy on the types of cases for which referral would be

appropriate nor a designation of methods or programs available for referrals.

N. **Communication and coordination among Judges, Magistrate Judges and Clerk's Office**

The District Court Judges meet in Executive Session four times a year at various locations throughout the District. The Clerk serves as Secretary for all executive sessions, and Bankruptcy Judges and Magistrate Judges are invited to attend portions of some of the sessions to discuss issues of common interest.

Houston Judges are assigned liaison responsibilities for adjuncts and agencies within the Houston Division by the Division of Work Order which is entered at the beginning of each calendar year. In the other divisions, the resident District Judge serves as liaison for the division. All Judges conduct their respective liaison duties as necessary and serve as the focus for presentation of issues within their area of responsibility for consideration by the full court. All Executive Sessions have published agendas which may include items submitted for discussion from the judges in their liaison capacity.

The Houston Division judges conduct weekly meetings to discuss operational and administrative matters affecting the Houston Division. The Clerk serves as Secretary for all of the weekly meetings.

Minutes of all Executive Sessions and Weekly Houston Judges' Meetings are drafted by the Clerk and distributed after approval by the Chief Judge to all Judges.

III. Summary. The Southern District of Texas will continue to experience a civil and criminal caseload which increases in volume and complexity. Despite the addition of five new judgeships which will certainly have a positive impact on a presently beleagured court, the District remains two judgeships short of the recommendation of the Judicial Conference and per judge statistics will remain above national norms.

Any civil justice expense and delay reduction plan developed for implementation in this District must, of necessity, take into consideration the distinctive regional caseloads and the integration of speedy, economic civil case management within the constraining, preceding and disproportionate criminal case requirements. Simply put, there are a finite number of judicial in-court hours which can be devoted to conducting trials and other matters, and when this number reaches its maximum threshold, alternative means of disposition must be utilized. However, in conjunction with alternative disposition methods, each judge should be assured that the consumption of his or her own valuable time in the disposition of civil matters is economic and productive.

In other words, before there is the commitment of an Article III judicial officer in the early and ongoing control of the pre-trial process and careful and deliberate monitoring through discovery/case management conferences, a determination must be made that the case warrants the involvement of this resource. Therefore, cases should be classified in the initial stages into categories which can be economically and expeditiously disposed by systematic and differential management maximizing utilization of Article III Judges, Magistrate Judges and alternative dispute resolution.

In this District, Class I civil cases (government collection, prisoner civil rights, and asbestos product liability), are being differentially managed through the use of Senior Judges, Pro Se law clerks and a Special Master in the Houston Division. There remains, however, a greater than national average proportion of Class II civil cases (contract actions, personal injury, non-prisoner civil rights, RICO, tax, copyright and patent, etc.), which may be susceptible to classification into categories that can be differentially managed. For example, contract actions comprise approximately 25% of all civil actions filed in the District. An analysis of this class of cases might reveal categories of contracts, parties, damages or attorney practice which would reflect disposition potential by alternative dispute resolution or Magistrate Judge Management/consent trial, thereby preserving the involvement of Article III Judges to those categories of cases which absolutely are not subject to other means of disposition.

Once the Article III Judge is assured the case is one which requires his or her commitment, the process of early and ongoing control of the pre-trial process and careful and deliberate monitoring through case management conferences can commence.

An analysis of the Class II caseload for the District for the purpose of identifying cases or trends which would allow systematic and differential case management should include:

1. An analysis of the Class II caseload in relation to each of the distinctive regional caseloads within the District.

2. An analysis of litigant and attorney practices for privately represented litigants within the Class II categories of cases.

3. An analysis of both criminal and civil practices related to United States litigation which impact on the management of the private civil docket.

4. An analysis of State litigation practices that impact the Federal courts, such as removal trends.

5. Identification of categories of cases which have probable disposition potential through alternative dispute resolution, and the availability of ADR programs in each of the Divisions.

6. An analysis of Magistrate Judge utilization to include identification of categories of cases which have probable disposition potential through consent trial, or intensive Magistrate Judge involvement in the pre-trial process.

**STATISTICAL YEAR 1990***
**COMPARISON OF INDIVIDUAL JUDGESHIP ACTIVITIES**
**SOUTHERN DISTRICT OF TEXAS VERSUS NATIONAL JUDGESHIP AVERAGE**

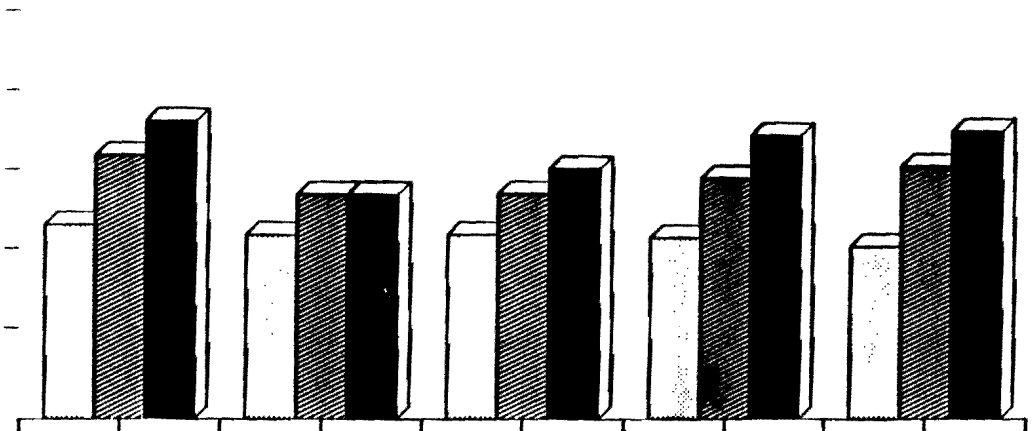
| | SOUTHERN TEXAS | NATIONAL AVERAGE | ACTUAL JUDGESHIP DIFFERENCE |
|---|---|---|---|
| | **18/13 Authorized/Actual | **649/575 Authorized/Actual | |
| Total Filings | 463 / 641 / 731 | 387 / 437 / 472 | TX(S) +55% |
| Civil Filings | 332 / 460 / 524 | 335 / 379 / 409 | TX(S) +28% |
| Criminal Felony Filings | 131 / 181 / 206 | 51 / 58 / 63 | TX(S) +227% |
| Pending Cases | 563 / 780 / 889 | 420 / 474 / 512 | TX(S) +74% |
| Weighted Filings | 424 / 587 / 669 | 432 / 488 / 527 | TX(S) +27% |
| Terminations | 431 / 598 / 682 | 375 / 423 / 457 | TX(S) +49% |
| Trials Completed | 48 / 67 / 76 | 32 / 36 / 39 | TX(S) +95% |

* Statistical Year 1990 Figures as of June 30, 1990.

**Includes additional judges authorized by Judicial Improvements Act of 1990.

**Federal Court Management Statistics, SY1990**

# Total Filings Per Judge
## Year Ending June 30

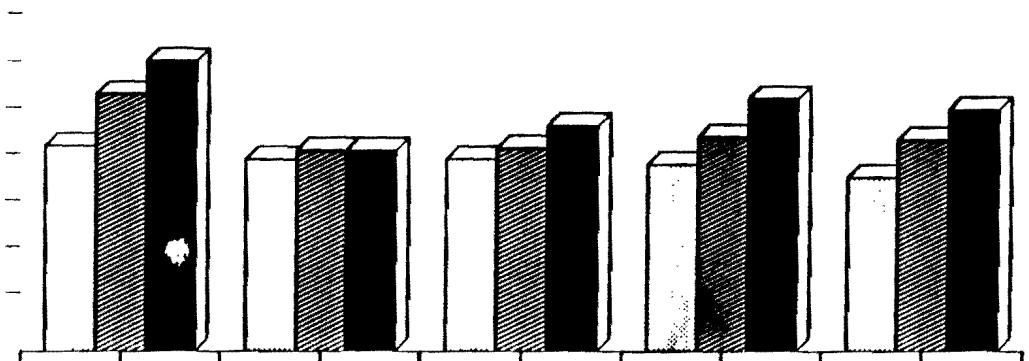


| | 1986 | 1987 | 1988 | 1989 | 1990 |
|---|---|---|---|---|---|
| National Average | 491 | 466 | 467 | 459 | 437 |
| SD/TX Average | 667 | 567 | 571 | 611 | 641 |
| SD/TX Adjusted Avg. | 752 | 567 | 635 | 721 | 730 |



Adjusted for Vacant Judgeship Months

# Comparison of Average Civil Filings Per Authorized Judgeship
## Year Ending June 30

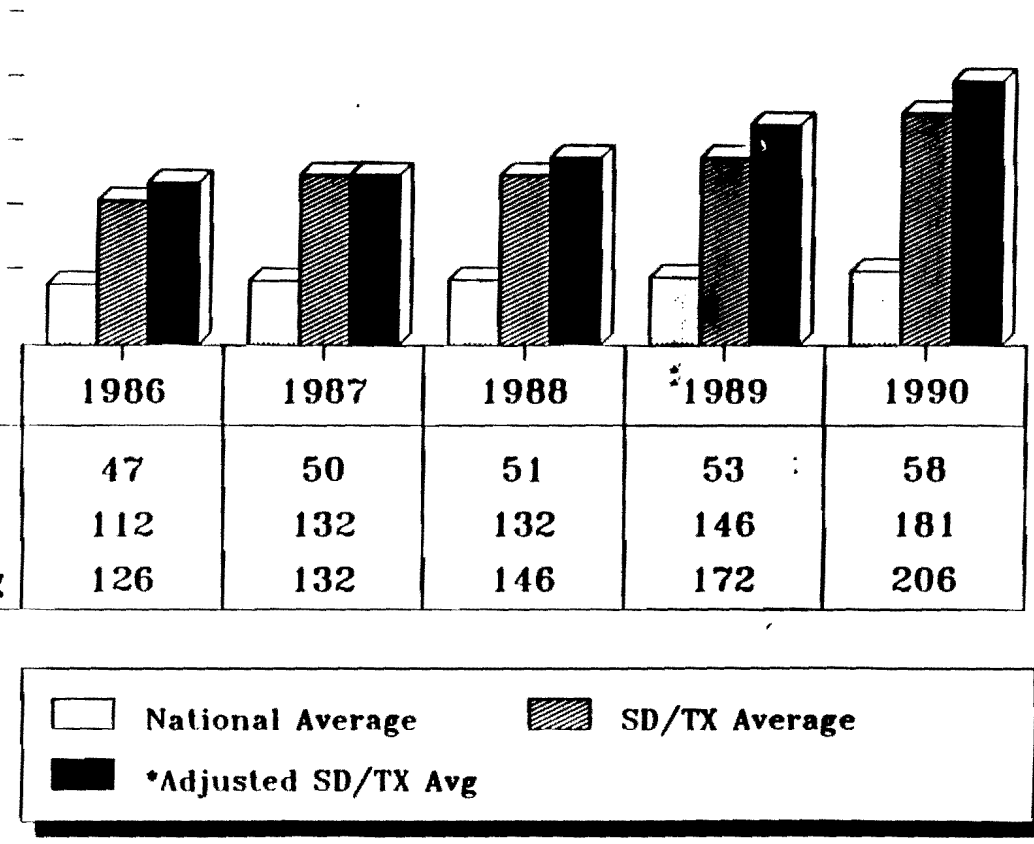


| | 1986 | 1987 | 1988 | 1989 | 1990 |
|---|---|---|---|---|---|
| National Average | 444 | 416 | 417 | 406 | 379 |
| SD/TX Average | 556 | 435 | 440 | 465 | 460 |
| *Adjusted SD/TX Avg | 626 | 435 | 488 | 548 | 524 |



*Adjusted for Vacant Judgeship Months

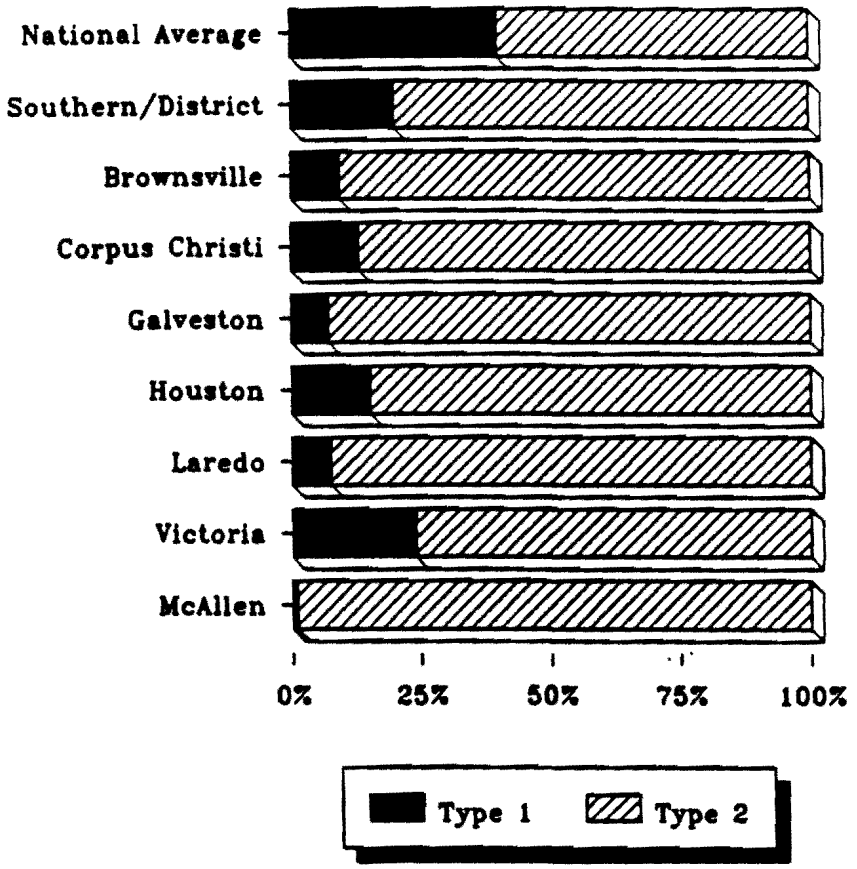
# Comparison of Average Felony Filings Per Authorized Judgeship
## Year Ending June 30




| | 1986 | 1987 | 1988 | *1989 | 1990 |
|---|---|---|---|---|---|
| National Average | 47 | 50 | 51 | 53 | 58 |
| SD/TX Average | 112 | 132 | 132 | 146 | 181 |
| *Adjusted SD/TX Avg | 126 | 132 | 146 | 172 | 206 |

*Adjusted for Vacant Judgeship Months

# COMPARISON OF CIVIL FILINGS
## Percentage of Type 1 and Type 2 Cases
## 1986 through 1990




Year Ending June 30

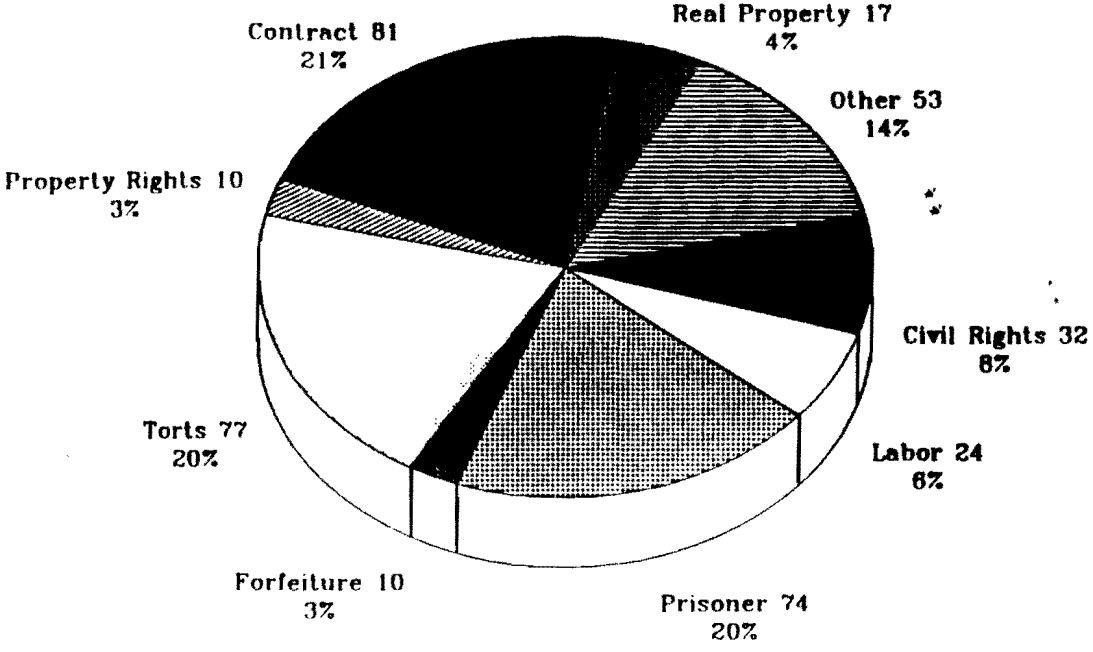
**TYPE 1 CASES**

- Government Collections
- Social Security Appeals
- Prisoner Civil Rights
- Habeas Corpus
- Bankruptcy Appeals
- Land Condemnation
- Asbestos Product Liability

**TYPE 2 CASES**

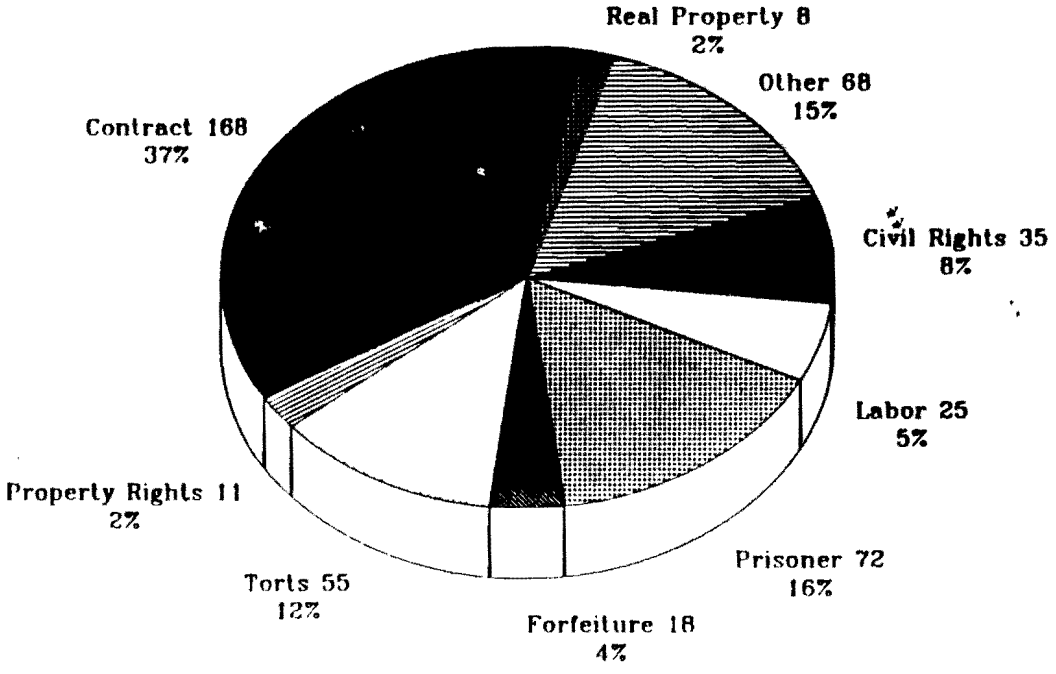
- Contract
- Civil Rights
- Personal Injury
- ERISA
- RICO
- Labor
- Tax
- Securities

# National Average Per Judge
## Civil Filings by Nature of Suit
### Year Ending June 30, 1990



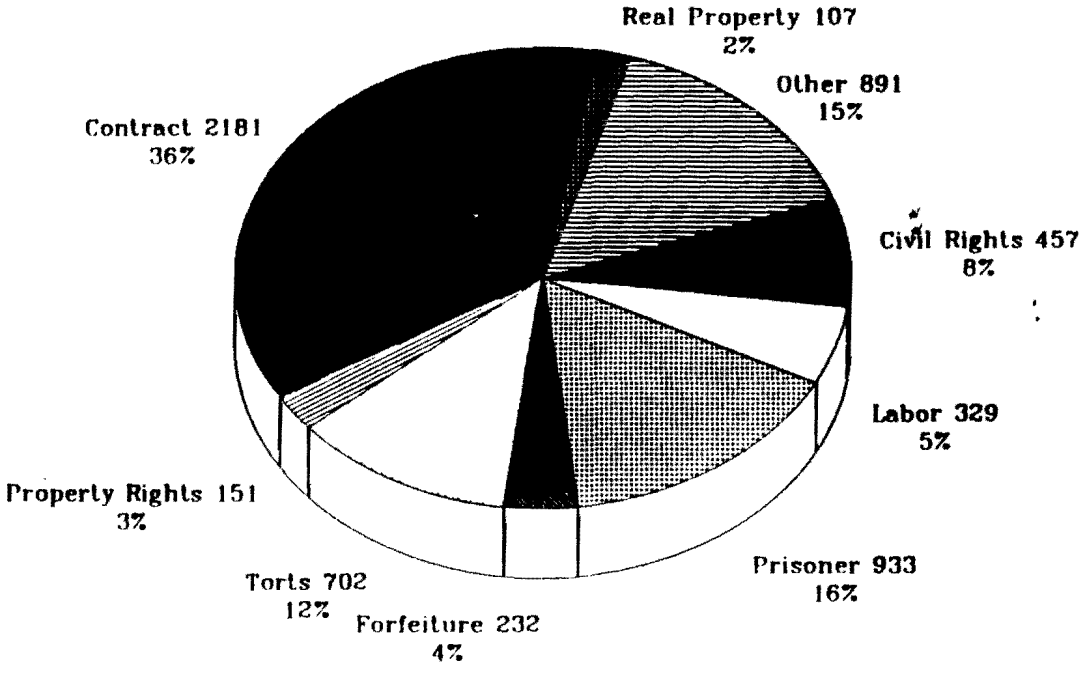

378 Average per Judge

# Southern District of Texas
## Civil Filings by Nature of Suit
### Year Ending June 30, 1990




460 Average per Judge

# Southern District of Texas
## Civil Filings by Nature of Suit
### Year Ending June 30, 1990




5,983 Total Civil Filings

SOUTHERN DISTRICT OF TEXAS
COMPARISON OF CRIMINAL FILINGS
1990 TO 1991

Year Ending March 31

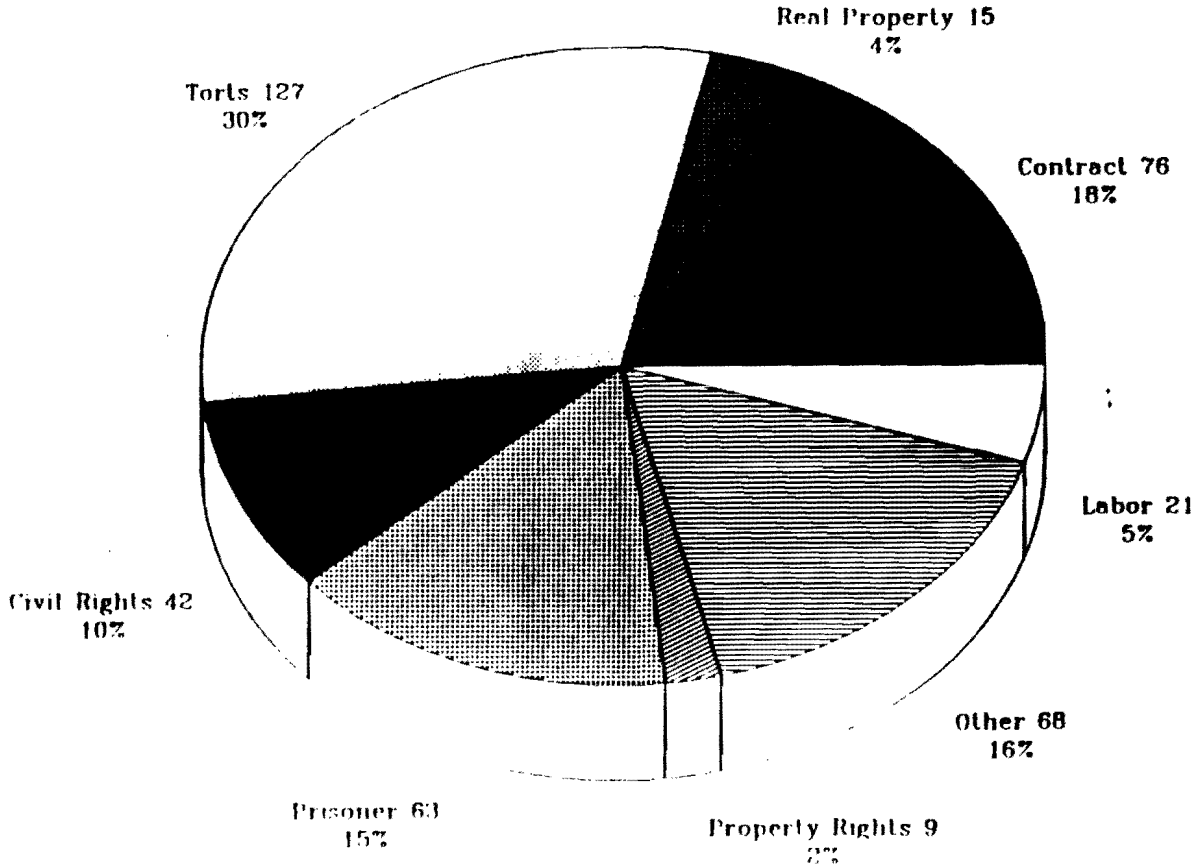
| DIVISION | 1990 | 1991 | Variance | %Change |
|---|---|---|---|---|
| Brownsville | 546 | 362 | -184 | -33.69% |
| Corpus Christi | 482 | 506 | +24 | +4.97% |
| Galveston | 20 | 23 | +3 | +15.00% |
| Houston | 437 | 348 | -89 | -20.36% |
| Laredo | 710 | 508 | -202 | -28.45% |
| Victoria | 8 | 3 | -5 | -62.50% |
| McAllen | 977 | 688 | -289 | -29.58% |
| District Total | 3,180 | 2,438 | -742 | -23.33% |

SOUTHERN DISTRICT OF TEXAS
COMPARISON OF CRIMINAL FILINGS
1990 TO 1991

Year Ending March 31

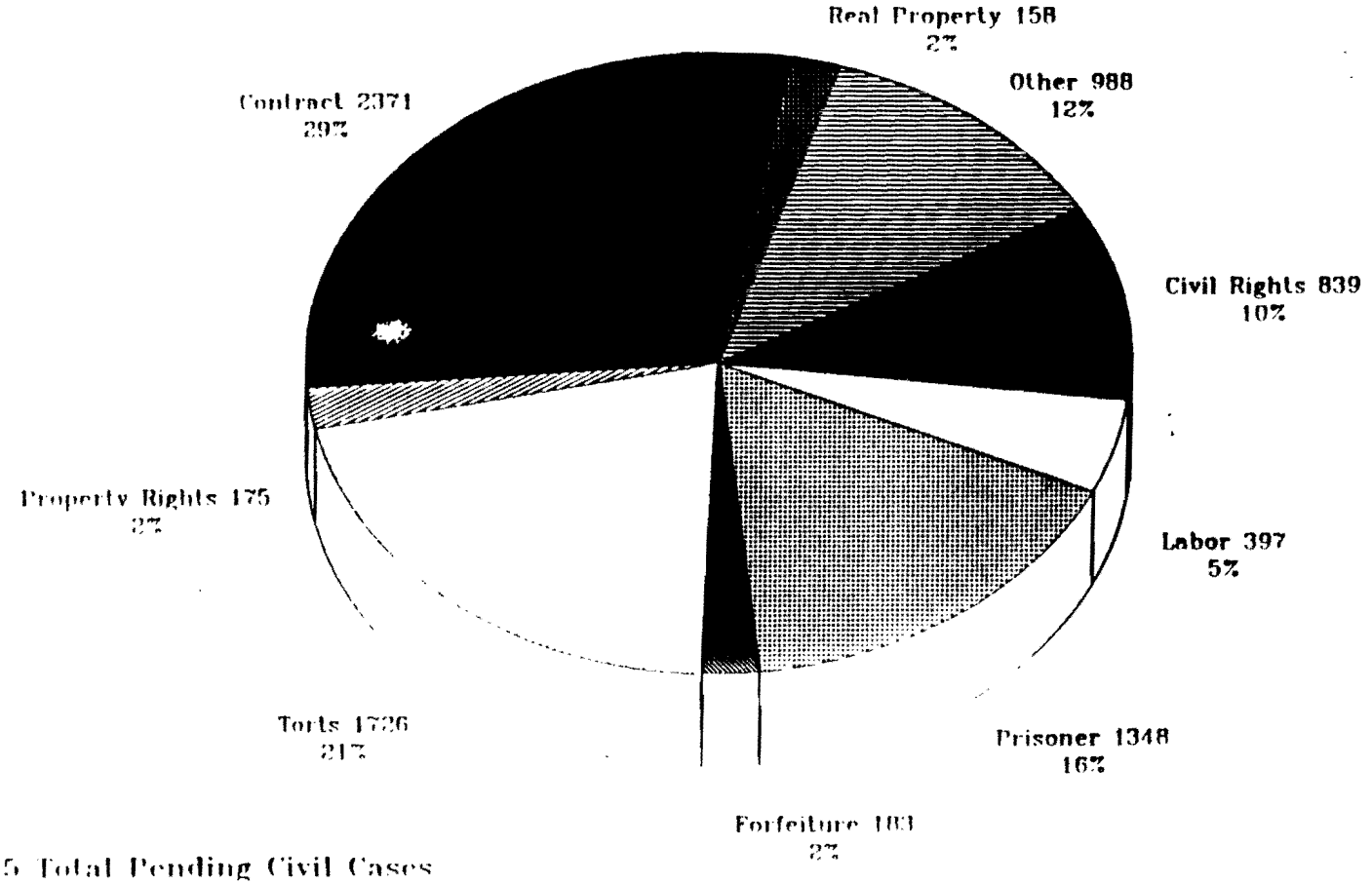
| DIVISION | 1990 | 1991 | Variance | %Change |
|---|---|---|---|---|
| Brownsville<br>Laredo<br>McAllen | 2,233 | 1,558 | -675 | -30.2% |
| Corpus Christi | 482 | 506 | +24 | +4.97% |
| Houston<br>Galveston<br>Victoria | 460 | 379 | -81 | -17.6% |

# National Average Per Judge
## Civil Pending by Nature of Suit
### Year Ending June 30, 1990



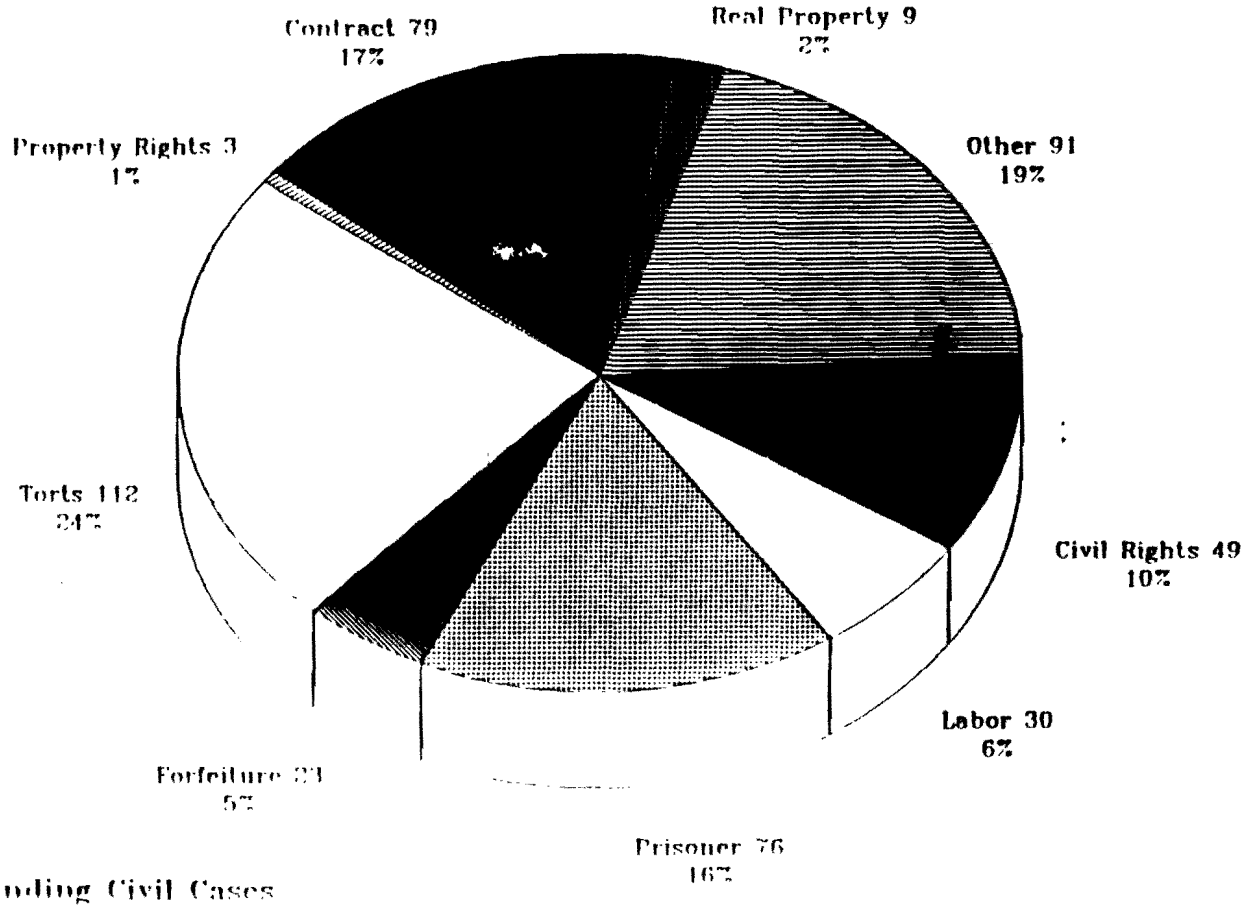

421 Average Per Judge

# Southern District of Texas
## Civil Pending by Nature of Suit
### Year Ending June 30, 1990



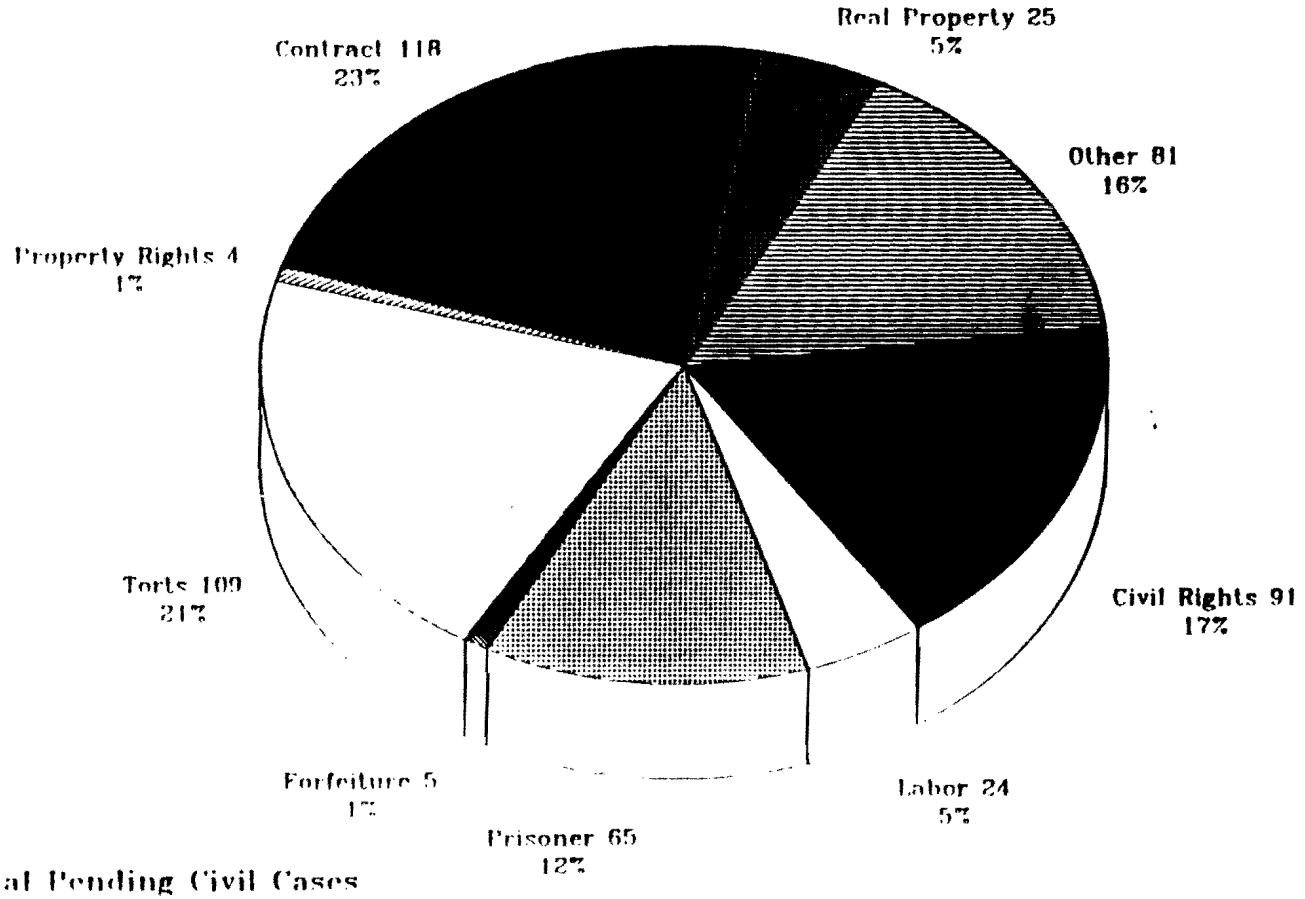

8,185 Total Pending Civil Cases

# Brownsville Division
## Civil Pending by Nature of Suit
### Year Ending June 30, 1990



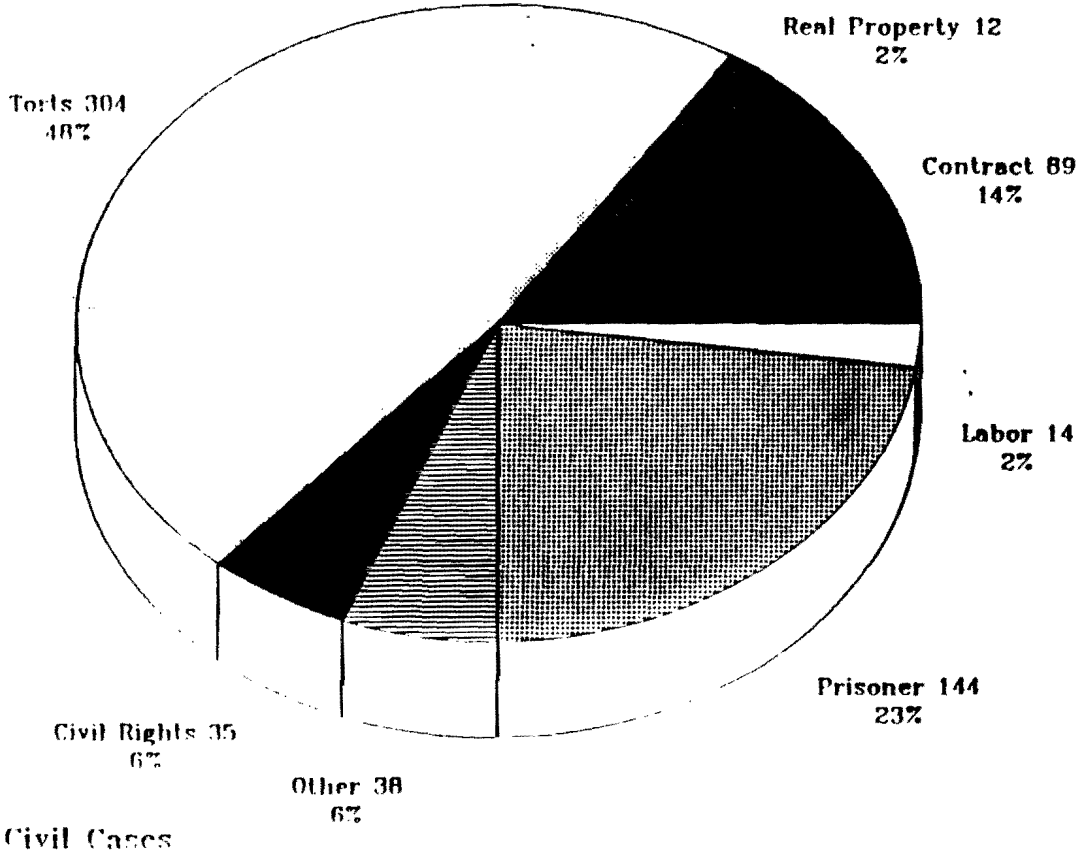

472 Total Pending Civil Cases

# Corpus Christi Division
## Civil Pending by Nature of Suit
### Year Ending June 30, 1990



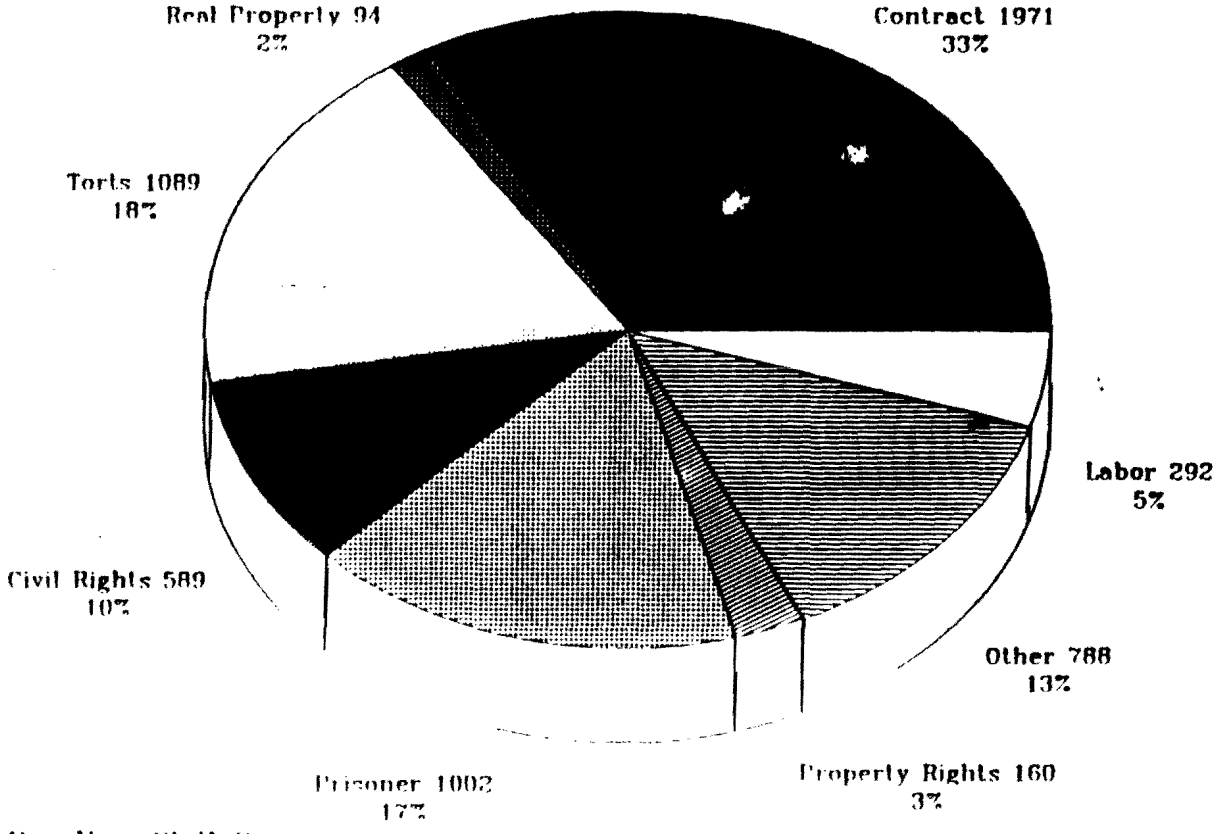

522 Total Pending Civil Cases

# Galveston Division
## Civil Pending by Nature of Suit
### Year Ending June 30, 1990



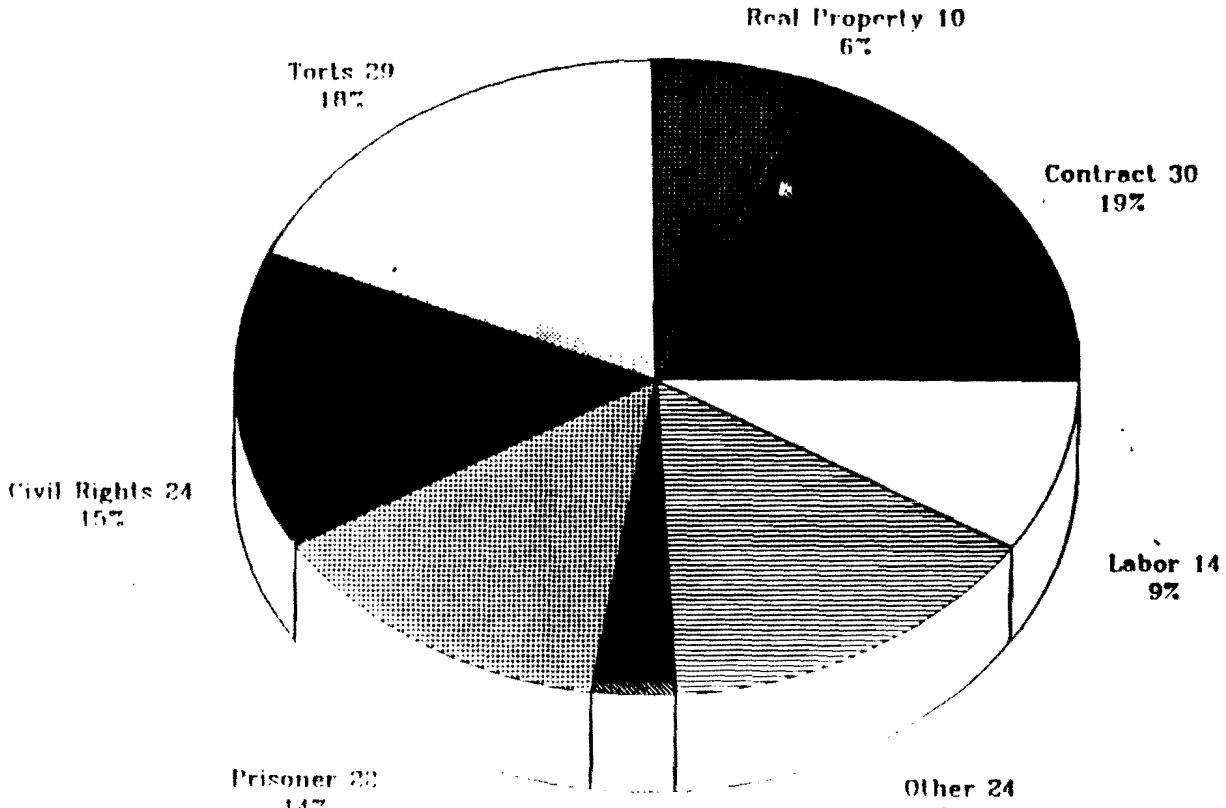

636 Total Pending Civil Cases

# Houston Division
## Civil Pending by Nature of Suit
### Year Ending June 30, 1990



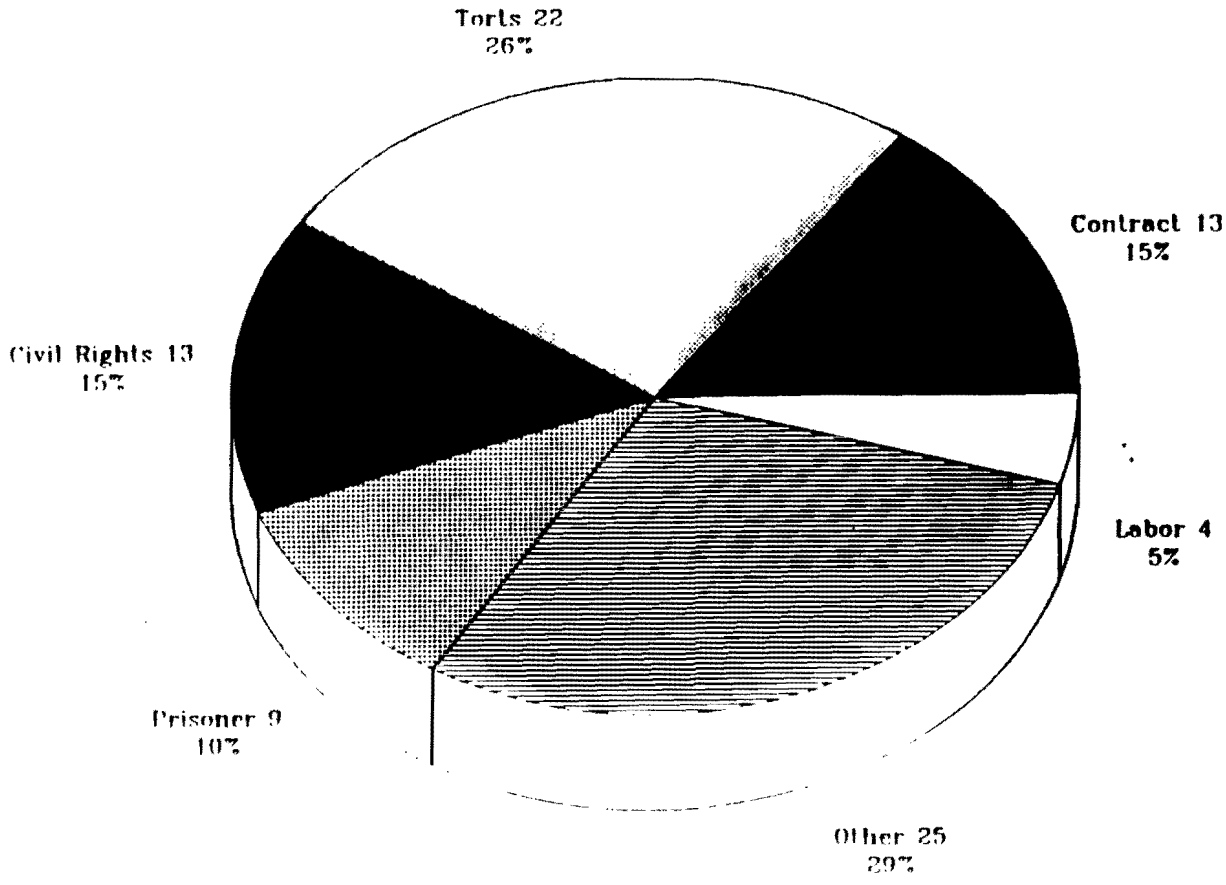

5985 Total Pending Civil Cases

# Laredo Division
## Civil Pending by Nature of Suit
### Year Ending June 30, 1990



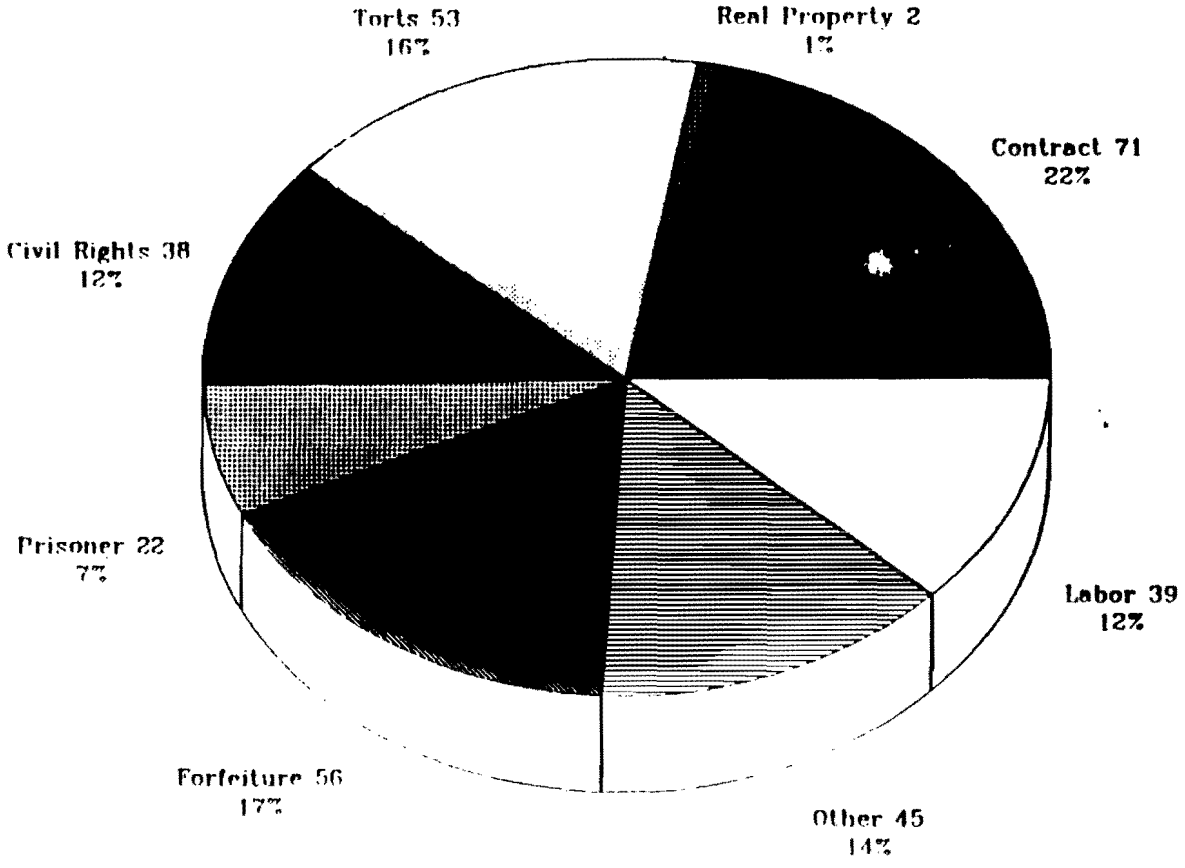

158 Total Pending Civil Cases

# Victoria Division
## Civil Pending by Nature of Suit
### Year Ending June 30, 1990




86 Total Pending Civil Cases

# McAllen Division
## Civil Pending by Nature of Suit
### Year Ending June 30, 1990




326 Total Pending Civil Cases

**PETTY OFFENSES***
**BEFORE UNITED STATES MAGISTRATE JUDGES**
**SOUTHERN DISTRICT OF TEXAS**

| MONTH | PLATTER | BOTLEY | KELT | STACY | PECHT | MALLET | de ASES | NOTZON | GARZA | SMITH | GUERRA |
|---|---|---|---|---|---|---|---|---|---|---|---|
| JAN | 0 | 0 | 0 | NA | | 193 | 0 | 43 | 61 | 0 | 99 |
| FEB | 0 | 6 | 18 | 0 | | 142 | 0 | 44 | 53 | 0 | 76 |
| MAR | 0 | 0 | 0 | 9 | | 135 | 1 | 54 | 65 | 0 | 72 |
| APR | 0 | 3 | 0 | 0 | | 210 | 0 | 41 | 69 | 0 | 52 |
| MAY | 3 | 0 | 0 | 0 | NA | 165 | 0 | 40 | 78 | 0 | 119 |
| JUN | 0 | 0 | 0 | 19 | 0 | 192 | 0 | 44 | 66 | 0 | 48 |
| JUL | 6 | 0 | 0 | 0 | 0 | 159 | 0 | 49 | 45 | 0 | 65 |
| AUG | 0 | 0 | 0 | 0 | 0 | 193 | 2 | 61 | 120 | NA | 41 |
| SEP | 0 | 0 | 0 | 0 | 36 | 141 | 1 | 58 | 92 | | 43 |
| OCT | 0 | 0 | 0 | 6 | 3 | 146 | 0 | 37 | 74 | | 34 |
| NOV | 0 | 0 | 0 | 0 | 16 | 135 | 3 | 35 | 25 | | 64 |
| DEC | 0 | 0 | 0 | 0 | 0 | 88 | 1 | 19 | 58 | | 26 |
| TOTAL | 9 | 9 | 18 | 34 | 55 | 1,899 | 8 | 525 | 806 | 0 | 739 |

*6 Months/$5,000

U.S. Magistrate Judges' Monthly Reports for the Year 1990 (JS43)

**PRELIMINARY FELONY MATTERS (28 U.S.C. 636(a))***
**BEFORE UNITED STATES MAGISTRATE JUDGES**
**SOUTHERN DISTRICT OF TEXAS**

| MONTH | PLATTER | BOTLEY | KELT | STACY | PECHT | MALLET | de ASES | NOTZON | GARZA | SMITH | GUERRA |
|---|---|---|---|---|---|---|---|---|---|---|---|
| JAN | 41 | 506 | 27 | NA | NA | 198 | 181 | 135 | 123 | 0 | 108 |
| FEB | 25 | 5 | 272 | 0 | NA | 235 | 206 | 163 | 158 | 5 | 97 |
| MAR | 144 | 0 | 26 | 5 | NA | 256 | 64 | 234 | 126 | 12 | 104 |
| APR | 26 | 1 | 12 | 516 | NA | 200 | 83 | 177 | 107 | 16 | 104 |
| MAY | 146 | 0 | 45 | 12 | NA | 243 | 164 | 304 | 172 | 32 | 145 |
| JUN | 135 | 9 | 362 | 10 | 0 | 241 | 184 | 213 | 147 | 14 | 70 |
| JUL | 65 | 438 | 2 | 405 | 2 | 179 | 73 | 148 | 66 | 9 | 130 |
| AUG | 49 | 0 | 15 | 45 | 259 | 182 | 239 | 198 | 143 | NA | 46 |
| SEP | 101 | 294 | 63 | 7 | 43 | 169 | 104 | 114 | 103 | NA | 91 |
| OCT | 25 | 2 | 506 | 6 | 6 | 208 | 92 | 119 | 103 | NA | 66 |
| NOV | 70 | 5 | 7 | 333 | 12 | 312 | 77 | 149 | 14 | NA | 180 |
| DEC | 36 | 1 | 24 | 15 | 322 | 253 | 130 | 120 | 75 | NA | 60 |
| TOTAL | 863 | 1,261 | 1,361 | 1,354 | 644 | 2,676 | 1,597 | 2,074 | 1,337 | 88 | 1,201 |

*Initial appearance, material witness, search warrants, summons, arraignments, bail review, etc.

U.S. Magistrate Judges' Monthly Reports for the Year 1990 (JS43)

**FELONY MATTERS (636(b)*
BEFORE UNITED STATES MAGISTRATE JUDGES
SOUTHERN DISTRICT OF TEXAS**

| MONTH | PLATTER | BOTLEY | KELT | STACY | PECHT | MALLET | de ASES | NOTZON | GARZA | SMITH | GUERRA |
|---|---|---|---|---|---|---|---|---|---|---|---|
| JAN | 3 | 9 | 2 | NA | NA | 42 | 27 | 8 | 29 | 0 | 10 |
| FEB | 1 | 0 | 11 | 0 | NA | 74 | 34 | 0 | 41 | 0 | 7 |
| MAR | 0 | 0 | 0 | 1 | NA | 40 | 27 | 3 | 65 | 3 | 5 |
| APR | 1 | 2 | 2 | 11 | NA | 33 | 22 | 5 | 53 | 25 | 18 |
| MAY | 11 | 0 | 8 | 1 | NA | 40 | 27 | 6 | 64 | 26 | 20 |
| JUN | 1 | 0 | 9 | 2 | 0 | 42 | 16 | 5 | 103 | 14 | 31 |
| JUL | 3 | 7 | 8 | 3 | 0 | 49 | 105 | 2 | 26 | 0 | 17 |
| AUG | 0 | 0 | 0 | 3 | 0 | 62 | 29 | 5 | 49 | NA | 11 |
| SEP | 2 | 3 | 3 | 0 | 13 | 46 | 52 | 4 | 57 | NA | 11 |
| OCT | 4 | 1 | 12 | 1 | 4 | 56 | 36 | 3 | 53 | NA | 17 |
| NOV | 3 | 0 | 0 | 7 | 9 | 44 | 16 | 5 | 2 | NA | 43 |
| DEC | 0 | 1 | 1 | 0 | 5 | 55 | 51 | 0 | 32 | NA | 17 |
| TOTAL | 29 | 23 | 56 | 29 | 31 | 583 | 442 | 46 | 574 | 68 | 207 |

*Contested and uncontested nondispositive motions, report and recommendation on dispositive motions, hearings, conferences, writs, etc.

U.S. Magistrate Judges' Monthly Reports for the Year 1990 (JS43)

**PRISONER CASES (28 U.S.C. 636(b))***
**BEFORE UNITED STATES MAGISTRATE JUDGES**
**SOUTHERN DISTRICT OF TEXAS**

| MONTH | PLATTER | BOTLEY | KELT | STACY | PECHT | MALLET | de ASES | NOTZON | GARZA | SMITH | GUERRA |
|---|---|---|---|---|---|---|---|---|---|---|---|
| JAN | 22 | 55 | 43 | NA | NA | 1 | 2 | 0 | 3 | 0 | 0 |
| FEB | 96 | 0 | 52 | 0 | NA | 2 | 7 | 0 | 0 | 0 | 0 |
| MAR | 80 | 134 | 63 | 0 | NA | 3 | 6 | 1 | 1 | 0 | 0 |
| APR | 73 | 135 | 57 | 1 | NA | 3 | 3 | 0 | 3 | 18 | 0 |
| MAY | 110 | 121 | 57 | 1 | NA | 2 | 6 | 0 | 3 | 0 | 0 |
| JUN | 36 | 58 | 18 | 4 | 1 | 1 | 7 | 2 | 3 | 0 | 0 |
| JUL | 2 | 99 | 26 | 18 | 10 | 1 | 4 | 2 | 1 | 0 | 0 |
| AUG | 0 | 81 | 15 | 18 | 12 | 3 | 5 | 0 | 6 | NA | 0 |
| SEP | 0 | 122 | 26 | 46 | 20 | 3 | 10 | 23 | 1 | NA | 0 |
| OCT | 0 | 30 | 8 | 26 | 9 | 2 | 0 | 12 | 2 | NA | 0 |
| NOV | 0 | 21 | 17 | 19 | 11 | 1 | 9 | 1 | 0 | NA | 0 |
| DEC | 0 | 17 | 11 | 29 | 11 | 1 | 12 | 1 | 1 | NA | 0 |
| TOTAL | 419 | 873 | 393 | 162 | 74 | 22 | 71 | 42 | 24 | 18 | 0 |

*Contested and uncontested nondispositive motions, report and recommendation on dispositive motions, hearings, conferences, and reports recommendations to the District Court.

U.S. Magistrate Judges' Monthly Reports for the Year 1990 (JS43)

## CIVIL DUTIES UNDER (28 U.S.C. 636(b))* ASSIGNED TO UNITED STATES MAGISTRATE JUDGES SOUTHERN DISTRICT OF TEXAS

| MONTH | PLATTER | BOTLEY | KELT | STACY | PECHT | MALLET | de ASES | NOTZON | GARZA | SMITH | GUERRA |
|---|---|---|---|---|---|---|---|---|---|---|---|
| JAN | 88 | 11 | 31 | NA | NA | 3 | 59 | 36 | 4 | 67 | 0 |
| FEB | 36 | 22 | 39 | 0 | NA | 12 | 25 | 35 | 36 | 80 | 0 |
| MAR | 2 | 19 | 30 | 23 | NA | 19 | 32 | 33 | 67 | 90 | 0 |
| APR | 27 | 72 | 28 | 11 | NA | 14 | 41 | 38 | 45 | 56 | 0 |
| MAY | 20 | 47 | 41 | 47 | NA | 23 | 24 | 37 | 32 | 69 | 0 |
| JUN | 4 | 50 | 30 | 52 | 1 | 22 | 36 | 50 | 42 | 103 | 0 |
| JUL | 51 | 44 | 29 | 34 | 4 | 18 | 35 | 47 | 26 | 77 | 0 |
| AUG | 7 | 34 | 52 | 211 | 3 | 25 | 68 | 20 | 30 | NA | 0 |
| SEP | 4 | 33 | 65 | 365 | 16 | 17 | 49 | 42 | 44 | NA | 0 |
| OCT | 21 | 33 | 34 | 251 | 14 | 19 | 21 | 45 | 34 | NA | 0 |
| NOV | 0 | 24 | 31 | 10 | 34 | 21 | 24 | 23 | 28 | NA | 1 |
| DEC | 4 | 21 | 31 | 87 | 12 | 24 | 35 | 32 | 32 | NA | 0 |
| TOTAL | 264 | 410 | 443 | 1,091 | 84 | 217 | 449 | 438 | 420 | 542 | 1 |

*Contested and uncontested nondispositive motions, dispositive motions, hearings and conferences.

U.S. Magistrate Judges' Monthly Reports for the Year 1990 (JS43)

**CIVIL CONSENT CASES TERMINATED/MOTIONS AND CONFERENCES HELD (28 U.S.C. 636(c)) BY UNITED STATES MAGISTRATE JUDGES SOUTHERN DISTRICT OF TEXAS**

| MONTH | PLATTER | BOTLEY | KELT | STACY | PECHT | MALLET | de ASES | NOTZON | GARZA | SMITH | GUERRA |
|---|---|---|---|---|---|---|---|---|---|---|---|
| JAN | 1/0 | 0/0 | 1/5 | NA | NA | 0/0 | 0/0 | 0/0 | 0/0 | 1/0 | 0/0 |
| FEB | 0/0 | 1/5 | 0/8 | 0/0 | NA | 0/0 | 0/0 | 0/0 | 1/1 | 0/0 | 0/0 |
| MAR | 0/0 | 1/0 | 2/12 | 0/10 | NA | 0/0 | 0/0 | 0/0 | 0/0 | 3/0 | 0/0 |
| APR | 0/0 | 0/0 | 4/17 | 1/1 | NA | 0/0 | 0/0 | 0/0 | 0/0 | 0/0 | 0/0 |
| MAY | 0/0 | 0/0 | 4/18 | 3/11 | NA | 0/0 | 1/0 | 0/0 | 1/0 | 3/1 | 0/0 |
| JUN | 0/0 | 0/7 | 1/9 | 1/19 | 0/0 | 0/0 | 0/0 | 0/0 | 0/0 | 2/0 | 0/0 |
| JUL | 0/0 | 1/0 | 0/0 | 1/3 | 0/0 | 0/0 | 0/0 | 0/0 | 1/0 | 1/0 | 0/0 |
| AUG | 1/0 | 0/0 | 1/20 | 3/7 | 0/0 | 0/0 | 1/0 | 0/0 | 0/0 | NA | 0/0 |
| SEP | 0/0 | 0/0 | 0/13 | 1/5 | 0/0 | 0/0 | 1/0 | 0/0 | 0/0 | NA | 0/0 |
| OCT | 0/0 | 3/0 | 0/0 | 3/5 | 0/3 | 0/0 | 0/0 | 0/0 | 0/2 | NA | 0/0 |
| NOV | 0/0 | 0/0 | 2/15 | 2/11 | 0/6 | 0/0 | 0/0 | 0/0 | 0/0 | NA | 0/0 |
| DEC | 0/0 | 0/0 | 0/12 | 1/2 | 0/0 | 0/0 | 0/0 | 0/0 | 0/1 | NA | 0/0 |
| TOTAL | 2/0 | 6/12 | 15/129 | 16/74 | 0/9 | 0/0 | 3/0 | 0/0 | 3/4 | 10/1 | 0/0 |

U. S. Magistrate Judges' Monthly Reports for the Year 1990 (JS43)

## CIVIL CONSENT CASES (28 U.S.C. 636(c)) ASSIGNED TO UNITED STATES MAGISTRATE JUDGES SOUTHERN DISTRICT OF TEXAS

| MONTH | PLATTER | BOTLEY | KELT | STACY | PECHT | MALLET | de ASES | NOTZON | GARZA | SMITH | GUERRA |
|---|---|---|---|---|---|---|---|---|---|---|---|
| JAN | 0 | 0 | 5 | NA | NA | 0 | 0 | 0 | 0 | 2 | 0 |
| FEB | 0 | 1 | 0 | 3 | NA | 0 | 0 | 0 | 0 | 2 | 0 |
| MAR | 0 | 1 | 3 | 1 | NA | 0 | 0 | 0 | 0 | 0 | 0 |
| APR | 0 | 1 | 1 | 10 | NA | 0 | 2 | 0 | 0 | 3 | 0 |
| MAY | 0 | 2 | 8 | 1 | NA | 0 | 0 | 0 | 0 | 0 | 0 |
| JUN | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| JUL | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| AUG | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | NA | 0 |
| SEP | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | NA | 0 |
| OCT | 0 | 0 | 0 | 1 | 2 | 0 | 0 | 0 | 1 | NA | 0 |
| NOV | 0 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | NA | 0 |
| DEC | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | NA | 0 |
| TOTAL | 0 | 5 | 18 | 16 | 9 | 0 | 2 | 0 | 1 | 7 | 0 |

SDTX Case Activity Reports for the Year 1990.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

PROBATION OFFICE

LOUIS G. BREWSTER
CHIEF PROBATION OFFICER
POST OFFICE BOX 61207
HOUSTON 77208-1207

April 25, 1991

POST OFFICE BOX 308
BROWNSVILLE 78520-0308
POST OFFICE BOX 2623
CORPUS CHRISTI 78403-2623
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LAREDO 78040-0847
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TEXAS COMMERCE CENTER
SUITE 728
MCALLEN 78501-8189
100 N. TEXAS
RIO GRANDE CITY 78582-3628
SUITE 114
1501 INTERSTATE 10
BAYTOWN 77521-1349
SUITE 102, 109
COMMERCIAL CIRCLE
CONROE 77304-2203

PLEASE REPLY TO: Houston

Mr. Jesse E. Clark
Clerk of the Court
Southern District of Texas/Houston
515 Rusk
Houston, Texas 77002

**RE: U. S. PROBATION/PAROLE DEPARTMENT - A SYNOPSIS OF ACTIVITIES/IMPACT UPON THE CRIMINAL DOCKET**

Dear Mr. Clark:

In an effort to assist the Court in its study pursuant to the Civil Justice Reform Act of 1990, pertinent statistics were reviewed to demonstrate trends in workload from 1987 through 1990. That data is summarized in the attached table listing some of the factors that are traditionally used by the Administrative Office of the U. S. Courts in assessing personnel allocation. As is readily apparent, increased criminal filings have resulted in increased numbers of presentence investigations ordered and persons under supervision of the U. S. Probation Officer.

**PRESENTENCE INVESTIGATIONS**

With the advent of "guideline sentencing" on November 1, 1987, the role of the U. S. Probation Officer in the sentencing process changed significantly. Prior to guideline sentencing, the probation officer functioned as a neutral third party who conducted an investigation into the defendant's crime and background, fashioning the results into a document that was more akin to a diagnostic tool for the Court's use in imposing sentence. Rarely did the defendant or defense counsel object to information contained in the PSI. If objections were raised, the Court, under then existing procedures, could resolve the dispute by simply stating on the record that the Court would not consider the disputed information in imposing sentence. Further, there were few statutory or procedural limitations in imposing sentence prior to 1987. The average time from adjudication of guilt to imposition of sentence, was approximately 30 days.

With the advent of guideline sentencing, the PSI has evolved from a diagnostic tool and "word picture" of the defendant to one best described as a legal document. Because guideline sentencing places primary emphasis on sentencing by rule rather than discretion, accompanying procedural safeguards in the sentencing process has resulted in the USPO becoming a preliminary fact-finder/paralegal for the Court.

We do not see the trend of increased criminal filings to change, nor do we anticipate the complexity of the sentencing process to diminish. With the annual passage of "tough" crime bills, adding agents and prosecutors to interdict crime, criminal filings can also be expected to increase. With each annual cycle of amendments to the guidelines and daily appellate decisions on various guideline issues, the complexity of guideline application increases. Consequently, so will disputes at sentencing. Further, as the defense bar becomes increasingly familiar with guideline sentencing and their liability should they provide inadequate representation to their clients during the sentencing process, the number of contested issues during the sentencing process are and can be expected to increase.

Finally, it is our impression that the nature of the offense and offender being prosecuted in this district is contributing significantly to the already complicated sentencing process. Conspiracies involving upwards of 30 defendants, spanning months and years of offense behavior, are significant challenges in applying the guideline sentencing scheme. Massive frauds involving sophisticated financial schemes are equally problematic. Further, many defendants have lengthy prior criminal histories and/or are uncooperative during the investigation. Many refuse to provide information upon advice of counsel. These latter factors significantly impede the probation officer's ability to gather information necessary to apply sentencing guidelines. Considering these issues, it is predicted the Court will be spending even more time in the sentencing process.

**PERSONS UNDER SUPERVISION**

The attached table reflects a steady increase of persons under supervision through 1990. More significant is the fact that the type of offender now being received for supervision is one requiring much more attention by the USPO and ultimately the Court in terms of revocations. As noted, the number of persons under supervision requiring drug treatment in 1990 as compared to 1987, has nearly tripled. Certainly the 22% increase in violation reports filed (even though caseload increased 13%) is indicative that the offender being prosecuted today is generally a greater risk to the community, has a history of drug or alcohol dependence, and/or is a more hardened, sophisticated offender. We not only anticipate this trend to continue, but expect violation reports to

significantly increase with the full implementation of the "Enhanced Supervision" model currently proposed by the Probation Division of the Administrative Office of the U. S. Courts. This model focuses on enforcement of conditions and risk control.

With the increase of such offenders and subsequent violations, the Court's time will increase via revocation hearings. We note the Sentencing Reform Act of 1984 abolished parole and in its place, Congress authorized "supervised release". However, rather than the U. S. Parole Commission disposing of violations of post custody supervision, the Court now carries that burden.

**STAFFING**

As the attached table reflects, each year the probation department has been understaffed according to the staffing formula in existence at the time. Each year staff would be added; only to have the volume of cases exceed the formula again, resulting in understaffing. Of significance is the number of positions understaffed as of the end of 1990. In 1990, a modified staffing formula was instituted by the Administrative Office of the U. S. Courts, recognizing the increased workload of the USPO. This office is currently attempting to fill these positions.

It is noted that since 1987, a total of 15 USPOs and 18 clerks have left the service of the U. S. Probation/Parole Department, Southern District of Texas (not including retirement). Of the probation officers, nine transferred to the U. S. Pretrial Services Agency, with one officer accepting employment in each of the following positions: State Parole, FBI, Bureau of Prisons, Administrative Office of the U. S. Courts, Federal Probation in another district, and private sector employment. Considering this turnover and new staff allocations, the average tenure and experience as a U. S. Probation Officer in this district is decreasing. Within the next few years, several officers will reach eligibility for retirement or mandatory retirement. Obviously, the burden on mid-level management has increased in an effort to meet training needs.

We trust this information will be useful for your purposes and appreciate the opportunity to participate. Should you desire additional information, do not hesitate to contact our department.

Respectfully submitted,

Jerry Denzlinger, Deputy Chief
U. S. Probation Officer

JD:sos

U.S. PROBATION/PAROLE SD/TX
WORKLOAD/STAFFING ANALYSIS FOR
12 MONTH PERIOD ENDING 12/31:

| | 1987 | 1988 | 1989 | 1990 | 1990 INCREASE OVER 1987 |
|---|---|---|---|---|---|
| Persons Under Supervision | 2720 | 2825 | 2877 | 3071 | 13% |
| Presentence Reports | 1452 | 1821 | 2345 | 2590 | 78% |
| Collateral Presentence Investigations | 801 | 854 | 778 | 932 | 16% |
| Violation Reports Filed | 893 | 1016 | 1043 | 1089 | 22% |
| Drug After-Care Cases Under Supervision | 233 | 456 | 502 | 641 | 175% |
| # of Positions Understaffed per staffing formula | -6 | -17 | -7 | -30* | |

*Staffing formula revised considering impact of Guideline Sentencing and Enhanced Supervision requirements.

SOURCE OF DATA

Data is taken from Quarterly Staffing Analysis reports prepared by the Probation Division, Administrative Office of U. S. Courts. Data for 1990 is for the 12-month-period ending 9-30-90, the most recent quarterly report available.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

PRETRIAL SERVICES AGENCY

Ranor C. Fry
Chief Pretrial Services Officer

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Houston 77208-1127
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April 19, 1991

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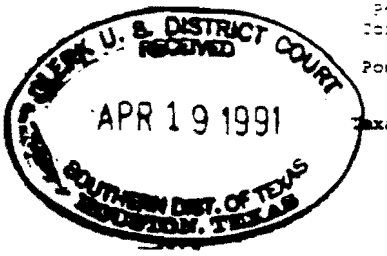
Suite 423
McAllen 78501




Please Reply to: Houston

Mr. Jesse E. Clark
Clerk of the Court
Southern District of Texas/Houston
515 Rusk Avenue
Houston, Texas 77002

RE: The U.S. Pretrial Services Agency-A Synopsis of Activities-Impact Upon the Criminal Docket

Dear Mr. Clark:

In order to assist the Court, we have reduced much of the following information from our annual reports. Pursuant to Title 18, USC, 3155, these reports are submitted to the Chief Judge and Director of the Probation Division, Administrative Office of the United States Courts. You are welcomed to review these reports any time.

In 1990, the Pretrial Services Agency for the Southern District of Texas became the largest of its kind in the United States--a reflection of a stepped-up rate of prosecution and the need to adequately staff five divisional offices. Staffing is formulated on a work measurement formula which is currently being reviewed by Congress and the Administrative Office. For the sake of brevity, the following table will serve to illustrate the growth of our agency. The table below reflects pretrial services officers and does not include our support staff. It is our understanding that you are interested in assessing the impact of our officers upon the criminal docket.

**PRETRIAL SERVICES OFFICERS IN SOUTHERN DISTRICT OF TEXAS**

| | 1987 | 1988 | 1989 | 1990 | 1991 (currently) |
|---|---|---|---|---|---|
| Houston | 4 | 5 | 5 | 6 | 7 |
| Brownsville | 3 | 3 | 4 | 4 | 5 |
| Corpus Christi | 2 | 2 | 2 | 3 | 3 |
| Laredo | 3 | 3 | 3 | 4 | 6 |
| McAllen | 3 | 4 | 5 | 5 | 7 |

(There are currently 28 officers and 12 support staff working for U.S. Pretrial Services in this district)

Title 18, USC, 3154 describes the functions of our agency. Our focus will be on those statutory expectations which have the most impact upon our criminal docket. The preparation of summary reports is done to assist the Court in formulating conditions of release or determining which individuals should be appropriately detained. Conditions of release may range from unsecured appearance bonds with no supervision to placement in a restricted facility just short of incarceration. Conditions of release may often require specific reporting instructions, treatment, and expectations which require consistent monitoring, frequent revisions and periodic violation reports. All of these activities will naturally require more court resources.

Pretrial services officers are required to review and modify reports to the Court and seek realistic alternatives to incarceration. Reports are developed pertaining to failure to appear and other issues.

Pretrial supervision is being performed with increased attention to home visits, urinalysis, collateral law enforcement records checks and other forms of surveillance to assure compliance with conditions of release. As a result of increased staffing and improved agency organization, we may anticipate more violation reports will be filed with the Court.

By way of illustration, certain of our judges have instructed their pretrial services officers to submit a violation report and request the issuance of an arrest warrant for any individual who submits even one urine sample which tests positive for the presence of an unlawful metabolite while under our supervision.

A final report on a demonstration program for mandatory drug testing of criminal defendants was submitted to the Congress on March 29, 1991. Pretrial urine testing prior to the initial appearance of defendants identifies 31% of all tested individuals in the eight pilot districts as drug users. This figure compares with 24% of the defendants nationally who admit to substance abuse problems or a recent history of substance abuse during the pretrial services interview. It is anticipated that mandatory testing with improved random urinalysis and increased expectations for drug treatment will result in a substantial increase in the number of violation reports, the issuance of more warrants, and an increased number of hearings to consider revocation of conditions of release. The Mandatory Detention for Offenders of Serious Crimes Act (Public Law 101-647, Title IX, November 29, 1990), has created the need for more detention hearings in most drug cases. Recent statistics from the U.S. Bureau of Prisons reflect that currently, 23% of all federal prisoners have had their cases adjudicated in the Southern District of Texas. The majority of these individuals has been sentenced for serious drug offenses.

Due to the severity of our drug cases and the international background of many of our defendants, the Southern District of Texas is experiencing a pretrial detention rate of approximately 50%. This relatively high figure is indicative of the pressure brought to bear on our judicial officers to try cases in a timely fashion so as to ensure the Sixth Amendment rights of our defendants. The U.S. District Clerk's Office will be in a better position to develop statistics on the numbers of detention hearings and, through the use of analyzing "control cases", determine the average length of court time spent in each detention case.

Your office has requested information regarding our officer attrition (turnover rate). Since 1987, three officers transferred (one to another district and two to U.S. Probation). No other officers have resigned their positions. None have been fired. Our employee retention rate has been remarkable, especially when one considers how we have generally been understaffed and faced great adversity!

There are many variables which will result in more time spent in court addressing violations of conditions of release and modifying court orders. Increased reliance upon pretrial supervision, urinalysis, and drug treatment conditions, electronic monitoring, and the creation of other conditions of release with greater specificity, are all factors which will necessarily result in more adverse action. There is every reason to believe pretrial services offices will be addressing violations of release orders in a more consistent fashion. Guidelines are being developed which will bring order out of chaos. The net result will be an increase in reports for the court's consideration and more time spent in court addressing these issues.

We have instructed our officers to remember that in this district, criminal filings represent a percentage of our judge's workload. We have attempted to streamline our operations and conduct our business in an economical fashion. We wish to be especially considerate towards our judges, given the pressures of their jobs. Despite our desires to limit exploitation of court resources, directives from the Administrative Office, new detention laws, increased law enforcement activities and political trends will continue to place pressure on our agency which will be felt by the courts.

We hope this correspondence is helpful. We will be pleased to pursue additional avenues you wish.

Respectfully yours,

Ricardo J. Espinoza, Supervising
U.S. Pretrial Services Officer

RJE/has

# APPENDIX D

# REPORT AND RECOMMENDATIONS OF THE SUBCOMMITTEE ON CRIMINAL DOCKET IMPACT

# REPORT AND RECOMMENDATIONS

# OF

# SUBCOMMITTEE ON CRIMINAL DOCKET IMPACT

## I. Legislative Mandate

A. Section 472 of Title 28 of the United States Code states in part:

> The advisory group ... shall submit to the court a report ... which shall include ... 28 U.S.C. § 472(b) a thorough assessment of the state of the court's civil and criminal dockets ... 28 U.S.C. § 472(c)(1) and shall determine the condition of the civil and criminal dockets; identify trends in case filing and in the demands being placed on the courts resources; ... and examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation of the courts.

28 U.S.C. § 472(c)(1)(A),(B),(D).

B. In enacting the Civil Justice Reform Act, Congress found among other things, that:

> (1) The problems of cost and delay in civil litigation in any United States district court must be addressed in the context of the full range of demands made on the district court's resources by <u>both civil and criminal matters</u>.

Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 102, 104 Stat. 5089 (1990) (emphasis added).

C. The advisory group's report shall be made available to the public, 28 U.S.C. § 472(b) and the group itself "should be representative so it can mobilize contributions from the entire community." Comment, p.5, Implementation of the Civil Justice Reform Act of 1990, Federal Judicial Center, Jan. 16, 1991.

II. State of the Criminal Docket.

A. Empirical Findings: Criminal Caseload.

The criminal docket has increased demands on the court's resources in the Southern District of Texas for more than a decade. Although annual increases were more pronounced in statistical years 1989 and 1990, with the exception of minor decreases in 1984 and 1985 (minus 3% each year), the number of felony indictments filed has increased each year since 1979. See Exhibit A. The number of felony indictments filed annually increased by 1,861 indictments or 165% from 1,129 indictments in 1979 to 2,990 indictments in statistical year 1990.

Other measures of the criminal docket indicate an increasing impact as well. A Federal Judicial Center study indicates that "the burden of a criminal case is proportional to the number of defendants". As the number of defendants per indictment increases, so do the demands on the court's time. Criminal defendant filings have increased each year since 1981, dramatically since 1986, to approximately 3,500 defendants in statistical year 1990. See Exhibit B.

The number of felony criminal trials in this district doubled, from 230 trials in 1985, to 461 in 1990. See Exhibit C.

Procedural changes in the law require significantly more time per criminal case adjudicated now than ten or even five years ago. Statutory changes concerning bail and detention, sentencing procedures, and revocation of supervised release require more time of the court and of the court's supporting Probation and Pretrial

agencies than did previous procedures. This increase is true whether the case is disposed of by guilty plea or by trial.

The number of felony indictments is down by 29%, to an estimated 2,124 indictments for the year ended June 30, 1991.

Our final observation concerns the volatility of the criminal caseload as measured by criminal filings. Although the number of indictments filed increased essentially throughout the 1980's until 1991, the decade of the 1970's was particularly volatile. Comparing annual filings for 32 years since 1960, it is interesting to note that the annual percentage change was more than 10% for each of 15 years, including 10 years in which the annual change from the previous year was more than 25%. See Exhibit A.

B. Empirical Findings: Statutes.

The sixth amendment to the United States Constitution since 1791 has recognized the right of the accused in all criminal proceedings to a speedy and public trial. In 1944, the Federal Rules of Criminal Procedure directed that "Preference shall be given to criminal proceedings as far as practicable." Fed. R. Crim. P. 50.

By a 1972 amendment, the Federal Rules of Criminal Procedure required each district court to "prepare a plan for the prompt disposition of criminal cases ... " The plan was directed to include unspecified time limits for the pretrial, trial, and sentencing phases of criminal proceedings. Fed. R. Crim. P. 50(b). The current Rule 50(a) still directs the court to give preference to criminal proceedings. Rule 50(b) directs the court to prepare

plans in conformity with the Speedy Trial Act. Fed. R. Crim. P. 50(a) and (b).

The Speedy Trial Act, 18 U.S.C. §§ 3161-3174 was enacted in 1974. It is comprehensive and was phased in over a six year period. It's basic provisions require that: (1) "any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such an individual was arrested ..." and (2) the trial of a person charged by information or indictment must commence within 70 days of the date of the filing of the information or indictment. 18 U.S.C. § 3161(b), (c)(1).

In 1984 Congress passed the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473. This was indeed a comprehensive revision of the federal criminal statutes which among other things generally brought more activity within the scope of the federal criminal statutes, e.g., addressed terrorism and hostage taking, increased penalties and fines, redefined the defense of insanity, and provided for forfeiture to the government of the gains from criminal activity. The provisions of the Act generally became effective October 12, 1984.

The Comprehensive Crime control Act also included the Bail Reform Act, codified as 18 U.S.C. §§ 3141-3156 which generally made it more difficult to obtain bail and required the court to hold a detention hearing within strict time limits to determine "whether any condition or combination of conditions ... will reasonably assure the appearance of the person ... and the safety of any other person and the community ...". 18 U.S.C. § 3142(f).

Another far reaching provision of the Comprehensive Crime Control Act was the Sentencing Reform Act. Pub. L. No. 98-473, §§ 212-239, 98 Stat. 1987-2039 (1984). This law, among other things, abolished parole and substituted in its place supervised release; established a narrow range of punishments to be imposed in each case (the Sentencing Guidelines); and formalized the content and the presentation of presentence reports by the probation officer. The provisions of this law became effective November 1, 1987.

In recent years, Congress has enacted a number of mandatory minimum sentencing provisions. Persons convicted of certain drug trafficking offenses, use of a firearm in a violent felony or drug trafficking offenses, and certain recidivists who possess a firearm are subject to mandatory jail sentences without parole.

The Anti-Drug Abuse Act of 1988 is the most recent example of Congressional enhancement of penalties under the drug laws. The Act establishes mandatory minimum sentences (five or ten years depending on quantity) and substantial fines for possession with intent to sell heroin, cocaine, cocaine base, phencyclidine (PCP), LSD, P2P, methamphetamine, or marijuana. 21 U.S.C. §§ 841(b)(1), and 960(b)(1). Penalties are also enhanced if death or serious bodily injury result from use of the substance or if the person has prior drug convictions. 21 U.S.C. §§ 841(b)(1), 960(b)(1). Also, higher fines are available for organizations. Id.

Statutes now require that an individual who uses or carries a firearm during the commission of a felony crime of violence or drug trafficking offense shall be sentenced to five years in prison without parole consecutive to any other sentence. 18 U.S.C. §

924(c). Persons with three prior violent felony or serious drug convictions shall be sentenced to at least fifteen years and no more than life without parole. 18 U.S.C. § 924(e).

## III. Analysis

### A. High Criminal Caseload

In directing the advisory group to consider the state of the criminal docket, Congress recognized that one of the principal causes of cost and delay in civil litigation is the court's criminal docket. The high volume of criminal cases in the Southern District of Texas limits the Court's resources available to handle civil litigation promptly.

The high volume of criminal cases in this district is influenced by the fact that Texas is beset by three of our society's most pressing problems: illegal drugs, illegal immigration, and illegal financial practices. The Southern District of Texas is geographically large and from northwest of Laredo to the mouth of the Rio Grande River, includes approximately 450 river miles of the international boundary between the United States and Mexico. This geography is most significant in terms of federal immigration and drug prosecutions.

The criminal caseload is down approximately 29% in the year ending June 30, 1991, and apparently is continuing to decline.

Policy decisions and prosecutorial discretion of the Department of Justice and the United States Attorney have a great impact on the criminal caseload in this district. In the long run, location, population trends, the state of the economy, and national funding levels appropriated to solve a persistent crime problem may

increase the criminal caseload back to 1990 levels. Policy changes by the Justice Department could do the same thing. It is probably not wise to rely on the lower criminal case load in planning ways to reduce cost and delay in civil litigation.

While the number of indictments is down in immigration, weapons, and some types of drug cases, we can expect many indictments alleging financial fraud. These cases may have numerous defendants per indictment and result in lengthy jury trials.

B. The Effects of Statutes to Combat Crime.

Criminal legislation enacted by Congress will further tax the court's resources available for civil litigation.

1. The Federal Sentencing Guidelines enacted pursuant to the Sentencing Reform Act of 1984 are a prime example of the impact on the court's criminal docket by new legislation. As noted in the United States Probation Office's report to the advisory group, prior to the guidelines, the average time from adjudication of guilt to imposition of sentence was approximately 30 days. Today, under "guideline sentencing" the time is approximately 70 days. The probation office report further notes that "with each annual cycle of amendments to the guidelines and daily appellate decisions on various guidelines issues the complexity of guideline application increased. Consequently so will disputes at sentencing." The sentencing hearing which used to take a few minutes prior to the guidelines may now take hours to resolve disputed issues.

Moreover, the sentencing guidelines have had a chilling effect on "plea bargaining" thus increasing the number of criminal trials. As one judge stated in his interview "Congress should modify or eliminate the minimum sentencing guidelines and give judges more flexibility for plea bargains."

2. Mandatory Minimum sentencing statutes have also increased the number of criminal trials. As a judge stated in his interview, "the mandatory minimum sentence, speedy trial provisions, and sentencing guidelines all create problems". Another judge also feels that

mandatory minimum sentencing has complicated criminal practice and has led to more criminal trials.

3. The Pretrial Services Agency report to the advisory group addressed another area where new legislation is increasing the demands of the Court's resources. Pursuant to the Bail Reform Act, Pretrial Services is charged with preparing reports to assist the Court in determining which individuals should be released or detained pending trial. Increased supervision and monitoring of individuals out on bail pending trial will result in more violation reports being filed with the Court. Pre-trial services anticipates that mandatory drug testing will result in a substantial increase in the number of violation reports, the issuance of more warrants and an increase in the number of hearings to consider revocation of conditions of release.

4. The abolishment of parole under the Sentencing Reform Act of 1984 has also had a significant impact on the Court's criminal docket. Prior to the act, parolees who violated conditions of their parole were dealt with by the United States Parole Commission. In place of parole Congress authorized "supervised release" and the Court must now deal with violations of post-custody supervision.

Thus it is clear that the enactment of new legislation by Congress has greatly increased the demand on the Court's resources by the Criminal docket. Proposals should be considered which would alleviate this burden on the court so that more of the court's resources can be directed to civil litigation.

IV. Methodology

A. Our subcommittee has reviewed the materials provided by the Federal Judicial Center, our District Clerk, and the Advisory Group chairman, and has reviewed the reports of interviews of judges.

B. In an effort to mobilize contributions from the community, we sent letters about the Advisory Group's work and seeking suggestions, to 26 criminal defense attorneys who now practice or have practiced in federal court in this district. The letter and list are found at Exhibit D.

C. We acknowledge that criminal caseload is one of the principal causes of cost and delay in court litigation since it limits the resources available for the court's civil caseload. Thus a reduction in the time it takes to adjudicate a criminal case should contribute to making more court resources available for the civil docket.

In criminal litigation we identify four special areas:

1. Charging practices
2. Plea negotiation practices
3. Timing of delivery of Jencks Act materials
4. Discovery practices

These practices clearly affect the time it takes to adjudicate criminal cases. The practices are however within the province of the Department of Justice in the Executive Branch, and therefore beyond the scope of the inquiry of our subcommittee.

V. Recommendations

A. Increase the use of magistrate judges in criminal cases beyond their present role.

B. Encourage the use of "visiting judges" within the district to move the criminal docket at a more rapid rate.

C. Avoid the temptation to address the problems of the civil docket at the expense of the rights of those accused of crime.

D Request Congress to:

1. Consider the impact on the judicial system before enacting legislation which increases sentences or expends federal criminal jurisdiction; and

2. Increase judicial resources commensurate with demands placed on the judiciary.

Respectfully submitted,

Subcommittee on Criminal Docket Impact

Roel R. Trevino, Chair
Antonio Alvarado
Roland E. Dahlin II
Ronald G. Woods

Exhibits:

A. Historical Data
B. Criminal Defendant filings
C. Criminal trials
D. Letter to attorneys and list of addressees

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

HISTORICAL CASELOAD DATA

| YEAR* | CRIMINAL FILINGS** | % CHANGE ANNUAL | % CHANGE 5 YEARS*** |
|---|---|---|---|
| 1960 | 906 | | |
| 1961 | 871 | - 3.9% | |
| 1962 | 861 | - 1.1 | |
| 1963 | 1,066 | + 23.8 | |
| 1964 | 1,150 | + 7.9 | + 26.9% |
| 1965 | 1,156 | + .5 | |
| 1966 | 1,203 | + 4.1 | |
| 1967 | 1,230 | + 2.2 | |
| 1968 | 1,153 | - 6.3 | |
| 1969 | 1,913 | + 65.9 | + 65.5 |
| 1970 | 2,326 | + 21.6 | |
| 1971 | 2,993 | + 28.7 | |
| 1972 | 3,290 | + 9.9 | |
| 1973 | 1,614 | - 50.9 | |
| 1974 | 1,116 | - 30.9 | - 52.0 |
| 1975 | 1,079 | - 3.3 | |
| 1976 | 1,804 | + 67.2 | |
| 1977 | 1,146 | - 36.5 | |
| 1978 | 1,839 | + 60.5 | |
| 1979 | 1,129 | - 38.6 | + 4.6 |
| 1980 | 1,138 | + 7.9 | |
| 1981 | 1,413 | + 24.2 | |
| 1982 | 1,537 | + 8.8 | |
| 1983 | 1,594 | + 3.7 | |
| 1984 | 1,542 | - 3.3 | + 35.5 |
| 1985 | 1,501 | - 2.7 | |
| 1986 | 1,600 | + 6.6 | |
| 1987 | 1,765 | + 10.3 | |
| 1988 | 1,901 | + 7.7 | |
| 1989 | 2,632 | + 38.5 | + 75.3 |
| 1990 | 2,990 | + 13.6 | |
| 1991 est. | 2,124 | - 29.0 | |

*Statistical year ending June 30.

**Felony indictments.

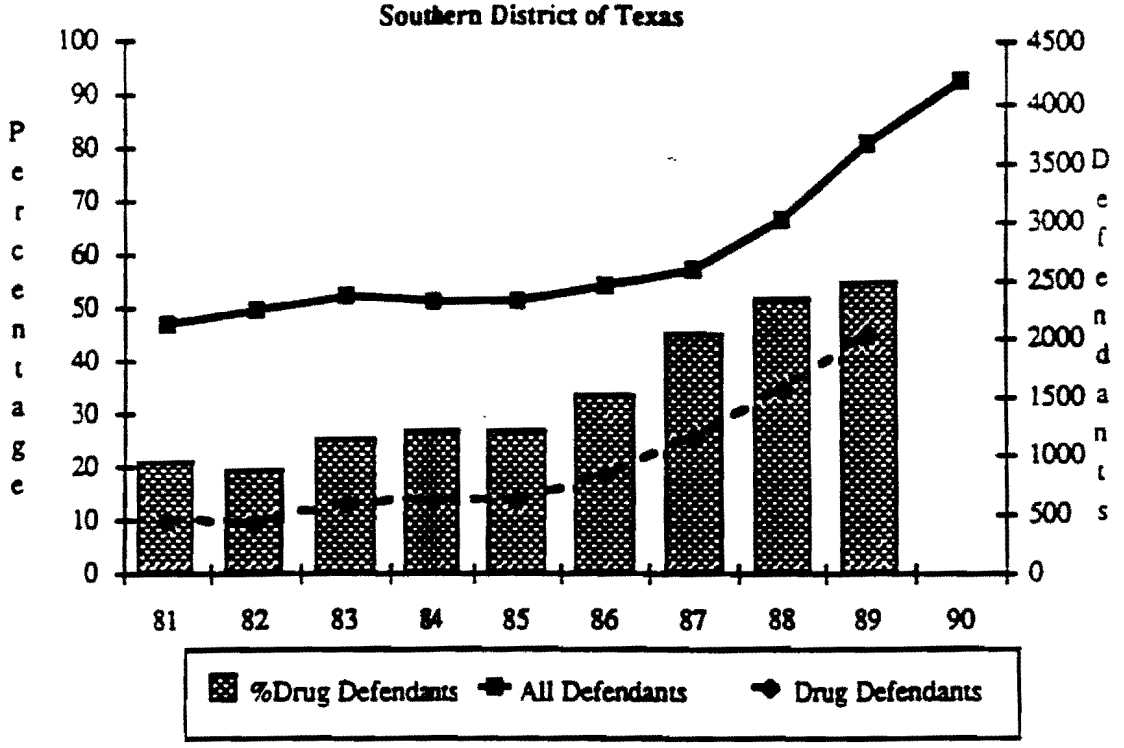
***Percent change over 5 year period, e.g. 1989 compared with 1985.

Source: Detailed Statistical Report, Appendix 1, to Annual Reports of the Director of the Administrative Office of the United States Courts.

Exhibit A

## Criminal Defendant Filings SY81-90, With Number and Percentage Accounted for by Drug Defendants, SY81-89

(Drug filings data not available for SY90)
Southern District of Texas

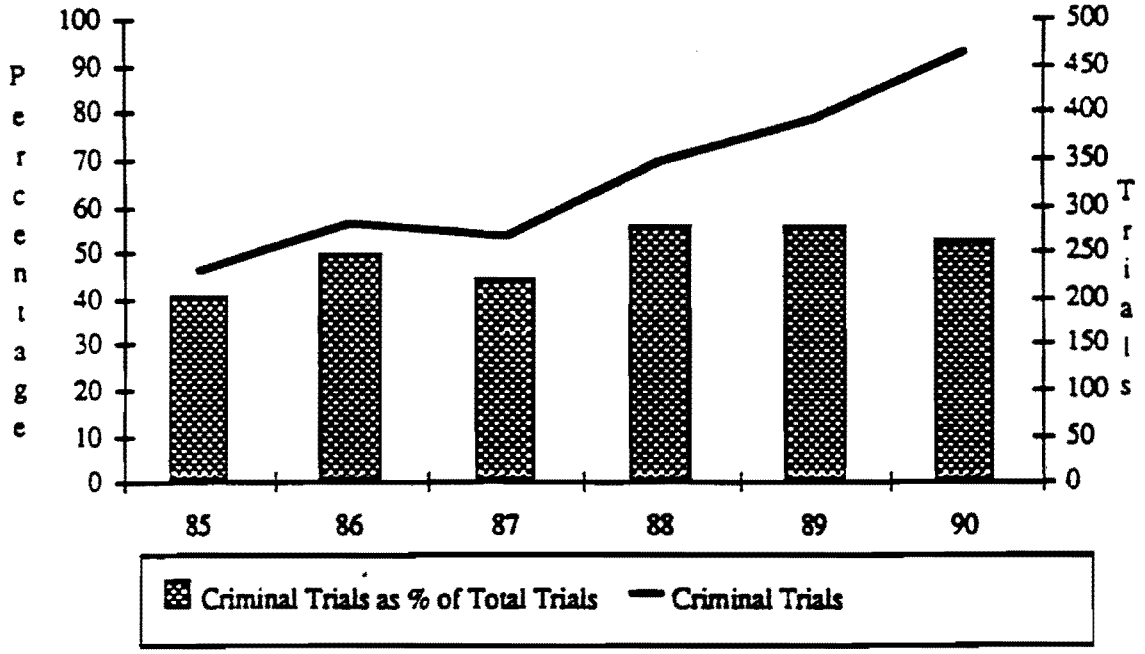



Source: Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990, Administrative Office of the United States Courts and the Federal Judicial Center, for the U.S. District Court for the Southern District of Texas, Chart 9, p. 18. (Feb. 28, 1991)

Exhibit B

## Number of Criminal Trials and Criminal Trials as a Percentage of Total Trials, SY85-90

### Southern District of Texas




Source: Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990, Administrative Office of the United States Courts and the Federal Judicial Center, for the U.S. District Court for the Southern District of Texas, Chart 10, p. 19. (Feb. 28, 1991)

Exhibit C

**ADVISORY GROUP**
**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**



Writer's Address:

Roland E. Dahlin II
P.O. Box 61508
Houston, TX 77208
Telephone: (713) 220-2194
FAX: (713) 220-2197

July 3, 1991

Mr. J.A. "Tony" Canales
Canales & Simonson, P.C.
2601 Morgan Avenue
P.O. Box 5624
Corpus, Christi, TX 78465-5624

Re: Reduction of Cost and Delay: Civil Litigation

Dear Tony:

The U.S. District Court for the Southern District of Texas has been designated a pilot district for implementation of the Civil Justice Reform Act of 1990, 28 U.S.C § 471 et seq. The objective of the Act is to reduce the cost and delay of federal civil litigation.

Our District's Advisory Group must recommend and the Court must adopt a plan for civil litigation by December 31, 1991, which considers the following principles:

1. Systematic, differential management of civil cases.
2. Early and continuing judicial involvement in the pretrial process. (Required presence, at all pretrial conferences, of an attorney who can bind that party).
3. Monitoring of complex cases by discovery-case management conferences. Fed. R. Civ. P. 26(f).
4. Encouragement of cost-effective discovery.
5. Prohibition of discovery motion hearings without certification of effort to reach agreement with opposing counsel.
6. Authorization to refer appropriate cases to alternative dispute resolution.

To facilitate completion of the complex task imposed by the Civil Justice Reform Act, the Advisory Group has been organized into seven subcommittees. I am writing on behalf of the Subcommittee

Exhibit D

on Criminal Docket Impact. You are one of about 30 criminal defense attorneys in the district selected to receive information and asked to make comments and suggestions. Please feel free to discuss this project with your colleagues.

Our Federal justice system, of course, has both civil and criminal components. The Advisory Group is analyzing docket statistics in order to assess the demands placed on the court system by each component. Meanwhile, the assumption is that a primary cause of delay of civil litigation is the high volume of criminal cases and the mandated fact that disposition of criminal cases takes precedence over civil litigation. Presumably, any procedure which could accelerate the disposition of the Court's criminal docket could reduce the delays in civil litigation.

We recognize the problem caused by the impact of the criminal docket on the court system. Yet, as lawyers in the criminal justice system, we know that statutes and the Constitution mandate certain rights and procedures in the criminal justice system. Problems of civil litigation delay cannot be solved at the expense of the accused or the criminal justice system.

If you desire more information or have comments or suggestions about how to reduce the cost and delay of federal civil litigation, please contact me or a member of the Subcommittee listed below.

Very truly yours,

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas
for the Subcommittee on
Criminal Docket Impact

cc:
Subcommittee:
Roel R. Trevino, Chair
Antonio Alvarado
Roland Dahlin
Ron Woods
Hon. Jesse Clark
Mr. Harry Reasoner, CJRA
Advisory Group

District Court Advisory Group
Source List for Information, Opinion, and Comment
Criminal Defense Attorneys

July 3, 1991

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Exhibit D-3

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Houston, TX 77007 director, Nat'l Ass'n Crim.
Def. Lawyers

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Maness, Attorney at Law
1900 N. Loop West, Suite 500 former 5th Cir. law clerk,
Houston, TX 77018 I believe to John R. Brown

Edward B. McDonogh Jr. (713) 223-8110
McDonough & Associates
The Lyric Centre former U.S. Attorney
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Houston, TX 77002

Bertrand Carl Moser (713) 659-8090
Pannill, Moser, Mize & Herrmann
1600 Two Houston Center No longer in criminal
909 Fannin practice, but former law
Houston, TX 77010-1007 clerk to 5th Cir. Judge
John R. Brown

| | | |
|---|---|---|
| Wendell A. Odom Jr.<br>Schaffer, Lambright, Odom & Sparks<br>1301 McKinney, Suite 3100<br>Houston, TX 77010 | (713) 951-9854 | |
| William G. Rosch III<br>Rosch & Ross<br>2100 Texas Commerce Bank Bldg.<br>Houston, TX 77002 | (713) 222-9595 | |
| Kent A. Schaffer<br>Attorney at Law<br>3000 Texas Commerce Tower<br>600 Travis<br>Houston, TX 77002 | (713) 228-8500 | board member, NACDL |
| Randy Schaffer<br>Schaffer, Lambright, Odom & Sparks<br>1301 McKinney, Suite 3100<br>Houston, TX 77010 | (713) 951-9555 | |
| Robert J. Sussman<br>Hinton, Sussman & Bailey<br>5300 Memorial, Suite 1000<br>Houston, TX 77007 | (713) 864-4477 | |
| Douglas Tinker<br>Attorney at Law<br>622 S. Tancahua Street<br>P.O. Box 276<br>Corpus Christi, TX 78403 | (512) 882-4378 | |
| Carol S. Vance<br>Bracewell & Patterson<br>2900 South Tower Penzoil Place<br>Houston, TX 77002-2781 | (713) 221-1212 | former Harris Co. D.A. |
| Sheldon Weisfeld<br>Attorney at Law<br>602 East St. Charles<br>Brownsville, TX 78520 | (512) 546-2727 | |
| Susan R. Williams<br>Williams & Williams<br>300 N. 15th Street<br>P.O. Box 5632<br>McAllen, TX 78502 | (512) 687-1001 | former part time U.S. Magistrate |

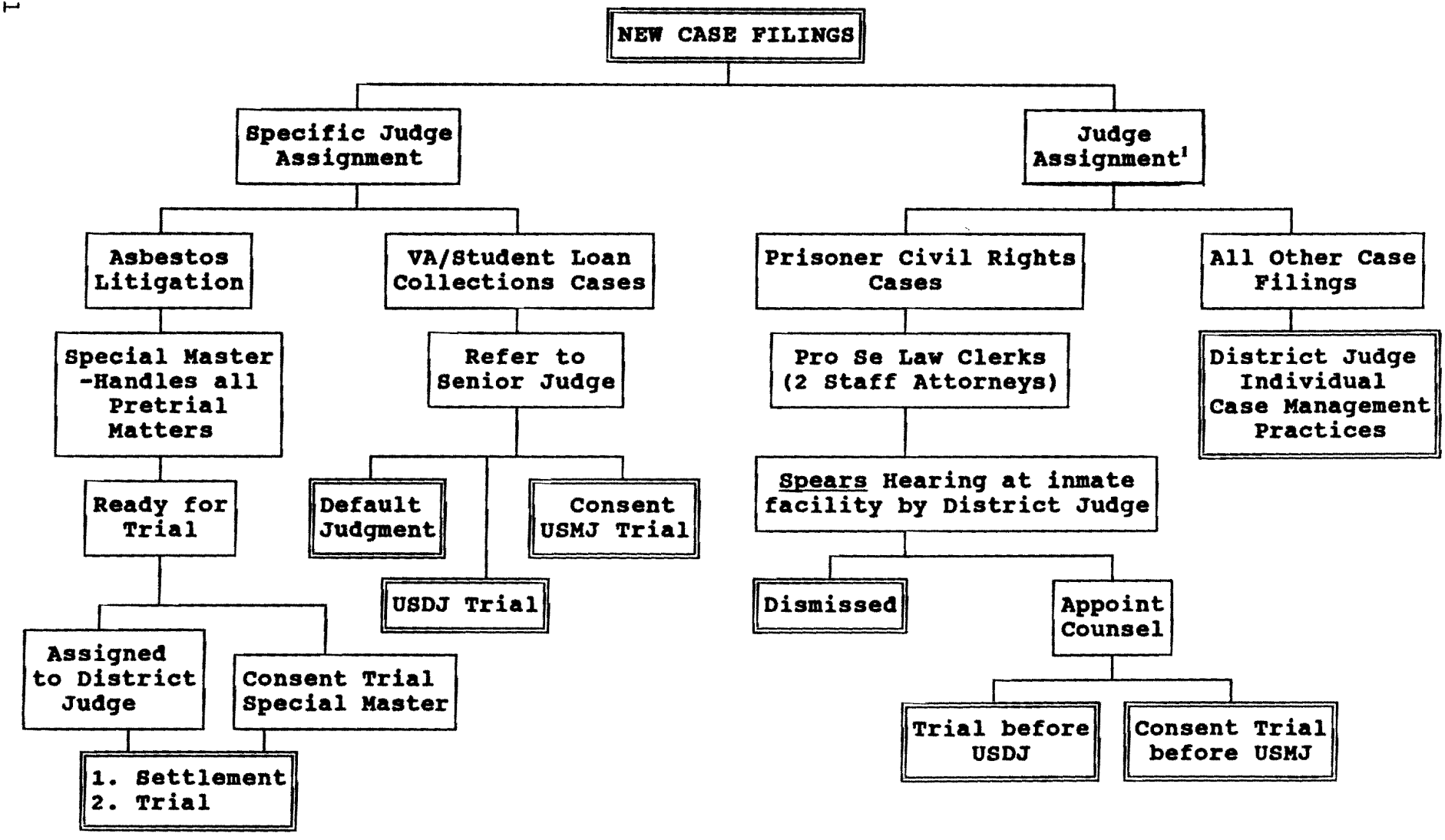


Exhibit D-5

# APPENDIX E

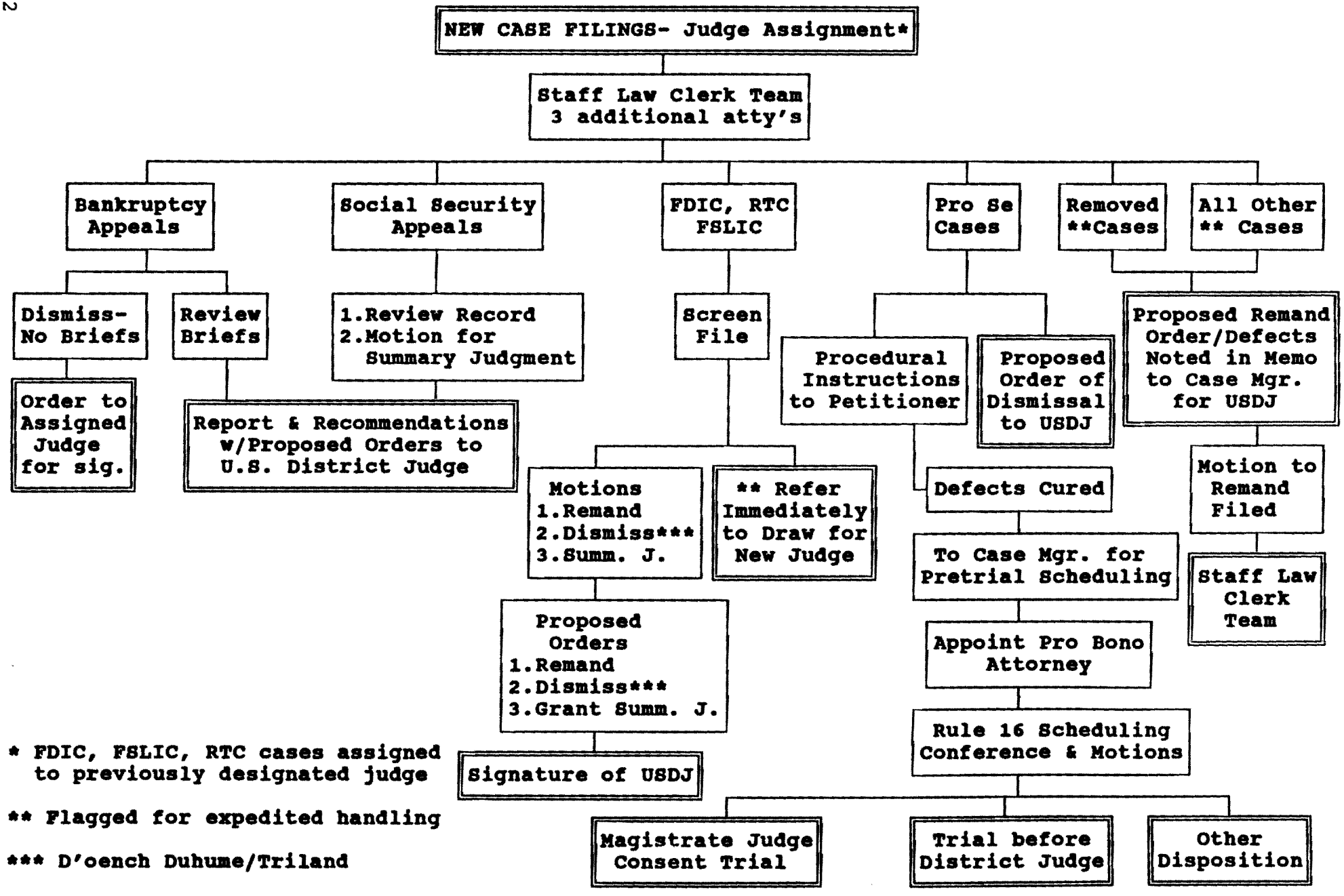
# DIFFERENTIAL CASE MANAGEMENT PRACTICE IN THE SOUTHERN DISTRICT OF TEXAS

# CURRENT DIFFERENTIAL CASE MANAGEMENT PRACTICE IN THE SOUTHERN DISTRICT OF TEXAS




[1] Houston Division random draw among 10 judges.

# PROPOSED ADDITIONAL DIFFERENTIAL CASE MANAGEMENT PRACTICES IN THE SOUTHERN DISTRICT OF TEXAS



# APPENDIX F

# MEASUREMENT OF THE CIVIL DOCKET

F-1
Exhibit A

| SDTX Year | Civil Filings | Civil Pending | Civil Terminations | Criminal Filings | Criminal Pending | Criminal Terminations |
|---|---|---|---|---|---|---|
| 1974 | 2449 | 2818 | 2412 | 1116 | 770 | 1228 |
| 1975 | 2674 | 3297 | 2195 | 1079 | 723 | 1126 |
| 1976 | 2880 | 4182 | 1995 | 1280 | 778 | 1225 |
| 1977 | 2832 | 4442 | 2572 | 1839 | 864 | 1967 |
| 1978 | 3294 | 4491 | 3245 | 1345 | 791 | 1147 |
| 1979 | 3570 | 4896 | 3165 | 1272 | 738 | 1326 |
| 1980 | 3734 | 5251 | 3379 | 1138 | 827 | 1049 |
| 1981 | 4336 | 5593 | 3994 | 1409 | 1027 | 1209 |
| 1982 | 4810 | 6166 | 4237 | 1530 | 1127 | 1429 |
| 1983 | 7691 | 8323 | 5534 | 1581 | 1184 | 1524 |
| 1984 | 7758 | 8947 | 7134 | 1542 | 1196 | 1532 |
| 1985 | 7654 | 9483 | 7118 | 1501 | 1263 | 1434 |
| 1986 | 7222 | 8834 | 7871 | 1600 | 1347 | 1516 |
| 1987 | 5661 | 7999 | 6496 | 1765 | 1405 | 1709 |
| 1988 | 5715 | 8196 | 5518 | 1901 | 1816 | 1491 |
| 1989 | 6043 | 8205 | 6033 | 2632 | 2297 | 2151 |
| 1990 | 5983 | 8185 | 5878 | 2990 | 2888 | 2401 |
| 1991 | 5497 | 7313 | 6011 | 1927 | 2692 | 2115 |

Source: Annual Report of the Director of the Administrative Office, 1974-1991

F-2
Exhibit A

| U.S. Year | Civil Filings | Civil Pending | Civil Terminations | Criminal Filings | Criminal Pending | Criminal Terminations |
|---|---|---|---|---|---|---|
| 1974 | 103530 | 97633 | 107230 | 39754 | 22644 | 41526 |
| 1975 | 117320 | 119767 | 104783 | 43282 | 22411 | 43515 |
| 1976 | 130597 | 140189 | 110175 | 55409 | 27769 | 59512 |
| 1977 | 130567 | 153606 | 117150 | 54761 | 24655 | 57876 |
| 1978 | 138770 | 166462 | 125914 | 35983 | 15847 | 37286 |
| 1979 | 154666 | 177805 | 143323 | 32688 | 15124 | 33442 |
| 1980 | 168789 | 186113 | 160481 | 28921 | 14759 | 29297 |
| 1981 | 180576 | 188714 | 177985 | 31287 | 15850 | 30221 |
| 1982 | 206193 | 205434 | 189473 | 32682 | 16659 | 31889 |
| 1983 | 241842 | 231920 | 215356 | 35872 | 18546 | 33985 |
| 1984 | 261485 | 250292 | 243113 | 36845 | 19938 | 35494 |
| 1985 | 273670 | 254114 | 269848 | 39500 | 22299 | 37139 |
| 1986 | 254828 | 242177 | 266765 | 41490 | 24456 | 39333 |
| 1987 | 238982 | 243159 | 238000 | 43292 | 25458 | 42287 |
| 1988 | 239634 | 244242 | 238753 | 44585 | 27733 | 42115 |
| 1989 | 233293 | 242436 | 234980 | 45995 | 30907 | 42810 |
| 1990 | 217879 | 242346 | 213922 | 48904 | 35519 | 44295 |
| 1991 | 207742 | 240599 | 211713 | 47035 | 39276 | 41569 |

Source: Annual Report of the Director of the Administrative Office, 1974-1991

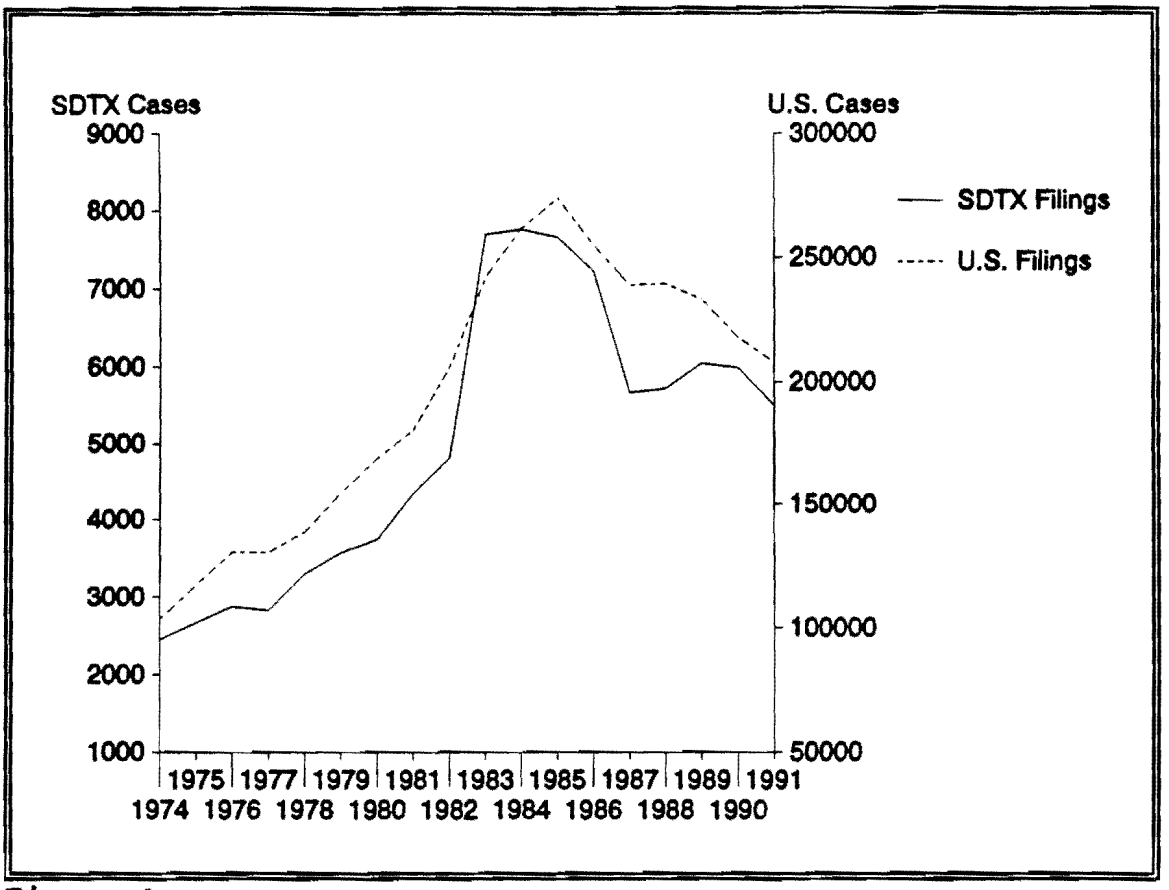



**Figure 1**

Civil filings for the United States and the Southern District of Texas

Source: Annual Report of the Director of the Administrative Office, 1974-1991.

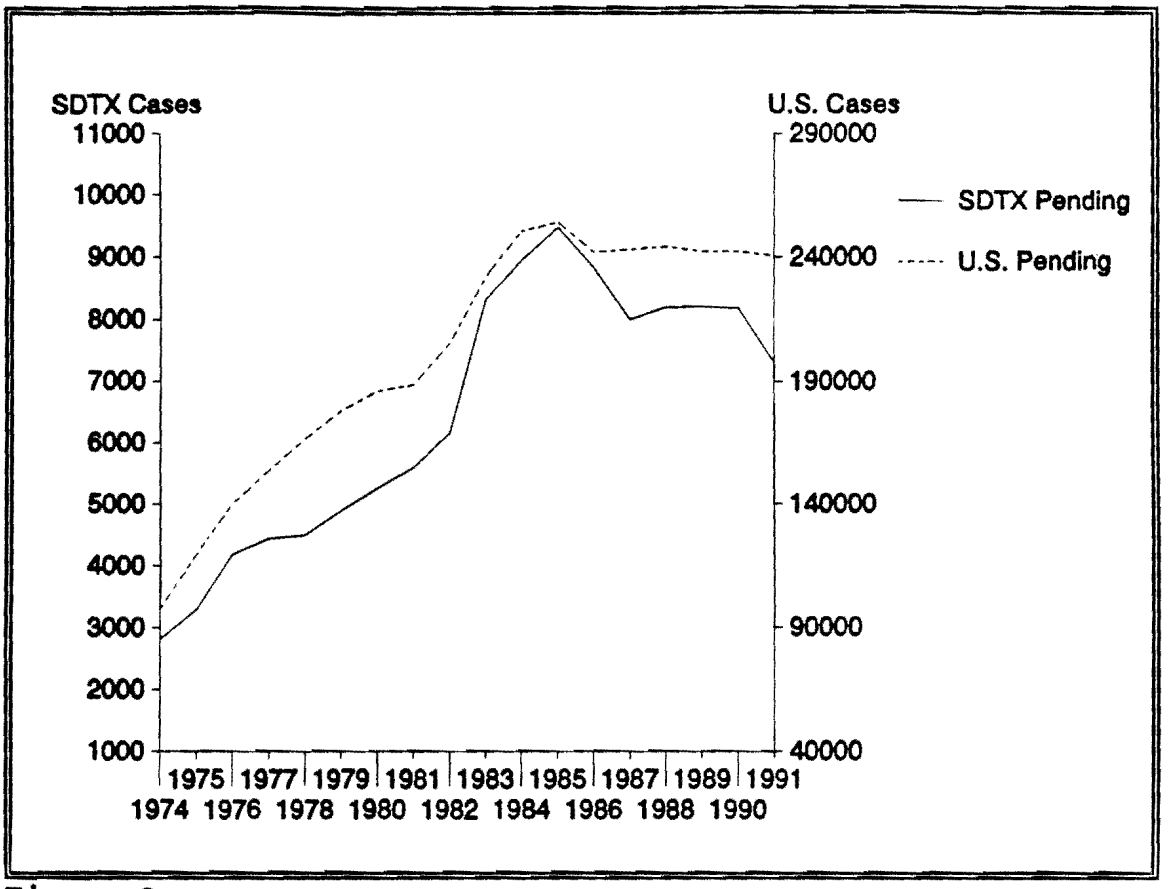



**Figure 2**

Civil cases pending for the United States and the Southern District of Texas

Source: Annual Report of the Director of the Administrative Office, 1974-1991.

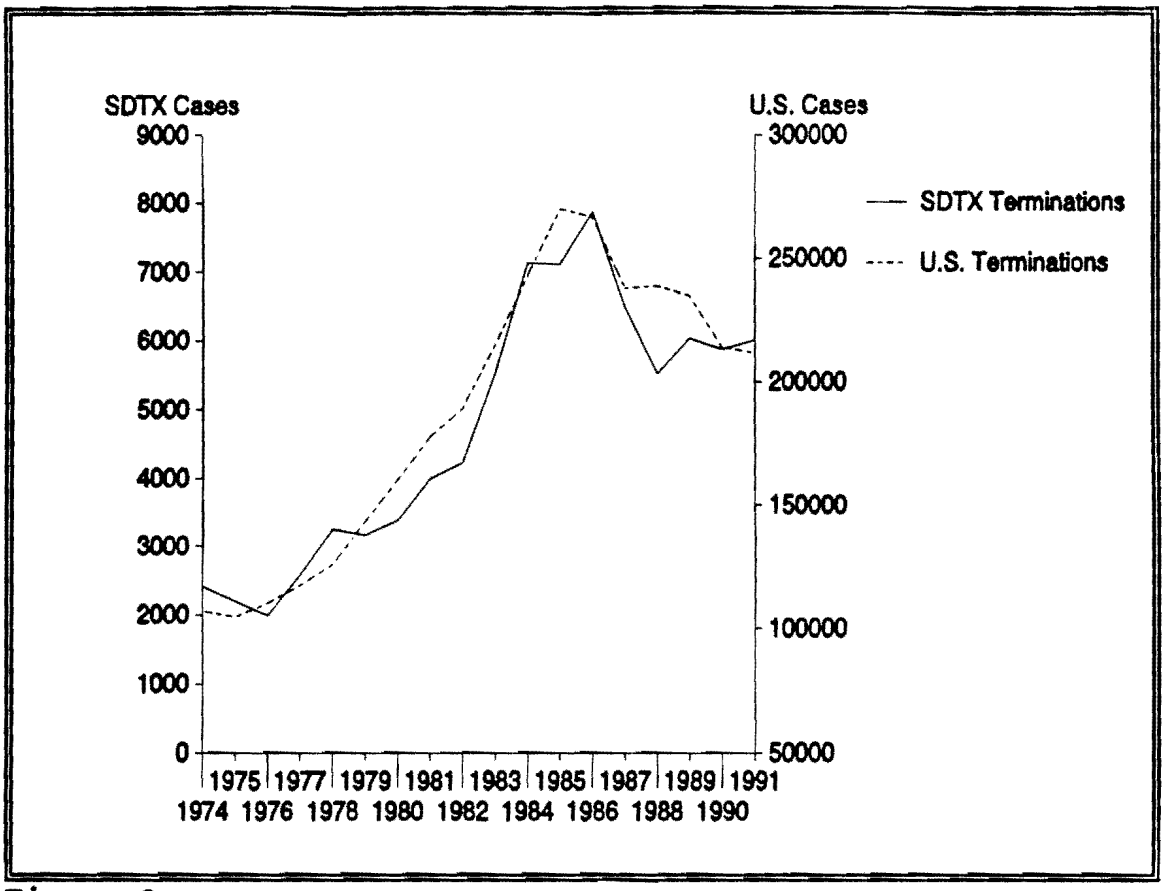



**Figure 3**

Civil case terminations for the United States and the Southern District of Texas

Source: Annual Report of the Director of the Administrative Office, 1974-1991.

| Year | SDTX Filings | expressed Civil Pending | as a Terminations | percenatage Filings | of U.S. Criminal Pending | Terminations |
|---|---|---|---|---|---|---|
| 1974 | 2.37% | 2.89% | 2.25% | 2.81% | 3.40% | 2.96% |
| 1975 | 2.28% | 2.75% | 2.09% | 2.49% | 3.23% | 2.59% |
| 1976 | 2.21% | 2.98% | 1.81% | 2.31% | 2.80% | 2.06% |
| 1977 | 2.17% | 2.89% | 2.20% | 3.36% | 3.50% | 3.40% |
| 1978 | 2.37% | 2.70% | 2.58% | 3.74% | 4.99% | 3.08% |
| 1979 | 2.31% | 2.75% | 2.21% | 3.89% | 4.88% | 3.97% |
| 1980 | 2.21% | 2.82% | 2.11% | 3.93% | 5.60% | 3.58% |
| 1981 | 2.40% | 2.96% | 2.24% | 4.50% | 6.48% | 4.00% |
| 1982 | 2.33% | 3.00% | 2.24% | 4.68% | 6.77% | 4.48% |
| 1983 | 3.18% | 3.59% | 2.57% | 4.41% | 6.38% | 4.48% |
| 1984 | 2.97% | 3.57% | 2.93% | 4.19% | 6.00% | 4.32% |
| 1985 | 2.80% | 3.73% | 2.64% | 3.80% | 5.66% | 3.86% |
| 1986 | 2.83% | 3.65% | 2.95% | 3.86% | 5.51% | 3.85% |
| 1987 | 2.37% | 3.29% | 2.73% | 4.08% | 5.52% | 4.04% |
| 1988 | 2.38% | 3.36% | 2.31% | 4.26% | 6.55% | 3.54% |
| 1989 | 2.59% | 3.38% | 2.57% | 5.72% | 7.43% | 5.02% |
| 1990 | 2.75% | 3.38% | 2.75% | 6.11% | 8.13% | 5.42% |
| 1991 | 2.65% | 3.04% | 2.84% | 4.10% | 6.85% | 5.09% |

Source: Annual Report of the Director of the Administrative Office, 1974-1991

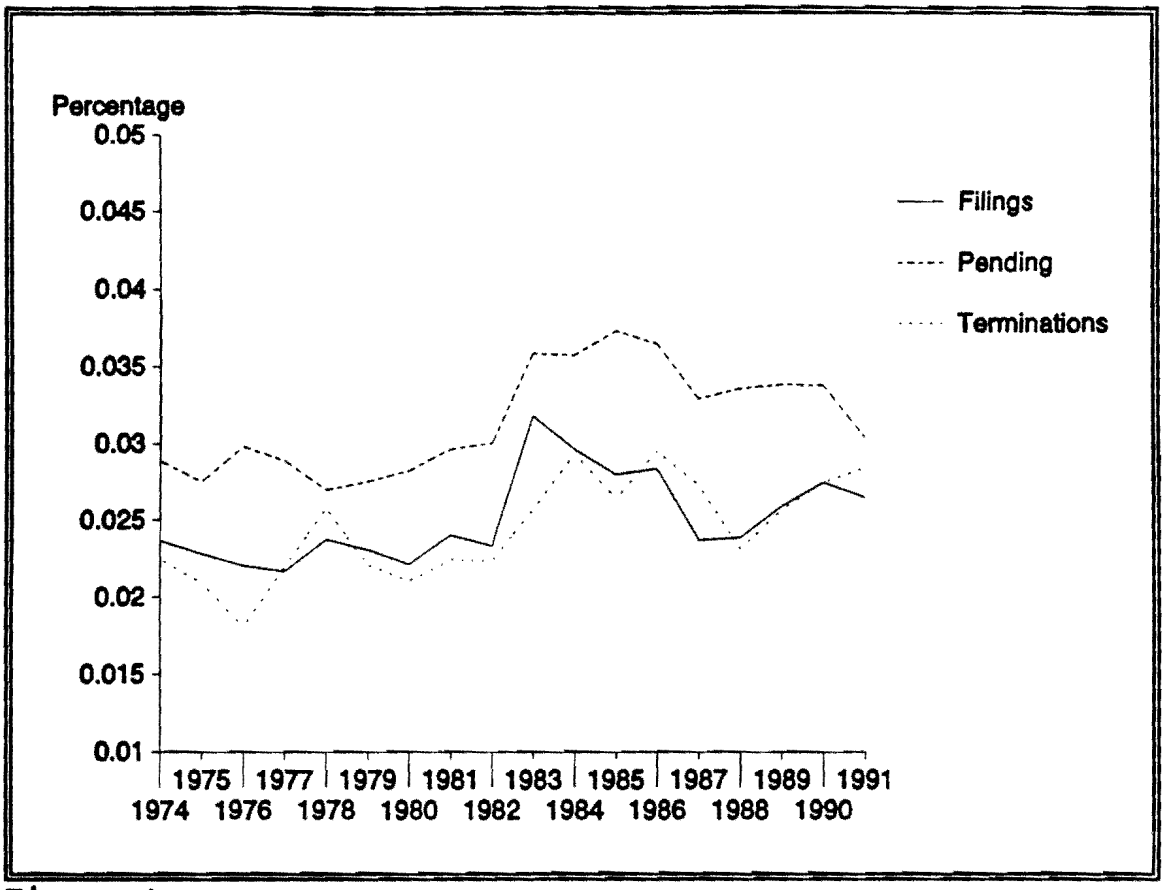



**Figure 4**

Civil filings, pendings, and terminations in the Southern District of Texas as a percentage of the United States total

Source: Annual Report of the Director of the Administrative Office, 1974-1991.

| Year | Ratio of Civil Pendings to Terminations | | | |
|---|---|---|---|---|
| | U.S. | SDTX | SDTX/U.S. | %diff (SDTX-U.S.)/SDTX |
| 1974 | 0.9105 | 1.1683 | 0.7793 | 28.317% |
| 1975 | 1.1430 | 1.5021 | 0.7610 | 31.413% |
| 1976 | 1.2724 | 2.0962 | 0.6070 | 64.744% |
| 1977 | 1.3112 | 1.7271 | 0.7592 | 31.717% |
| 1978 | 1.3220 | 1.3840 | 0.9552 | 4.686% |
| 1979 | 1.2406 | 1.5469 | 0.8020 | 24.692% |
| 1980 | 1.1597 | 1.5540 | 0.7463 | 33.999% |
| 1981 | 1.0603 | 1.4004 | 0.7572 | 32.074% |
| 1982 | 1.0842 | 1.4553 | 0.7450 | 34.221% |
| 1983 | 1.0769 | 1.5040 | 0.7160 | 39.656% |
| 1984 | 1.0295 | 1.2541 | 0.8209 | 21.816% |
| 1985 | 0.9417 | 1.3323 | 0.7068 | 41.475% |
| 1986 | 0.9078 | 1.1223 | 0.8089 | 23.630% |
| 1987 | 1.0217 | 1.2314 | 0.8297 | 20.525% |
| 1988 | 1.0230 | 1.4853 | 0.6887 | 45.194% |
| 1989 | 1.0317 | 1.3600 | 0.7586 | 31.819% |
| 1990 | 1.1329 | 1.3925 | 0.8136 | 22.916% |
| 1991 | 1.1364 | 1.2166 | 0.9341 | 7.054% |



Source: Annual Report of the Director of the Administrative Office, 1974-1991

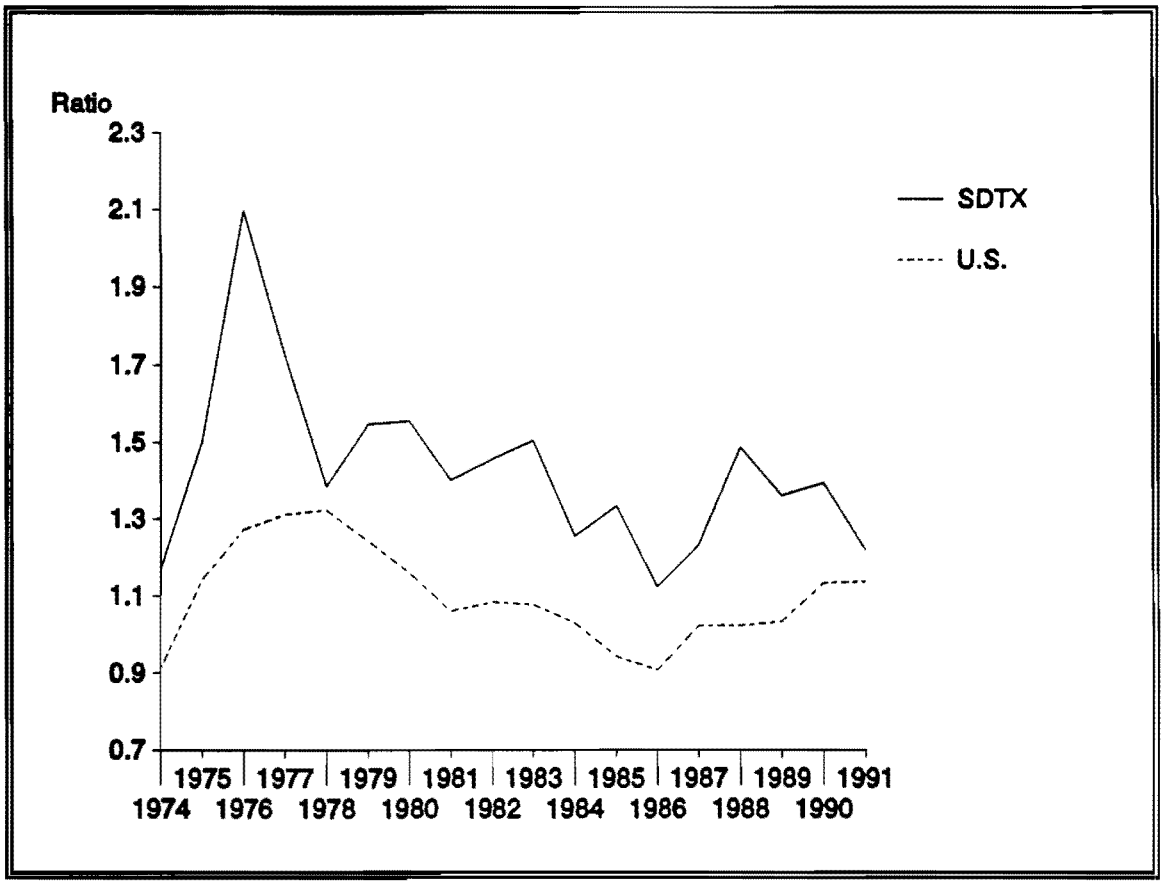



**Figure 5**

Ratio of annual civil pendings to terminations for the United States and the Southern District of Texas

Source: Annual Report of the Director of the Administrative Office, 1974-1991.