UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

LUCIUS D. BUNTON
Chief Judge

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January 13, 1992

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Honorable Frederick J.R. Heebe
Honorable John V. Parker
Honorable Robert M. Parker
Honorable Barefoot Sanders
Honorable L.T. Senter, Jr.
Honorable John M. Shaw

Your Honors:

Pursuant to the provisions of the Civil Justice Reform Act of 1990, attached is a copy of the Advisory Group Report of the Western District of Texas.

Sincerely yours,

Lucius D. Bunton

LDB:ce
Encl.
cc - Mr. L. Ralph Mecham
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Administrative Office of the U.S. Courts
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REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990

December 31, 1991

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Honorable Lucius D. Bunton, III, **Chief Judge**
Honorable Charles W. Vagner, **Clerk of Court**

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I. INTRODUCTION: THE WORK OF THE ADVISORY GROUP

Pursuant to the Civil Justice Reform Act (the "Act"), Chief Judge Lucius Bunton of the United State District Court for the Western District of Texas (the "Western District") appointed this Advisory Group on February 25, 1991. The Group appointed by Chief Judge Bunton satisfies the Act's mandate that "the advisory group of a district court shall be balanced and include attorneys and other persons who are representative of major categories of litigants in such court."[1] It includes a federal judge, a magistrate judge, a former federal judge, a petroleum engineer, a banker, a school teacher, a homemaker, criminal defense lawyers, government lawyers, civil trial lawyers who represent both plaintiffs and defendants in a wide range of civil actions, a law professor, the Federal Public Defender, and the United States Attorney. Chief Judge Bunton and the Clerk of Court, the Honorable Charles W. Vagner, serve *ex officio* to the Advisory Group.[2]

The Advisory Group's organizational meeting was held on March 15, 1991. At that meeting, we divided into six subcommittees: the Subcommittee on Docket Assessment; the Subcommittee on Alternative Dispute Resolution; the Subcommittee on Burdens Created by the Criminal Docket; the Subcommittee on Facilities, Personnel and Equipment; the Subcommittee on Pretrial Procedures; and the Subcommittee on Trial Procedures. The Advisory Group's Chairman, Jim Bowmer,

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[1]28 U.S.C. § 478(b).

[2]Biographical sketches of the Western District Advisory Group members are included in Appendix A. The Advisory Group has also received invaluable assistance from Henry Cantu, a second-year law student at Baylor University School of Law, Ralph Hasson of the Center for Conflict Management, and Paul Warren, an associate with Jones, Day, Reavis & Pogue in Austin, Texas.

assigned a wide range of tasks to these subcommittees.[3] The Chairman, the Vice Chairman, Roy R. Barrera, Sr., and the Reporter, Professor William Underwood of the Baylor University School of Law, served as *ex officio* members of each subcommittee.

Although the Advisory Group met as a committee of the whole on three additional occasions, June 7, 1991, September 13-14, 1991, and December 6, 1991, most of our work was performed through the subcommittees. The subcommittees met regularly, both formally and informally. Following several months of investigation, each subcommittee produced a report to the Advisory Group.[4] These subcommittee reports were considered by the Advisory Group as a whole on September 13-14, 1991. They serve as the foundation for this report.

In performing our statutory responsibilities, we have drawn extensively from our own varied experiences. We have also actively solicited input from groups interested in civil justice throughout the Western District of Texas. The Advisory Group interviewed every district judge and magistrate judge in the Western District.[5] We interviewed law clerks and personnel in the Clerk's Office. We solicited ideas from a number of judges and attorneys outside the Western District. Attorneys among the Advisory Group sent questionnaires to their clients. We solicited the views of attorneys and their clients in a random sample of recently

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[3]The responsibilities that were assigned to each subcommittee are outlined in Appendix B.

[4]The six subcommittee reports are available for inspection in the Office of the Clerk of the Western District located in San Antonio, Texas.

[5]The Advisory Group developed an outline for use in interviewing the judicial officers. We have included a copy of this outline in Appendix C.

closed cases, using methodology developed by the Federal Judicial Center.[6] We contacted trial practitioners who frequently appear in federal court to obtain their views on various proposals under consideration by the Advisory Group. Finally, we surveyed over 300 jurors as they completed their service to obtain their perspectives on how trial procedures can be improved.[7] Each of these groups made suggestions that have materially contributed to this report.

The Act seeks to reduce unnecessary cost and delay in civil litigation, focusing primarily on a variety of suggested procedural reforms. Several of these suggested reforms are good ideas and have been included among our recommendations to the Western District. Indeed, we have recommended a wide range of procedural reforms that the Court can implement by amending its local rules and practices. These recommendations are outlined in the proposed Expense and Delay Reduction Plan contained in Section III of this report.

Promoting speed and efficiency is a laudable goal. But we must not elevate the speed of justice over the quality of justice. Procedural reforms must be consistent with the principal directive of our civil justice system -- that the determination of every action be just. To accomplish this objective, attorneys who know the needs of their clients and the particulars of their clients' disputes must be allowed to litigate

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[6]The Subcommittee on Docket Assessment developed questionnaires based on models developed by the Advisory Group for the Southern District of Florida which we distributed to attorneys and litigants in 153 recently closed cases. Of the 456 questionnaires that we circulated, we received a total of 202 responses from attorneys and 79 responses from litigants. The results of this survey are reported in Appendix D.

[7]The results of the Advisory Group's juror survey are reported in Appendix E. The surveys were completed by jurors before they left the courthouse, ensuring a response rate of nearly 100% of the jurors surveyed.

free of excessive "management." Court procedures must also allow litigants to fairly present their competing claims to a neutral authority. We have rejected several potential reforms identified in the Act as inconsistent with these principles.

The procedural reforms that we recommend will promote speed and efficiency. They will not alone, however, be adequate to cure the docket backlog confronting civil litigants in several divisions of the Western District. Criminal prosecutions have increased in the Western District by 174 percent during the past decade. During this same decade, drug-related prosecutions in the Western District have increased nearly 400 percent. Increased federal law enforcement requires increased judicial resources. We simply do not have enough judges to meet the demand created by the vast array of criminal legislation being generated by the legislative and executive branches, even with the three additional judgeships authorized for the Western District in 1990. Moreover, one full year after these additional judgeships were authorized, only one has been filled. Three judgeships are currently vacant in the Western District and there is no indication that any of these vacancies will be filled in coming months. This is an inexcusable waste of available judicial resources.

Given the burgeoning criminal docket and the lack of adequate judicial resources, the judicial officers and court personnel in the Western District have performed admirably. Broadly speaking, the civil docket in the Western District is in better shape today than it was in 1980. This is a credit to the energy and imagination of the judicial officers who serve this District.

II. ASSESSING THE COURT'S DOCKET

The Act requires that in developing its recommendations each Advisory Group "shall promptly complete a thorough assessment of the state of the court's civil and criminal dockets."[8] As part of that assessment, the Advisory Group shall identify trends in case filings, and describe the principal causes of cost and delay.[9] In addition, the Advisory Group is to "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts."[10] This portion of our report satisfies these statutory requirements.

A. An Overview of the Western District

The Western District is geographically diverse, encompassing both heavily populated metropolitan areas and vast expanses of sparsely populated rural areas. The Western District's geographic jurisdiction includes 90,055 square miles and extends some 750 miles from Waco to El Paso. Over 600 miles of the Western District border on Mexico. The Western District covers 68 counties, including the heavily populated counties of Bexar, El Paso, and Travis. These 68 counties have experienced a 23.3 percent growth in population during the past decade. The Western District presently includes a population well in excess of four million people.

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[8]28 U.S.C. § 472(c)(1)(A).

[9]28 U.S.C. § 472(c)(1)(B), (C).

[10]28 U.S.C. § 472(c)(1)(D).

The Western District is divided into seven divisions: Austin, Del Rio, El Paso, Midland, Pecos, San Antonio, and Waco. Five of the divisions within the Western District have at least one resident judge; the Del Rio and Pecos Divisions do not. Because judges do not reside in every division, the judges must travel and the distances are long. It is 210 miles from El Paso to Pecos, for example, and 150 miles from San Antonio to Del Rio.

B. The Resources Available in the Western District

1. Judicial Resources

Judicial officers are our most valuable resource. In December 1990 the authorized judgeships in the Western District increased from seven to ten.[11] As of the date of this report, three of the ten authorized judgeships are vacant. The Western District is presently served by six judges in regular active service, including Chief Judge Lucius D. Bunton, III, Judge Harry Lee Hudspeth, Judge H.F. Garcia, Judge James R. Nowlin, Judge Edward C. Prado, and Judge Walter S. Smith, Jr. Newly-appointed Judge Sam Sparks will assume his duties following January 1, 1992. Two additional judgeships authorized in December 1990 remain vacant. A third vacancy was created on May 30, 1991 when Judge Emilio M. Garza was elevated to the United States Court of Appeals for the Fifth Circuit. This third judgeship also remains vacant. The Western District suffered forty-three vacant

[11]*See* 28 U.S.C. § 133.

judgeship months in calendar year 1991. This represents lost judicial time that the Western District can never recover.

The Western District presently has one senior judge, Senior Judge D.W. Suttle. Judge Suttle resides in the San Antonio Division. Judge Suttle has continued to perform substantial judicial service since he assumed senior status in 1979. Judge Suttle was assigned a specific percentage of the San Antonio Division docket until 1990 when, at his request, he was removed from the random case assignment system. Consequently, new cases filed in the division are no longer directly assigned to him. Chief Judge Bunton is eligible to assume senior status in December 1992 and has announced that he intends to do so when eligible. Judge Garcia is eligible to assume senior status in October 1993. None of the remaining four judges in regular active service are eligible to assume senior status until the year 2000.

The Western District currently is served by seven full-time magistrate judges, including Magistrate Judge Stephen H. Capelle, Magistrate Judge Philip T. Cole, Magistrate Judge Dennis G. Green, Magistrate Judge Durwood Edwards, Magistrate Judge Robert B. O'Connor, Magistrate Judge John W. Primomo, and Magistrate Judge Janet C. Ruesch. The Western District is also currently served by four part-time magistrate judges, including Magistrate Judge Katherine H. Baker, Magistrate Judge Walter M. Holcombe, Magistrate Judge Nancy Stein Nowak, and Magistrate Judge Robert R. Sykes. There are no vacant magistrate judgeships. The Administrative Office of the United States Courts is, however, evaluating the viability of converting a part-time magistrate judgeship in San Antonio into a full-time

position. The creation of full-time magistrate judgeships are also being considered for the Austin/Waco Divisions and for the Pecos Division.

Each district judge employs magistrate judges in different ways. With certain exceptions, district judges can refer nondispositive matters for magistrate judges to determine. Magistrate judges can also be referred dispositive matters for recommendation. By local rule, applications for relief from custody and convictions in criminal cases, prisoner complaints, and appeals from administrative agency decisions, such as social security determinations, are referred to magistrate judges for recommendation. With the consent of the parties, full-time magistrate judges can conduct civil trials, and all magistrate judges can try criminal misdemeanor cases. Magistrate judges also handle most initial proceedings in criminal cases, both felony and misdemeanor, including reviewing and filing complaints, issuing arrest and search warrants, accepting grand jury returns, and presiding over initial appearances, bond/detention hearings, preliminary examinations, identity hearings, and arraignments.

The work assigned to magistrate judges has steadily increased in recent years. The growth of the criminal docket in the Western District, especially drug-related offenses, has adversely impacted the workload of magistrate judges. Magistrate judges handled 178 more detention hearings, 148 more search warrants, 57 more preliminary examinations, and 108 more arrest warrants in 1990 than in the previous year. The use of magistrate judges in civil matters has greatly increased as well. From 1989 to 1990, the number of nondispositive pretrial motions handled by

magistrate judges rose from 132 to 480. During that same period, the number of case dispositive motions handled by magistrate judges rose from 86 to 100. At the end of June 1991, 45 consent cases were pending before full-time magistrate judges (part-time magistrate judges cannot try civil cases by consent). In the past year, magistrate judges disposed of 69 consent cases.

Each district judge is allocated two law clerks, and each full-time magistrate judge is allocated one law clerk. Chief Judge Bunton and Judge Hudspeth each have a third law clerk. Judge Prado has four law clerks. Chief Judge Bunton receives the additional law clerk because of his position as Chief Judge of the Western District. Judges Hudspeth and Prado have extra law clerks on a temporary basis to assist with civil case management. Judge Prado is currently handling Judge Garza's former docket as well as his own. Judges Nowlin and Smith share a third law clerk, also on a temporary basis. With the exception of Chief Judge Bunton's third clerk, these extra law clerk positions will no longer be funded when the new district judges take the bench. Part-time magistrate judges are not allocated a law clerk. They must pay for their staff and supplies out of their pocket, subject to reimbursement, and they receive substantially less than one-half of the salary of full-time magistrate judges. The district has two *pro se* law clerks. One offices in San Antonio and the second offices in Waco. Both assist with civil cases involving *pro se* plaintiffs or defendants.

2. Office of the Clerk of Court

The Office of the Clerk of Court ("Clerk's Office") is a model of efficiency. This is in large part due to the exceptional leadership of the Clerk of Court, the Honorable Charles W. Vagner. The Western District is truly fortunate to be served by the Clerk of Court and his able staff.

The Clerk's Office presently employs approximately 250 persons. These personnel positions are based on a work measurement study developed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States. The work formula used to allocate supporting personnel positions to the Clerk's Office is not based solely on case filings, although these filings play a substantial part in determining the total number of positions. The work formula also considers jury administration, financial management, procurement, attorney admissions, number of judicial officers, number of appeals filed, naturalization proceedings, prisoner litigation and other factors peculiar to this district.

The work measurement study does not, however, accurately reflect current needs in the Clerk's Office. The current work measurement study was approved by the Judicial Conference in its March 1982 meeting. Since then, additional functions and responsibilities have been delegated to the Clerk's Office, yet there has been no significant revision to the work formula to provide additional personnel resources. A new work measurement study is currently underway and is being conducted by a private contractor under the direction of the Director of the Administrative Office.

The results of this work measurement study will be presented by the Director of the Administrative Office to the Judicial Conference within 18 months.

Even if the work measurement study were current, the Clerk's Office has not been allocated all the positions authorized by that study. The Balanced Budget and Emergency Deficit Control Act of 1985 mandated budget cuts across the board for all judiciary appropriations. Based on this Act, the Executive Committee of the Judicial Conference determines on an ongoing basis the percentage of the established formula allowances to be allocated to each clerk's office. This percentage has varied since 1986 when the Western District reached a low of 94 percent of the established formula allowance. In November 1990, the district was allocated 100 percent of the formula allowance, but this percentage was reduced once again in April 1991 to 96 percent.

The Clerk's Office in the Western District performs unique functions and is allocated additional personnel to assist in these functions. The Western District is consolidated with the United States Bankruptcy Court and the Clerk's Office is thus responsible for bankruptcy administration. Additionally, the Clerk is responsible for two national programs under the auspices of the Administrative Office, the Central Violations Bureau and Automated Systems Training Center. The Central Violations Bureau processes petty offense cases initiated by violation notice in the First, Second, Third, Fourth, Fifth and Eleventh Circuits, as well as the States of Arizona and Washington. The Central Violation Bureau records all violation notices issued by participating agencies, collects forfeiture of collateral, prepares notices to appear

before the magistrate judges, calendars all hearings before the magistrate judges, prepares their dockets, records judgments, and collects any fines and special assessments imposed. The Automated System Training Center provides training to court personnel throughout the United States in implementing the automated Integrated Case Management Systems developed by the Administrative Office. These include the electronic docketing systems for both federal district courts and the federal bankruptcy courts, as well as the PACTS system developed for federal probation and pretrial services agencies. The Center also provides user support to all courts employing these varied applications.

Positions for the bankruptcy court are allocated by the Administrative Office using a separate work measurement formula. Positions for the Central Violations Bureau and Automated System Training Center are provided as additives to the work measurement formula. Additional positions are provided for electronic recorder operators, arbitration, video recorder operator, pro se law clerks, and magistrate clerical assistants.

Of the permanent positions allocated, the Clerk is required to provide deputies-in-charge of divisional offices and courtroom deputies for the district and bankruptcy judges. Each district judge, bankruptcy judge, and full-time magistrate judge is provided a courtroom deputy to assist the judicial officers in case management. The deputies assigned to magistrate judges assist in criminal case management but not with civil caseloads. These courtroom deputies monitor the judges' dockets, set hearings, and assist them in the courtroom. They also validate the case inventory

reports and speedy trial reports which are printed from the electronic docketing systems. Copies of these reports are also provided to the individual judges to assist them in their case management practices. The San Antonio Division provides administrative support for all divisions in the areas of financial administration, procurement, space and facilities, automation, personnel management, refilling of master and qualified jury wheels, and consolidation of all reports submitted to the Administrative Office on a monthly basis, as well as special reports during the year.

To ensure that positions are equitably distributed to the divisional offices, the Clerk personally monitors monthly filings throughout the district, comparing them with previous years' filings. The Clerk allocates new positions to the divisions as quickly as possible if a significant increase in filings occurs. Before the Clerk allocates or transfers positions from one division to another, however, an established trend over a period of time must justify the allocation or transfer. Since career employees are involved, the Clerk does not transfer positions unless absolutely necessary.

3. Facilities

The addition of the three new judgeships to the Western District will fill the existing facilities. The Administrative Office of the United States Courts met with the Clerk of Court earlier this year to review the present facilities and to project the needs for the district over the next thirty years. Overall, it is the Clerk's opinion that the facilities which are presently available to the district judges, magistrate judges,

and the bankruptcy judges in the Western District are not impacting the movement of the civil docket.

The magistrate judge courtrooms in San Antonio, however, are too small. According to the Council Approved Guidelines for Magistrate's Chambers, Courtroom and Adjunct Facilities, a magistrate judge's courtroom should be 1500 square feet. Judges O'Connor's and Primomo's courtrooms are 891 square feet and 841 square, respectively. Judge Nowak's courtroom is 566 square feet. The guidelines recommend 4,241 square feet of space for the magistrate judge's chambers, courtroom and adjunct facilities. Judges O'Connor's and Primomo's total space is 1786 square feet and 1661 square feet respectively. Judge Nowak has 890 square feet. To fully utilize these magistrate judges, especially to conduct civil jury trials by consent, will likely require enlarging their courtrooms.

4. Automation

Over the past five years the automation facilities in the Western District have expanded dramatically, having grown from a small office operated as a computer room to a fully equipped computer center with three additional offices used by automation personnel. These facilities are used to support the district court, the bankruptcy court, each judge and magistrate judge's chambers, the Automated Training Center, the Central Violations Bureau, and the Probation Office. With this expansion, the level of automation in the Western District is as advanced as that of the most advanced district courts in the nation.

Housed in the computer room are four Unisys 5000/90 mini-computer systems complete with uninterruptible power supplies, system monitors and console printers. The office also has a 386 PC System and a 486 PC system for Bankruptcy Court. The communications center has 13 multiplexors and modems connected to the divisional offices and the San Antonio Bankruptcy Court. There are 200 personal computers located throughout the district, each of which has access to a printer. Every judicial officer and law clerk in the Western District has been offered a personal computer which includes word processing capabilities, computer-assisted legal research, CHASER (chambers access to integrated case management system) and other office functions. Each district and bankruptcy judge's chambers has a Novell network, as does the Clerk's Office and the Training Center. CHASER enables PCs in chambers to access the Clerk's Office system and download selected information directly into a judge's official case dockets, party indexes, case schedules, and the standard reports stored in the Clerk's Office computers. PACER (public access to court electronic records system) provides the public with dial-in electronic access to selected case information from a court-based personal computer. The district clerk is currently working on an electronic filing system. A document can be sent computer-to-computer by a litigant to the Clerk's Office where it will be printed and placed into the clerk's file.

The Western District currently runs the following applications on its mini-computers: Civil/Criminal, BANCAP (Bankruptcy), COURTRAN (old Criminal System), Attorney Admissions, Financial Accounting (CFS), Federal Records Center,

Personnel, Property, Inventory, Case Assignment System, Naturalization, Jury, Word Processing, Surety System, Arbitration, Central Violations Center, Probation Automated Case Tracking System (PACTS), PACER-C, PACER-B, CHASER, VCIS, Electronic Filing System, and a Bulletin Board System. The following applications are run on its personal computers: Novell Netware, Novell ELS, WordPerfect 5.0, WordPerfect Library, Lotus 1-2-3, FormTool, Organization Chart, Procomm, TimeLine, and Calendar Creator Plus.

On March 1, 1991, the Fifth Circuit Court of Appeals and the Western District adopted a local rule to implement an experimental project using video recording equipment to make the official record of court proceedings. During a two year experimental phase, videotapes will serve as the official record of court proceedings. No narrative of the proceedings can be made a part of the record on appeal nor can transcripts of videotapes be included as part of the official record on appeal. This experiment is presently under way in Judge Prado's courtroom.

C. The Docket in the Western District

1. Case Assignment

Because of the geographic breadth of the Western District and because judges do not reside in every division, the docket is divided geographically among the judges. The Western District operates on an individual judge calendar system. Under this system, the clerk's office assigns each case, civil or criminal, to a specific judge when the case is initially filed. The case usually remains with that judge until final

disposition. Though the Advisory Group considered a proposal that the Western District adopt a central docketing system in its San Antonio Division, we do not recommend that the court adopt such a system. The principal advantage of a central docketing system would be that it could reduce the number of civil trial settings rescheduled to accommodate criminal trials. Weighing against this speculative benefit is concern that a central docketing system would prevent particular judges from becoming familiar with particular cases, and the probability that different judges would occasionally rule differently on related matters in the same case. The Advisory Group concludes that the present individual judge calendar system has given the judges both the incentive and control necessary to manage their caseloads efficiently and does not recommend any departure from that system.

2. Filing Trends

To a steadily increasing degree, criminal cases are dominating the docket in the Western District. Though the civil docket has undergone a gradual increase in filings during the last decade, the criminal docket has experienced explosive growth, particularly since 1987.[12] In 1985, criminal cases represented only 19.16 percent of all actions filed in the Western District. Only five years later, in 1990, criminal cases represented 35.33 percent of all newly filed actions.

[12]Unless otherwise specified, all references to years are to statistical years, which run from July 1 through June 30.

Table 1: Civil and Criminal Filings

Year	Civil Cases	Criminal Cases	Percent Criminal
1981	1881	599	24.15
1982	2096	696	24.93
1983	3067	984	24.29
1984	3980	1065	21.11
1985	4478	1061	19.16
1986	3631	940	20.56
1987	2672	1036	27.94
1988	2903	1163	28.60
1989	3280	1523	31.71
1990	3004	1641	35.33

Total civil cases filed in the Western District have increased 59.7 percent during the last ten years, from 1,881 in 1981 to 3,004 in 1990. In addition, weighted filings have increased 45.3 percent, from 400 in 1981 to 581 in 1990.[13] With the exception of social security filings, which decreased from 125 in 1981 to 37 in 1990, filings in all other major categories of civil litigation have increased during the last ten years. During this decade, the area of greatest increase was in contract filings,

[13]Total number of cases filed is an important figure, but it does not provide complete information about the work the cases impose on the Court. For this reason, the Judicial Conference uses a system of case weights based on measurements of judge time devoted to different types of cases.

which increased 104.6 percent, from 474 in 1981 to 970 in 1990. Other major categories which have substantially increased include: civil rights filings, which increased 54.9 percent from 195 in 1981 to 302 in 1990; tort and personal injury filings, which increased 32.4 percent from 244 in 1981 to 323 in 1990; and prisoner petitions, which increased 22.4 percent from 447 in 1981 to 547 in 1990. The largest categories of weighted filings in the Western District over the last three years include civil rights actions, contract actions, and banking actions. ERISA and civil RICO actions are not yet significant burdens in the Western District. For example, only 11 civil RICO actions and 77 ERISA actions were filed in the Western District in 1990.

Table 2: Civil Filings

Year	Contract	Tort	Civil Rights	Prisoner Petitions	Social Security	Other	Total Civil
1981	474	244	195	447	125	396	1881
1982	570	301	222	422	112	469	2096
1983	1359	294	268	498	132	516	3067
1984	2125	289	315	532	194	525	3980
1985	2817	313	297	440	164	447	4478
1986	1968	344	282	378	109	550	3631
1987	1047	315	329	362	79	540	2672
1988	1014	387	345	433	103	621	2903
1989	1097	354	318	565	58	888	3280
1990	970	323	302	547	37	825	3004

The percentage of the civil docket consisting of diversity filings has not increased over the past decade. In 1981, the Western District had 348 diversity filings, which constituted 18.5 percent of the civil docket. In 1991, the Western District had 495 diversity filings, which constituted 18.1 percent of the civil docket.

Table 3: Diversity Filings

Year	Total Civil	Diversity	Percent of Caseload
1981	1881	348	18.5
1982	2096	451	21.5
1983	3067	478	15.6
1984	3980	467	11.7
1985	4478	488	10.9
1986	3631	493	13.6
1987	2672	521	19.5
1988	2903	606	20.9
1989	3280	580	17.7
1990	3004	442	14.7
1991	2730	495	18.1

While the increase in civil filings in the Western District during the last decade has been substantial, it does not approach the explosive increase in criminal filings. The 59.7 percent increase in civil filings compares with an increase of 174 percent in criminal filings during the past decade, from 599 in 1981 to 1,641 in 1990. Total felony filings have increased 146 percent, from 503 in 1981 to 1,239 in 1990, placing the Western District second in the Fifth Circuit and third in the nation in 1990. Drug-related prosecutions are largely responsible for this increase and now account for 40 percent of

the criminal filings in the Western District. The Western District has experienced a remarkable increase of 398.5 percent in drug-related prosecutions in the last decade, from 130 in 1981 to 648 in 1990. Drug-related cases are generally more complex than most criminal cases because they tend to involve multiple defendants, multiple transactions, and complicated factual and legal issues. They thus require more judicial time than most other criminal cases.

Table 4: Criminal Filings

Year	Total Criminal	Felony	Percent Felony	Drug-Related	Percent Drug-Related
1981	599	503	83.97	130	21.70
1982	696	561	80.60	130	18.68
1983	984	754	76.63	177	17.99
1984	1065	707	66.38	171	16.06
1985	1061	752	70.88	180	16.97
1986	940	692	73.62	207	22.02
1987	1036	745	71.91	290	27.99
1988	1163	842	72.40	379	32.59
1989	1523	1134	74.46	622	40.84
1990	1641	1239	75.50	648	39.49

Several factors have contributed to this explosion in the Western District's criminal docket. First, there has been a tremendous increase in law enforcement

activity in the Western District. For example, in August 1986 the Justice Department initiated Operation Alliance to intercept drugs smuggled into this country from Mexico. Operation Alliance has caused a sharp increase in the number of drug cases filed in the Western District. The Western District also has a Drug Task Force. Though the task force has not yet generated a large number of criminal filings, those prosecutions that have resulted have been particularly burdensome because of the large number of defendants and the large drug quantities involved. The Justice Department has also designated the Western District as a High Intensity Drug Trafficking Area. This designation will bring additional federal law enforcement agents to the Western District. Finally, in March of 1991 former Attorney General Thornburgh announced that the Justice Department was initiating a new program, Operation Triggerlock. Under Operation Triggerlock, the Attorney General has directed each United States Attorney to take career criminals off the streets by bringing state cases into federal court through the use of federal firearm laws. Because the Justice Department has only recently initiated Operation Triggerlock, we lack any objective evidence of its impact on the Western District's docket. That impact, however, is likely to be significant.

A second major cause of the growth in the Western District's criminal docket is the recent trend by the legislative and executive branches to enact legislation criminalizing conduct previously and traditionally the concern of the states. It has become common practice for Congress to identify a problem involving undesirable conduct, classify the conduct as criminal, and define it as a new federal crime,

regardless of whether the conduct is already criminalized under state laws. This procedure is often unaccompanied by any attempt to determine the willingness and ability of state governments to regulate the conduct. Much of the drug abuse legislation enacted in recent years, for example, is directed at conduct already criminalized under state law. The executive branch has enthusiastically seized upon this new legislation to prosecute conduct traditionally the subject of state regulation in federal courts, as evidenced by Operation Triggerlock. By enacting federal laws that criminalize a wide range of conduct already criminalized by state laws, the legislative and executive branches of government have imposed additional, and perhaps unnecessary, burdens on the federal courts.

Enacting federal criminal legislation that addresses conduct which is already criminalized under state law does not necessarily mean that federal authorities will enforce these new federal crimes. But there are a number of incentives to prosecute offenders in the federal system. One incentive is simply that state officials often lack sufficient resources to initiate state prosecutions and then to incarcerate offenders following conviction. For precisely this reason, the Federal Courts Study Committee has recommended that "Congress should direct additional funds to the states to help them to assume their proper share of the responsibilities for the war on drugs, including drug crime adjudication."[14]

Another incentive is that federal sentencing is often an attractive alternative to state sentencing. In recent years, the legislative and executive branches of the

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[14]REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 35-36 (1990).

federal government have established, mainly for drug-related crimes, numerous sentences with mandatory minimum terms. For example, a 1986 statute set a mandatory minimum sentence of five years for possession with intent to distribute five grams of crack cocaine.[15] A 1988 statute created the same mandatory five-year minimum sentence for simple possession of that amount.[16] Similarly, those who use or even carry a firearm during any drug trafficking crime will receive, in addition to the punishment provided for drug trafficking, an additional mandatory minimum sentence of 5, 10, 20, or 30 years, depending on the type of firearm and the existence of prior convictions.[17] Numerous other examples of mandatory minimum federal sentences exist. The impact of these mandatory minimum sentences is enhanced by the fact that federal offenders serve their sentences almost in full. The 1984 Sentencing Reform Act abolished parole for crimes committed after October 1987, and it also sharply curtailed any "good time" reductions. The likelihood of stiffer penalties in federal court coupled with the availability of greater law enforcement resources in the federal system encourage federal prosecution of activity criminalized under both federal and state law. This federalization of criminal law enforcement is largely responsible for the explosive growth in criminal filings in the Western District.

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[15]*See* 21 U.S.C. § 841(b)(1)(B)(iii).

[16]*See* 21 U.S.C. § 844(a).

[17]*See* 18 U.S.C. § 924(c)(1).

3. The Present State of the Docket

The Western District is fortunate to have hardworking, innovative judicial officers and court personnel. Despite the phenomenal growth in the court's docket during the past decade, the Western District's docket remains among the more current dockets in the nation.

a. Median Times

Traditionally, the state of a court's docket has been determined by its median times from filing to disposition and issue to trial. For 1991, the median time from filing to disposition for all civil cases in the Western District was nine months, ranking the court 34th best out of the 94 districts that comprise the federal judicial system and second best of the nine districts within the Fifth Circuit. During the same period, the median time from issue to trial for those civil cases requiring a trial was 13 months, which ranked the court 26th best nationally and second best in the circuit. As Table 5 indicates, the Western District has improved its national standing over the last decade in both median times from filing to disposition and from issue to trial. On the other hand, that standing has declined since the massive growth in the criminal docket began in earnest in 1987.

Table 5: Civil Median Times (in months)

Year	Filing to Disposition	Rank U.S./5th Cir.	Issue to Trial	Rank U.S./5th Cir.
1981	9	51/9	20	67/18
1982	8	49/4	14	40/6
1983	8	50/3	14	40/5
1984	6	23/2	13	27/2
1985	6	21/1	12	25/2
1986	6	19/1	13	30/2
1987	8	34/1	12	20/2
1988	8	26/1	13	29/3
1989	9	30/2	11	15/2
1990	9	27/3	11	12/1
1991	9	34/2	13	26/2

b. Age of Caseload

Despite the increase in civil and criminal filings, the Western District's docket has remained current. The Western District had 1,912 pending civil cases that were less than one year old as of June 30, 1990. This was approximately 62.8 percent of all pending civil cases and is better than the national average for 1990 of 55.8 percent. Approximately 27.6 percent of the 1990 pending caseload was comprised of cases between one and two years of age. Approximately 7.7 percent of the 1990

caseload was between two and three years of age. As of June 30, 1991, the Western District had 40 pending three-year-old cases, representing only one percent of the total pending civil caseload. The national average, which was 10.4 percent in 1990, is considerably higher. In 1991, the Western District ranked seventh best nationally and best in the circuit in percentage of three-year-old cases. Only 4.7 percent of all cases terminated in the Western District between 1989-1991 were three or more years old when terminated.

c. Case Life Expectancy

Perhaps the most accurate way to tell whether a court is staying abreast of its caseload is to track the ratio of pending cases to annual case terminations. If that ratio stays constant, the court is staying abreast. If the ratio decreases, the court is gaining ground by disposing of cases faster. If the ratio increases, the court is falling behind. The ratio of pending cases to annual case terminations is also a good estimate of the average duration (or life expectancy) of a court's cases.

As Table 6 indicates, the Western District is doing a better job of staying abreast of its caseload today than it was ten years ago. The ratio of pending cases to annual case terminations has declined from a ratio of 1.40 in calendar year 1981 to a ratio of 1.06 in calendar year 1990. On the other hand, the more recent trend indicates that the court is beginning to lose ground. Since 1986 the ratio has increased from 0.76 to its present level of 1.06. This is further evidence of the impact of the extraordinary growth in the criminal docket beginning in 1987.

Table 6: Civil Case Life Expectancy[18]

Year	Pending Start	Filed	Terminated	Pending Conclusion	Ratio[19]
1981	------	1908	1579	2215	1.40
1982	2215	2197	1589	2520	1.33
1983	2520	3980	3361	3139	0.93
1984	3139	3837	3629	3347	0.92
1985	3347	4631	4346	3631	0.84
1986	3631	2895	3714	2817	0.76
1987	2817	2827	2685	2956	1.10
1988	2956	3057	2859	2983	1.04
1989	2983	3182	3051	3127	1.02
1990	3127	3150	3024	3196	1.06

d. Weighted Filings, Terminations, and Trials Completed Per Judgeship

The Western District has consistently been among the top ten districts in the nation in trials completed per judgeship. In 1990, for example, the Western District ranked first in the nation in trials completed per authorized judgeship. In 1991, the

[18]The statistics in the table are based on calendar years.

[19]Ratio of cases pending at the conclusion of the calendar year to cases terminated during the year. The ratio gives average case duration in years.

Western District slipped to third best among the 94 judicial districts nationally, but that ranking is itself remarkable given that the Court operated with a 40 percent vacancy in authorized judgeships during 1991.

Terminations per judgeship in the Western District have increased 55.1 percent during the past decade, from 381 in 1981 to 590 in 1990. In 1990, the Western District ranked fifth best nationally and second best in the circuit in terminations per judgeship. In 1991, the Western District slipped to 24th best nationally and seventh best in the circuit in terminations per judgeship. But again, the 1991 per judgeship statistics are skewed by the high number of vacant judgeship months in the Western District during statistical year 1991.

Table 7: Actions Per Judgeship

Year	Weighted Filings	Terminations	Trials Completed	Vacant Judgeship Months
1981	400	381	64	15.1
1982	439	372	64	4.2
1983	510	505	67	0
1984	557	740	65	3.2
1985	473	678	60	2.9
1986	466	716	63	0
1987	453	533	56	0
1988	514	537	65	5.6
1989	668	567	87	0
1990	581	590	88	0
1991	393	409	62	22.3

D. The Principal Causes of Unnecessary Cost and Delay

The Act requires the Advisory Group to "identify the principal causes of cost and delay in civil litigation" in the Western District. The Act suggests that we consider court procedures and the conduct of litigants and their attorneys as likely contributors.[20] We conclude that the conduct of litigants and their attorneys as well as certain court procedures have contributed to avoidable cost and delay in the Western District. But we further conclude that the principal cause of unnecessary

[20]28 U.S.C. § 472(c)(1)(C).

cost and delay is the decision by the executive and legislative branches to federalize criminal law enforcement without providing the necessary judicial resources to meet the increased demand.

1. Insufficient Judicial Resources

The principal cause of unnecessary cost and delay in civil litigation in the Western District is the lack of sufficient judicial resources. This lack of sufficient judicial resources delays the resolution of civil cases in several ways. Perhaps most significantly, it prevents judges from ruling promptly on dispositive motions. The Advisory Group sent questionnaires to attorneys in a representative sample of 152 civil actions recently disposed of in the Western District. Over 200 questionnaires were returned by the attorneys. Of the attorneys who responded, a majority believed that their case took longer to resolve than was necessary. Of this majority, 23 percent cited the Court's inability to rule promptly on motions as a cause of the unnecessary delay. One attorney described the sentiment of many others when he reported to the Advisory Group:

> It ain't fair that the judges require parties and lawyers to meet all of those artificial, unnecessary pre-trial deadlines, and then delay ruling on summary judgment motions for so long that, first, we have to conduct wasteful, costly discovery, and second, we have no idea until a week before trial what witnesses and evidence we will need or even what issues we will try.

Statistics provided by the Clerk's Office support our conclusion that delay in disposing of motions is a significant problem in the Western District. According to these statistics, 1,243 motions had been pending for at least six months as of

September 30, 1991. The problem is not uniform throughout the Western District. For example, neither Chief Judge Bunton nor Judge Smith have a significant backlog of pending motions. The few pending motions reported on their dockets are attributable to bankruptcy stays.

According to the Clerk's Office, these statistics overstate the number of pending six month-old motions. The statistical reports were generated from the civil electronic docketing system to meet the reporting requirements of the Civil Justice Reform Act and eliminate the need for each judicial officer to produce the report manually. Because of the short time frame in which the reports were due there was little time to validate all of the motion data extracted from the automated system prior to the report submission date. Later, when validating the reports it was discovered some of the motions were moot because the cases had been closed. Also, other motions remained pending because the orders were not properly interpreted by the docket clerks. The Clerk's Office anticipates that future reports will provide more reliable data. The judges will be provided a copy of their report monthly. This will permit the judges and their staffs to review the report and advise the Clerk's Office of those motions which have been disposed of or are moot because of other Court action.

Table 8: Motions Pending At Least Six Months[21]

Judicial Officer	Total Pending Motions	Total Dispositive Motions	Percent Dispositive	Total Due To Caseload[22]	Percent Caseload
Bunton	8	4	50.0	0	0
Garcia	313	110	35.1	215	68.7
Garza Docket	140	78	55.7	84	60.0
Hudspeth	265	91	34.3	0	0
Nowlin	216	81	37.5	154	71.3
Prado	143	42	29.4	114	79.7
Smith	27	6	22.2	0	0
Magistrate Judges	131	46	35.1	71	54.2
Totals	1243	458	36.8	638	51.3

The lack of sufficient judicial resources also interferes with the Court's ability to schedule early, firm trial dates. The Act itself recognizes the importance of firm,

[21]This table includes motions pending as of September 30, 1991. The reference to dispositive motions includes motions for summary judgment, motions for judgment on the pleadings, motions to dismiss, motions for directed verdict, and motions for default judgment.

[22]This column reports the number of motions pending because of each judicial officer's heavy civil and criminal caseload. The pending motions reports generated in the chambers of judicial officers require each officer to identify the reasons each motion has not yet been disposed of.

credible trial dates in reducing cost and delay by identifying the setting of "early, firm trial dates" as a fundamental principle of cost-effective case management.[23] Without adequate judge-power, trial dates, even when set, are often contingent. Attorneys surveyed by the Advisory Group frequently cited the lack of early, firm trial settings as a cause of unnecessary delay.

Justice delayed is not only justice denied, but is also expensive justice, for individual litigants and for society generally. While a dispositive motion is pending the attorneys must nonetheless continue with trial preparations. Discovery may continue. When several months elapse before a ruling granting a dispositive motion, a great deal of unnecessary trial preparation is likely to have taken place. The litigants pay for these unnecessary preparations. Similarly, when significant delay occurs between preparing a pretrial order and the ultimate trial itself, the attorneys must not only prepare a new pretrial order in many cases, but must also relearn the case. The need to review a file many times during extended litigation significantly increases total hours and thus total costs. The delays that result from lack of sufficient judicial resources are thus a primary cause of avoidable cost in civil litigation.

The scarcity of judicial resources in the Western District is principally the product of the burgeoning criminal docket. The criminal docket has experienced rapid growth in the Western District relative to the slower growth in judicial resources allocated to the District. And a wide gulf exists between the rapid growth

[23]28 U.S.C. § 473(a)(2)(B).

of federal law enforcement resources allocated to the Western District and the much slower growth in judicial resources available to respond to that law enforcement activity. In the last three years, the Western District offices of the Federal Bureau of Investigation, Drug Enforcement Administration, Secret Service, and Bureau of Alcohol, Tobacco and Firearms, among others, saw a significant growth in their agent and staff allocations. One law enforcement representative who spoke to the Advisory Group indicated that, overall, the enforcement personnel assigned to the Western District had increased by approximately 50 percent in just the last two years. The number of Assistant United States Attorneys assigned to criminal law enforcement has grown from 36 in 1987 to 56 in 1991, an increase of 61 percent in only four years. By comparison, it has taken 13 years, from 1978 to 1991, for the authorized judgeships in the Western District to achieve a similar increase, from 6 authorized judgeships in 1978 to 10 in 1991. This gap between the rate of growth in law enforcement resources and growth in judicial resources is likely to continue.[24]

In addition to a higher number of criminal cases being filed in the Western District, the amount of judicial resources consumed by each prosecution has increased, largely because of certain legislative initiatives. Minimum mandatory

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[24]Section 6159(b) of the Anti-Drug Abuse Act of 1988 requires the Judicial Conference of the United States to evaluate the impact of drug-related criminal activity on the personnel needs of the federal courts. Pursuant to that requirement, the Judicial Conference issued a report dated March 1989. At that time drug-related offenses already accounted for "about 24 percent of the criminal case filings of the district courts and 44 percent of all criminal trials." To quote from the report's Executive Summary: "The judiciary clearly has the talent, the systems, and the will to handle the increasingly drug-related criminal caseload flowing from the war on drugs. What it lacks is basic resources."

sentences, for example, frustrate the desirable process of pretrial settlements in criminal cases. Guilty pleas have historically been the dominant mode of disposing of criminal prosecutions. Traditionally, 85 to 90 percent of federal convictions result from guilty pleas, generally as part of a plea bargain. Even a 5 percent reduction in guilty pleas means a 50 percent increase in trials, an intolerable result given existing burdens on our judicial resources. Mandatory minimum sentences encourage defendants facing lengthy minimums to take their chances on trial, even defendants likely to be convicted, by taking away a principal incentive to plead guilty -- the hope for leniency. While no data is yet available to quantify the impact of mandatory minimum sentences on guilty pleas, both common sense and the experience of criminal law practitioners among the Advisory Group suggest that there are fewer guilty pleas in mandatory minimum cases.[25] We recommend that the Federal Judicial Center undertake to compile data on the relationship between mandatory minimum sentences and guilty plea rates.

The impact of the growing criminal docket in the Western District has also been magnified by the federal sentencing guidelines. The 1984 Sentencing Reform Act created the United States Sentencing Commission (the "Commission") and directed it to fashion a comprehensive and rational sentencing system.[26] The

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[25] *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 134 (1990). In the United States Sentencing Commission's exhaustive SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991), the Commission points out that "the plea rate is considerably lower for mandatory minimum cases."

[26] *See* 28 U.S.C. § 991.

Commission's statutorily mandated guidelines prescribe sentencing ranges for most federal crimes, which the court adjusts based on various factors particular to the offense and the offender. A guideline's range is subject to the maximum sentences that Congress has prescribed for each crime and any minimum sentences it may have prescribed for particular crimes. Under this statutory scheme, the judge may impose a sentence that is outside the guideline range only if the case presents factors that the Commission did not adequately consider in preparing the guidelines. Sentences outside the guideline ranges ("departures") are subject to appellate review to determine whether they are reasonable.

The guidelines have increased the burdens related to the criminal docket in several respects. First, several of the judicial officers interviewed by the Committee indicated that the guidelines have made sentencing significantly more time consuming. Under the guidelines, a defendant gets points for the nature of the criminal conduct charged, adjustments are made for such factors as the defendant's role in the offense, and points are computed for the defendant's criminal record. The total points for the adjusted offense level and criminal history are then compared to a grid which tells the judge the sentencing guideline range that applies. Because the results of any particular finding allowed under the guidelines significantly impact the sentence imposed, judges are required to spend a great deal of time making findings at sentencing hearings before they can impose a sentence.

Second, the time necessary for conducting guilty plea hearings under Rule 11 of the Federal Rules of Criminal Procedure has also increased. Because sentencing

is now so technical, explaining the process to a defendant during a change of plea has increased the time required for taking a change of plea.

Third, the guidelines may have adversely impacted plea bargaining. The Western District has seen a decrease in the number of prosecutions disposed of by guilty plea since the sentencing guidelines went into effect on November 1, 1987. In calendar years 1985-1987, for example, 75.6 percent of all criminal prosecutions in the Western District were disposed of by guilty plea. By comparison, in calendar years 1988-1990, only 70.8 percent of all criminal prosecutions were disposed of by guilty plea. Substantial disagreement exists among members of the Advisory Group concerning the significance of these statistics. We do agree, however, that quantifying the precise impact of the sentencing guidelines on plea bargaining is necessary and we recommend that such a project be undertaken.

Table 9: Disposition By Guilty Plea[27]

Year	Total Defendants	Guilty/Nolo Pleas	Guilty/Nolo Percent	Trials	Trial Percent
1980	677	397	59	114	17
1981	649	405	62	79	12
1982	813	551	68	99	12
1983	1017	724	72	115	11
1984		Data Unavailable			
1985	1076	833	77	110	10
1986	1138	858	75	137	12
1987	1038	769	74	154	15
1988	1032	714	69	157	15
1989	1370	1012	74	205	15
1990	1704	1182	69	239	14

More criminal cases, more criminal trials, and more complex sentencing procedures require more judges. In December 1990, we finally received three additional judgeships. One year later, however, two of these new judgeships remain vacant, as does the judgeship vacated by Judge Garza in May of 1991. The Western District had 43 vacant judgeship months in calendar year 1991 alone. This is an inexcusable waste of allocated judicial resources. For progress to be made in reducing

[27]Total defendants disposed of by guilty/nolo pleas and by trials does not equal 100% because the totals do not include dismissals by government action, prosecutions transferred out of the district, and deferred adjudications.

cost and delay in the Western District, judicial vacancies must be filled in a timely fashion. Even when finally filled, the three new judgeships will be too little too late. We have no reason to anticipate that steadily increasing activity in the criminal docket will subside. As long as federal policy calls for the continued federalization of law enforcement, the number of criminal cases to be litigated in federal court is likely to increase.

The political reasons for the glaring disparity in funding and resource allocation are obvious. Being "tough on crime" is standard fodder in all congressional campaign platforms. Increased funding for federal law enforcement and prosecutors is politically popular. Increased funding for federal judges, however, is not so easily translatable into the "tough-on-crime" rhetoric. To the contrary, our constitutionally independent judiciary is not always popular with the electorate. As a consequence, the needs of the judiciary are often overlooked in the appropriation process.

While increased staffing and funding initially might seem to increase rather than decrease costs, that is not true on a system-wide basis. Delays in disposing of the criminal docket exact enormous social costs. Delays in removing guilty criminal defendants from circulation allow the continuation of crime and all of its associated social costs and tragedy. Such delay decreases the credibility of the criminal justice system's deterrent value. On the civil side, litigants suffer uncertainty and in many instances ever-increasing costs, while important constitutional and commercial disputes remain unresolved. In the long run, increasing staff and funding levels of federal courts to a reasonable and realistic level will result in savings of these

system-wide costs. We submit that remedying the deficiencies in staffing and funding of our federal courts would do far more to reduce the delays and system-wide costs in federal court than any other change or procedural modification could achieve.

2. Excessive Discovery and Motion Practice

Judges and practitioners alike agree that excessive discovery and motion practice contributes significantly to unnecessary litigation costs. Attorneys file too many motions -- motions that are frivolous, motions that are crafted for delay (such as many Rule 12 motions), motions driven by unreasonable client demands, motions that are filed to avoid any risk of later criticism, and motions filed for some ulterior motive (such as summary judgment motions filed to obtain discovery). These motions should not be filed. They not only require costly responses but also waste our judicial resources. The Court should discourage parties from filing these motions through judicious use of sanctions.

The Court should bear in mind, however, that not all motions, even discovery motions, are unnecessary. Many motions are necessitated by the unreasonable conduct of the nonmovant. Some lawyers consistently push for more than the rules allow, calculating that their opponent will be reluctant to seek the Court's intervention. To the extent the Court indiscriminately discourages motion practice, it encourages these unreasonable lawyers to push for even more. Moreover, legitimate disagreements arise during the course of litigation. Courts exist to resolve good faith disagreements. Economy in litigation is desirable, but only to the extent

that it can be achieved without undermining the right of access to the Court to resolve legitimate disputes.

Attorneys also conduct too much discovery. Conducting discovery in a cost-effective fashion requires the attorneys to exercise judgment. Many new lawyers charged with waging modern discovery wars lack the experience and judgment to know when a deposition is unnecessary, what information can be best gathered by interrogatories, how to identify what documents are really needed, and what disputes are legitimate and worth pursuing. Even experienced litigators, however, often approach their files with an attitude of "leaving no stone unturned," even when doing so costs far more than is justified by any potential benefit. The motivation for this attitude may range from concern about malpractice suits, to the need to bill hours, to a desire to win at any cost, to a desire to magnify litigation costs for perceived enemies.

Having concluded that attorneys file too many motions and take too much discovery, we confess that we are unable to cite supporting empirical evidence. Our conclusions are based simply on our own experience as well as an anecdotal evidence furnished by others. Moreover, we believe that excessive discovery and motion practice is not nearly the problem in the Western District that it is in many other districts, though again we rely simply on our own experience and anecdotal evidence for this conclusion.

3. Court Procedures

A number of court procedures in the Western District create unnecessary expense for litigants. First, current court procedures often require parties to prepare and file pretrial orders months or even years before a case actually goes to trial. The pretrial order is an extremely costly endeavor for clients and time-consuming for counsel. Expenditures of $20,000 to $50,000 or more in attorney's fees are not unusual for drafting a pretrial order. Time and money could be saved if the joint pretrial order was not due until some limited period before the actual trial date. Additionally, pretrial orders should not be required while potentially case-dispositive motions are still pending. If the pretrial order due date is moved closer to the actual trial date, parties would save money, attorneys would save the time required to create the pretrial order and to reacquaint themselves with the order as the pending trial date approaches, and the courts would still have the pretrial order sufficiently in advance of trial.

Second, current court procedures require parties to not only identify witnesses in the pretrial order, but also to provide a brief statement of the testimony of each witness. This latter requirement greatly increases the time and expense incurred in preparing pretrial orders, yet it provides no real benefit to the parties or to the court. Proper discovery concerning witnesses, and even informal discovery by discussions between parties, can provide the same information without the necessity of requiring the parties to carefully craft the responses so as to avoid having limits imposed on the witness's testimony at trial.

Third, Local Rule CV-36 limits the number of requests for admission to ten. Requests for admission are a useful tool for effective management of litigation. They can compel one's opponent to take a position on factual and legal issues even when the court takes no active part in case management. And they can narrow the scope of discovery and facilitate trial preparation. Only 15 of the 94 federal judicial districts limit requests for admission by local rule and none of the 14 other districts impose a restriction as stringent as that imposed by Local Rule CV-36. By limiting the number of requests for admissions to ten, Local Rule CV-36 unnecessarily discourages the use of what could be a valuable device for reducing litigation costs.

Fourth, the local rules require that most pretrial disputes be resolved following full briefing by the parties.[28] Minor disputes involving matters of discretion could instead be resolved following short oral presentations to a judicial officer without the need for expensive briefing. The briefing requirements contained in the local rules thus frequently create avoidable costs.

Fifth, Rule 16 of the Federal Rules of Civil Procedure requires the district judge to confer with the parties before issuing a scheduling order. In some instances, the judges in the Western District issue scheduling orders without requesting input from the parties. Allowing the parties to submit a proposed scheduling order gives them an opportunity to advise the court, based on the nature of the case, concerning the deadlines that the parties consider realistic in preparing the case for trial. The court is not bound to accept the parties' proposed deadlines, but the court would

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[28]*See* W.D. Tex. R. CV-7(a)-(e).

comply with Rule 16 by obtaining the parties' input. In addition to complying with Rule 16, this approach permits flexibility in adapting the court's deadlines to the nature of particular cases. Judges may have a set timetable that they wish to employ and may advise the parties of the timetable that the court normally uses, but the parties would have an opportunity to suggest alternative deadlines better suited to their particular case and provide explanations to the court justifying the deadlines. By conferring with the parties initially and taking into account the parties' description of the nature of the discovery needed, the court can more accurately manage the litigation and thereby avoid future motions seeking to extend the various deadlines imposed.

Sixth, the judges in the Western District use different forms of scheduling orders. Some include dates that others do not. A uniform form of scheduling order would contain standard deadlines. These standard deadlines would assist lawyers practicing in different divisions of the Western District in monitoring their dockets.

III. EXPENSE AND DELAY REDUCTION PLAN FOR THE WESTERN DISTRICT

The Act identifies six "principles and guidelines of litigation management and cost and delay reduction."[29] Each district court, in consultation with its Advisory Group, "shall consider and may include" in its plan each of these principles.[30] In addition, the Act specifically invites consideration of "other features" that may commend themselves to the court in consultation with the Advisory Group.[31] This part of the report analyzes each of the enumerated principles of litigation management and offers the Advisory Group's recommendations for reducing unnecessary cost and delay in civil litigation in the Western District.

A. Judicial Involvement in Pretrial Preparations

The Act assumes that increased judicial involvement in the pretrial process is both an effective and desirable means of reducing cost and delay in civil litigation. The Act thus requires us to consider as a principle "of litigation management and cost and delay reduction . . . early and ongoing control of the pretrial process through involvement of a judicial officer."[32] In particular, the Act requires us to consider active judicial involvement in "assessing and planning the progress of the case,"[33]

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[29]28 U.S.C. § 473(a).

[30]*Id.*

[31]28 U.S.C. § 473(b)(6).

[32]28 U.S.C. § 473(a)(2).

[33]28 U.S.C. § 473(a)(2)(A).

in setting a wide range of deadlines for completing pretrial preparations,[34] and in conducting case management conferences.[35]

At the outset, we note that there is already substantial judicial involvement in the Western District pretrial process. The scheduling order required by Rule 16(b) of the Federal Rules of Civil Procedure mandates that the court set deadlines to join parties, amend pleadings, file motions, and complete discovery. Rule 16 also authorizes the court to include in the scheduling order "the date or dates for conferences before trial, a final pretrial conference, and trial" as well as "any other matters appropriate in the circumstances of the case."[36] The scheduling orders entered by judges in the Western District vary considerably in form, but typically include not only the deadlines required by Rule 16, but also a deadline for designating expert witnesses, a deadline for conferring to prepare a pretrial order, and a deadline for filing the pretrial order.[37] The judges typically require the pretrial order to include a great deal of information, such as a report on jurisdictional issues, pending motions, the claims of the parties, stipulations, contested issues of fact and law, exhibits, either proposed jury instructions or findings and conclusions, an estimate of trial length, voir dire questions, a report on settlement negotiations,

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[34]28 U.S.C. § 473(a)(2)(B), (C), (D).

[35]28 U.S.C. § 473(a)(3), (b)(1).

[36]Fed. R. Civ. P. 16(b)(4), (5).

[37]*See* Appendix B to the Local Rules of the United States District Court for the Western District of Texas.

and a list of witnesses for each party, together with a statement of the testimony of each witness.[38]

Before considering the need for additional judicial involvement in the pretrial process, we note that several changes in existing procedures under Rule 16 would reduce unnecessary expense and delay in the Western District. First, Rule 16 requires that before issuing a scheduling order, the court "shall" consult with the attorneys for the parties and any unrepresented parties "by a scheduling conference, telephone, mail, or other suitable means." Rule 16 requires this consultation because different cases have different scheduling needs. Several judges in the Western District, however, do not generally allow the parties input into the deadlines contained in the scheduling order. As a result, the deadlines they impose may have no relation to the needs of individual cases. The parties are then required to either incur unnecessary expense by employing extraordinary efforts to meet the deadlines, or by obtaining an order amending the scheduling order. To avoid these expenses and to comply with Rule 16, we recommend that the Court confer with the parties before issuing Rule 16 scheduling orders. This procedure would allow the sort of "systematic, differential treatment of cases" encouraged by the Act.[39]

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[38]*See* Form PT-1 in Appendix B to the Local Rules of the United States District Court for the Western District of Texas.

[39]*See* 28 U.S.C. § 473(a)(1) (recognizing as a fundamental principle of litigation management and cost and delay reduction "systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, [and] the amount of time reasonably needed to prepare the case for trial . . . .").

We recognize that current demands on judicial resources generally preclude actual conferences with the parties. Moreover, actual conferences with the Court are not necessarily a cost-effective means for the litigants to provide input into the scheduling process. But Rule 16 contemplates other means for the Court to obtain input from the parties. In particular, we recommend that prior to issuing a Rule 16 scheduling order, the Court allow the parties to submit a joint written recommendation concerning an appropriate schedule. This could be accomplished by adopting the following addition to Local Rule CV-16:

> (d) Within 90 days after the filing of the complaint or within 30 days after the appearance of any defendant, whichever is earlier, the plaintiff shall submit a proposed scheduling order to the Court. The plaintiff shall confer with any party who has appeared concerning the contents of the proposed scheduling order, which shall include proposals for all deadlines set out in the scheduling order contained in Appendix B to these rules. The parties shall endeavor to agree concerning the contents of the proposed order, but in the event that the parties are unable to do so, each party's position and the reasons for the disagreement shall be included in the proposed schedule submitted to the Court. In the event that the plaintiff has not yet obtained service on all defendants, the plaintiff shall include an explanation of why the plaintiff has failed to do so.

The timing for parties to submit their proposed schedule may require later revision. Rule 16 in its present form contains an unworkable deadline for obtaining the input of the parties prior to issuing a scheduling order. Rule 16(b) presently requires the Court to issue a scheduling order "as soon as is practicable but in no event later than 120 days after filing of the complaint." Since Rule 4 of the Federal

Rules of Civil Procedure allows 120 days for service of summons,[40] Rule 16 requires the court to issue its scheduling order in some cases before any or all of the defendants have appeared. As a result, in these cases it will be impossible to give all parties input into the initial schedule. Rule 16 does allow any party to obtain amendment of the schedule upon a showing of good cause. But a later opportunity to seek amendment based upon a showing of good cause is hardly an adequate substitute for input into the initial pretrial schedule.

The amendments to the Federal Rules of Civil Procedure presently under consideration by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States would address this timing issue. A proposed amendment to Rule 16 would change the time for issuing the scheduling order to "as

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[40]Rule 4 allows the plaintiff too long to serve defendants and is itself a cause of unnecessary delay. We recommend later in our report that Congress amend Rule 4 to reduce the time to obtain service to 90 days.

Rule 83 presently prohibits districts from adopting local rules inconsistent with the federal rules. The proposed amendments to Rule 83 presently under consideration by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States would allow a district court to adopt inconsistent local rules with prior approval of the Judicial Conference. In the event that amended Rule 83 is adopted, we recommend that the Western District seek approval of the following proposed Local Rule CV-4:

> If service of the summons and complaint is not made upon a defendant within 90 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the Court's own initiative with notice to such party or upon motion. This rule shall not apply to service in a foreign country pursuant to Rule 4(i) of the Federal Rules of Civil Procedure.

soon as practicable but in no event more than 60 days after the appearance of a defendant." This amendment would ensure the Court's ability to obtain the input of at least one defendant concerning the contents of the proposed scheduling order. In the event this amendment to Rule 16 is adopted, we recommend that proposed Local Rule CV-16(d) be amended as well to provide as follows:

> (d) Within 30 days after the appearance of any defendant, the plaintiff shall submit a proposal scheduling order to the Court. The plaintiff shall confer with any party who has appeared in the action concerning the contents of the proposed scheduling order, which shall include proposals for all deadlines set out in the scheduling order contained in Appendix B to these rules. The parties shall endeavor to agree concerning the contents of the proposed order, but in the event that they are unable to do so, each party's position and the reasons for the disagreement shall be included in the proposed schedule submitted to the Court. In the event that the plaintiff has not yet obtained service on all defendants, the plaintiff shall include an explanation of why the plaintiff has failed to do so.

The deadlines contained in the scheduling order greatly impact its effectiveness in reducing unnecessary cost and delay. As we noted earlier in our report, requiring the parties to confer, prepare, and file a pretrial order well in advance of trial (in many cases in the Western District before the case is set for trial) creates a great deal of unnecessary expense. The closer a case gets to trial the more likely the case is to settle. Moving the time for filing the pretrial materials close to trial would in many cases that ultimately settle eliminate altogether the expense of preparing the order. Moreover, requiring the parties to file the order shortly before the actual trial setting would avoid the unnecessary expense caused by the need to prepare for trial

twice -- once while preparing the pretrial order and again later when preparing for the actual trial setting. Finally, changing the deadline for filing the pretrial order would not interfere with the Court's trial preparations. The Court seldom, if ever, has an opportunity to review the pretrial materials well in advance of trial. Indeed, in other districts in Texas and elsewhere, pretrial orders are routinely filed close to the actual trial date without disrupting the Court's preparations.[41] Rather than scheduling a date for filing the pretrial order unrelated to the actual trial date, we recommend that the initial scheduling order instead simply require the parties to submit the pretrial order within 14 days of the actual trial date set by the Court.[42]

The present format of pretrial orders required in the Western District also imposes unnecessary costs on the parties. In particular, the requirement that the parties include not only a list of each party's witnesses, but a description of the testimony of each witness in the pretrial order creates unnecessary expense. This requires the attorneys to carefully craft pretrial witness statements to avoid the Court later restricting the testimony of witnesses at trial. Doing so takes time and costs money. Yet these witness statements provide no real benefit to either the Court or the litigants. The judges do not generally examine the summaries of witness

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[41]The Northern District of Texas, for example, provides by local rule that a "pretrial order shall be filed with the Court at least 10 days before the scheduled date for trial." N.D. Tex. R. 7.1(a).

[42]In the alternative, the Court could delete all reference to pretrial orders in the initial scheduling order and instead adopt a local rule providing that "a pretrial order shall be filed with the Court at least 14 days before the scheduled date for trial." The local rules could also specify the contents of the pretrial order. *See* N.D. Tex. R. 7.1(a); S.D. Tex. R. 9.

testimony. Nor are the summaries needed to prevent one party from surprising another at trial. Formal discovery and even informal discovery by discussion among the parties can and already does provide all the information needed to prepare for trial. We therefore recommend that the Court no longer require that pretrial orders include statements concerning the contents of testimony and that it amend Form PT-1 contained in Appendix B to the Local Rules to reflect this change.

Most judges in the Western District do not include trial settings in their scheduling orders, even though litigators almost universally believe that the most effective tool for resolving cases quickly and without undue expense is a firm trial date set relatively promptly after the complaint is filed. A firm trial date helps to resolve cases because the prospect of a trial focuses the attention of the litigants on the risks they face by not compromising. A firm date also saves money because lawyers and witnesses need prepare only once.

Indeed, one might say that issuing a scheduling order without a trial setting has the tail wagging the dog. The entire pretrial process should focus on preparing for the trial. Efficient preparation often requires preparing as close to the trial date as possible so that as little effort as possible requires later duplication. The cost of completing preparations long before trial, and thus having to later repeat preparations, arguably outweighs any benefit of adhering to a pretrial schedule. This "hurry up and wait" process may, in short, actually increase costs.

Judges who attempt to schedule firm trial settings in their scheduling orders encounter numerous difficulties in fixing a schedule. Busy litigators who practice in

their courts may have conflicting trial schedules. Criminal cases must be tried within specified periods under the Speedy Trial Act. A large percentage of civil cases that are set will settle on the eve of trial. And the time required to try particular civil cases cannot be predicted with accuracy until long after a scheduling order has been issued.

Despite these problems, we believe that the judges should endeavor to include realistic trial settings in their scheduling orders. If the press of the criminal docket makes it unlikely that a judge can reach a civil case until two years after the case is filed, the judge should put that date in the scheduling order and fix a schedule that focuses on the remote trial setting. With experience, judges will develop a sense of how many civil and criminal cases settle and will be able to schedule an appropriate number of trials for the same time slot. The judges will also develop a sense for the frequency and impact of the occasional protracted criminal and civil trials and adjust their schedules accordingly.

Despite the judges' best efforts, we recognize that scheduling conflicts will arise. When a conflict does arise, the trial should be rescheduled for some date in the near future. The judges should build into their schedules sufficient leeway to permit this approach. Moreover, the problem of scheduling conflicts might be mitigated through the use of visiting judges. Two Senior Circuit Judges who reside in the Western District, the Honorable Thomas M. Reavley and the Honorable Sam D. Johnson, are both experienced in trying civil and criminal cases and have indicated their willingness to assist in trying cases. Also, under 28 U.S.C. § 294(d) the Chief

Justice of the United States maintains a roster of retired judges willing to undertake special judicial duties. And there may be district judges in other less congested districts who would be willing to try cases on occasion in the Western District. To the extent lack of courtroom facilities would be an impediment to use of visiting judges, we note that three law schools are located within the Western District -- Baylor University in Waco, St. Mary's University in San Antonio, and the University of Texas in Austin. Each of these schools has courtroom facilities that could be borrowed. The Clerk of Court should develop a cost-effective means to ensure the availability of courtroom personnel to staff trials conducted by visiting judges. The Western District will no doubt require an increase in funding to secure the necessary courtroom personnel and we recommend that that funding be both requested and approved. We believe that setting reasonably firm trial dates in the scheduling order is a goal worth attaining and that every reasonable effort should be undertaken to achieve this goal.

Several judges in the Western District include a deadline for designating expert witnesses in their scheduling orders. Although such a deadline is not required by Rule 16, imposing deadlines for designating expert witnesses can be an effective case management technique. Parties can and usually do learn the identity of opposing testifying experts through service of interrogatories. Setting appropriate deadlines for designating expert witnesses ensures that these interrogatories are fully answered in time to allow orderly expert witness discovery. To achieve this objective, the scheduling order should sequence expert witness designation deadlines, with parties

who are asserting affirmative claims for relief required to designate their testifying experts first. Parties resisting claims for relief should be required to designate their testifying experts at a later date also specified in the scheduling order. The time gap between the designation deadlines for parties asserting claims and parties resisting claims should be sufficient to allow parties resisting claims to depose opposing experts and make a reasoned decision concerning the need for responding experts. Finally, parties asserting claims for affirmative relief should be provided an opportunity to designate rebuttal experts after a reasonable opportunity to take discovery from opposing experts.

The judges in the Western District use different forms of scheduling orders. We encourage the judges to work toward adopting a uniform format for their scheduling orders. We recognize that certain cases require customized scheduling formats. We further recognize that experimentation by individual judges with pretrial case management techniques is desirable. But a uniform format would assist practicing attorneys, both in recommending deadlines to the Court in compliance with proposed Local Rule CV-16(d) and in monitoring their own dockets. We have carefully examined all of the formats currently in use in the Western District as well as several formats used in other districts. Based on our investigation, we recommend that the following format replace the format currently included as Appendix B to the Western District Local Rules:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
_____ DIVISION

_____

V. CIVIL ACTION NO. _____

_____

SCHEDULING ORDER

Pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule CV-16, the Court orders that the parties adhere to the following deadlines:

1. A report on alternative dispute resolution in compliance with Local Rule CV-88 shall be filed by _____.

2. Motions to join other parties shall be filed by _____.

3. Motions to amend or supplement pleadings shall be filed by _____.

4. Parties shall designate testifying expert witnesses in accordance with the following schedule. Parties asserting claims for relief shall designate testifying experts by _____. Parties resisting claims for relief shall designate their testifying experts by _____. Parties asserting claims for relief shall designate any rebuttal experts by _____.

5. Discovery shall be completed by the parties on or before _____. Counsel may by agreement continue discovery beyond this deadline but there will be no intervention by the Court, except in extraordinary circumstances, after this date. No trial setting will be vacated because of information acquired in post-deadline discovery.

6. Dispositive motions shall be filed by _____.

7. The parties shall file a joint notification of trial readiness by _____. The notification shall include a report on any pending motions, an

estimate of the length of time needed for trial, and an estimate of the number of witnesses that each party will likely call.

8. This case is set for trial on _____ at 9:00 a.m. The parties shall file a pretrial order that conforms with the requirements of Form PT-1 contained in Appendix B to the Local Rules at least 14 days before the scheduled date for trial.

Some judges in the Western District include in their scheduling orders a number of explanations concerning the deadlines and practice in that particular judge's court. The uniform format that we propose should in no way interfere with each judge's decision whether to include such additional information in their orders. Moreover, we recognize that some cases will require modification of the recommended format to meet particular needs that exist in those cases. Nonetheless, we believe that the recommended format would be appropriate in the vast majority of cases.

Having assessed the current level of judicial involvement in the pretrial process, we reject the Act's assumption that more judicial involvement in the pretrial process than already exists is necessarily better. Indiscriminate involvement of judicial officers in planning the progress of cases is neither a necessary nor a desirable means of reducing cost and delay in civil litigation. Planning litigation strategy is the lawyer's responsibility. Lawyers who best understand the case and their client's needs should have ample freedom to plan and try their own cases. The current level of judicial involvement in the pretrial process under Rule 16, with the changes we have proposed, is all that is necessary and appropriate.

Of course, even if more judicial involvement were necessary and desirable, our judicial officers in the Western District simply do not have the time to become more involved. One commentator has recently observed that judges in the Southern and Western Districts of Texas "are spending 10, 12 and more hours a day trying to process the never-ending torrents of criminal cases that come in each week between the increasing Scylla of mandatory minimum sentences and the Charybdis of more categories of crimes being enacted by Congress each year."[43] She continues by noting that in existing circumstances "the federal judges [she has] spoken to think that the suggested solution to their civil (not to mention criminal) caseload of a more active or hands-on role is, well, funny."[44] We agree.

B. Discovery

The discovery process authorized by the Federal Rules of Civil Procedure was intended to revolutionize the nature of pretrial preparation. Indeed, it has. The trial lawyer of yesterday has been replaced by the litigator of today. Discovery commands the bulk of the litigator's efforts. Because a litigator's time is expensive, discovery itself has become expensive. The Act focuses our attention on the discovery process and requires us to consider ways we can make the discovery process more cost-effective. Addressing the discovery process is particularly appropriate given our

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[43]Kieve, *Discovery Reform*, 77 ABA JOURNAL 79, 80 (December 1991).

[44]*Id.*

conclusion that excessive discovery contributes significantly to unnecessary litigation costs in the Western District.

1. Controlling Discovery

The Act requires the Advisory Group to consider "controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion."[45] To a large extent, measures are already in place in the Western District to control both the extent of discovery and the time for completing discovery. We recommend several additional measures, however, that should contribute further to reducing avoidable costs in the discovery process.

a. The Time for Completing Discovery

A basic element of any system of discovery control is setting time limits for completing discovery. Realistic time limits can be effective in focusing discovery on the necessary issues because, with limited time, attorneys will tend to limit themselves to the discovery that most needs to be done. Realistic time limits can also reduce the opportunity for diversionary activity, such as motions for sanctions. Rule 16 of the Federal Rules of Civil Procedure mandates that the court impose time limits

[45]28 U.S.C. § 473(a)(2)(C).

limits on discovery. In all cases, except those exempt by local rule,[46] the court is required to issue a scheduling order within 120 days after filing of the complaint. This order is required to establish, among other things, a date for completing discovery. The existing Rule 16 scheduling order requirement is an appropriate means to control the time for discovery, provided that the court allows the parties input into setting an appropriate discovery deadline.

b. The Extent of Discovery

Prior to its amendment in 1983, Rule 26 of the Federal Rules of Civil Procedure provided that the frequency of use of any discovery device in a case was "not limited." In 1983 the provision permitting unlimited use of the various discovery devices was deleted. Rule 26 now expressly authorizes judges to control the frequency of discovery:

> The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information

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[46]Western District Local Rule CV-16 exempts the following types of cases from the Rule 16 scheduling order requirement: (1) Social Security cases filed under 41 U.S.C. § 405(g); (2) Applications for writs of habeas corpus under 28 U.S.C. § 2254; (3) Motions to vacate sentence under 28 U.S.C. § 2255; (4) Civil forfeiture cases; (5) IRS summons cases; (6) Bankruptcy matters; (7) Land condemnation cases; (8) Naturalization proceedings filed as civil cases; (9) Interpleader cases; (10) Cases under 42 U.S.C. § 1983 filed by prisoners proceeding pro se; (11) VA overpayment cases; (12) Student loan cases; (13) Out-of-district subpoena cases; and (14) Any other cases where the judge finds that the ends of justice would not be served by using the scheduling order procedure of Rule 16(b).

> sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

The local rules in the Western District go further than Rule 26, by imposing mandatory ceilings on use of certain discovery devices. Local Rule CV-33(a), for example, provides that

> Each party that chooses to submit written interrogatories pursuant to Rule 33, Fed. R. Civ. P., will be initially limited to propounding twenty questions to each adverse party. Each separate paragraph within a question and each sub-part contained within a question which calls for a response shall be counted as a separate question. The Court may permit further interrogatories upon a showing of good cause.

Similarly, Local Rule CV-36(a) provides that

> Requests for admissions made pursuant to Rule 36, Fed. R. Civ. P., will be limited to ten requests, which shall in like manner include all separate paragraphs and sub-parts contained within a number request. The Court may permit further requests upon a showing of good cause.

The Western District's restriction on the numbers of interrogatories has reduced discovery-related costs. Interrogatories produce information of limited utility. And the cost of answering interrogatories can be significant, especially in relation to the cost of propounding interrogatories. Twenty interrogatories is usually a sufficient number to obtain that information most efficiently gathered by interrogatories. In those rare instances when twenty interrogatories are not sufficient, Local Rule CV-33(a) permits the Court to allow additional interrogatories.

Not all restrictions on the frequency of discovery, however, necessarily reduce costs. Requests for admission, for example, provide a useful and cost efficient device for establishing facts. Properly requested and answered, requests for admission can substantially reduce the expenses of the parties. Indeed, we believe that requests for admission are an underutilized technique for lowering litigation costs and framing disputes. Local Rule CV-36 presently limits the number of requests to ten. This restriction discourages use of what should be a valuable technique for reducing costs.

We recognize, conversely, that allowing unrestricted use of requests for admission creates an opportunity for abuse. Requests on central issues will rarely be admitted. The effort on both sides in propounding and responding to such requests is wasted. Given this potential for waste, a presumptive limit on requests for admission is appropriate. The Advisory Group recommends that the Court increase the limit on requests for admission to thirty. Implementing this increase would require modifying Local Rule CV-36(a) to read as follows:

> (a) Requests for admissions made pursuant to Rule 36, Fed. R. Civ. P., will be limited to ~~ten~~ thirty requests, which shall in like manner include all separate paragraphs and sub-parts contained within a number request. The Court may permit further requests upon a showing of good cause.

The Advisory Group considered, but rejected, additional restrictions on the extent of discovery. Most significantly, one proposal based on the proposed amendments to Rule 26 of the Federal Rules of Civil Procedure would provide that, absent some directive from the Court, no more than ten depositions could be taken by the plaintiffs, no more than ten depositions could be taken by the defendants, and

no more than ten depositions could be taken by third parties. We were not convinced, however, that this proposal would reduce costs or delay without also limiting the ability of litigants to adequately prepare for trial. If the presumptive limit on depositions were set at a sufficiently high level to allow most litigants to adequately prepare, the limit would not likely reduce costs. If the presumptive limit were set lower, many parties would have serious difficulty preparing their case. Given the wide variety in deposition needs from one case to the next and the central role of depositions in pretrial preparations, an appropriate presumptive limit for most cases simply cannot be fixed. Limits on depositions might also encourage litigants to adopt tactics forcing their opponents to waste depositions. For example, refusing to stipulate to the authenticity of business records would often force an opponent to use a deposition. For these reasons, the Advisory Group recommends against adopting a local rule fixing presumptive limits on depositions.

c. Ensuring Compliance with Appropriate Requested Discovery in a Timely Fashion

We conclude that the most effective technique to ensure timely compliance with appropriate requested discovery is judicious use of the Court's authority to impose sanctions under Rule 37 of the Federal Rules of Civil Procedure. If the court makes clear that sanctions will be imposed when necessary, fewer discovery abuses will likely occur. The Advisory Group considered, but rejected, a proposal that the Court award reasonable expenses, including attorneys' fees, to the prevailing party in any discovery dispute. Such a rule would unfairly suppress good faith discovery motions.

And it might also encourage parties to engage in marginally improper behavior daring opponents to risk the cost of challenging the behavior and losing. Such a rule would also lead to additional litigation over who was the "prevailing party" in any particular dispute, especially given the tendency of courts to "split the baby" in discovery disputes.

In addition to judicious use of sanctions under Rule 37, the Advisory Group believes that several additional measures could discourage discovery disputes and thus reduce costs. One would be a local rule approving standard definitions for use in discovery requests. Another local rule could approve certain common interrogatories. The Court would thereby reduce the number of discovery disputes relating to commonly-used definitions and interrogatories. To implement this proposal, we recommend that the Court adopt the following addition to Local Rule CV-26:

> (c) The full text of the definitions and rules of construction set forth in this paragraph is deemed incorporated by reference into all discovery requests, but shall not preclude (i) the definition of other terms specific to the particular litigation, (ii) the use of abbreviations or (iii) a more narrow definition of a term defined in this paragraph. This Rule is not intended to broaden or narrow the scope of discovery permitted by the Federal Rules of Civil Procedure. The following definitions apply to all discovery requests:
>
> (1) *Communication*. The term 'communication' means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).
>
> (2) *Document*. The term 'document' is defined to be synonymous in meaning and equal in scope to the usage of this term in

Federal Rule of Civil Procedure 34(a). A draft of a non-identical copy is a separate document within the meaning of this term.

(3) *Identify (With Respect to Persons).* When referring to a person, 'to identify' means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(4) *Identify (With Respect to Documents).* When referring to documents, 'to identify' means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

(5) *Parties.* The terms 'plaintiff' and 'defendant' as well as a party's full or abbreviated name or a pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

(6) *Person.* The term 'person' is defined as any natural person or business, legal or governmental entity or association.

(7) *Concerning.* The term 'concerning' means relating to, referring to, describing, evidencing or constituting.

(d) The following rules of construction apply to all discovery requests:

(1) *All/Each.* The terms 'all' and 'each' shall be construed as all and each.

(2) *And/Or.* The connectives 'and' and 'or' shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

(3) *Number.* The use of the singular form of any word includes the plural and vice versa.

We further recommend that the Court adopt the following addition to Local Rule CV-33:

> (d) Each party that chooses to submit written interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure may use the following instructions and questions. The Court will not entertain any objection to these approved interrogatories, except upon a showing of exceptional circumstances. Each of the following interrogatories counts as one question; as to all interrogatories other than those approved in this rule, subparts count as separate questions.
>
> (1) **Instructions**:
>
> (a) All interrogatories must be answered fully in writing in accordance with Rules 33 and 11 of the Federal Rules of Civil Procedure.
>
> (b) All answers to interrogatories must be signed by the party except that, if circumstances prevent a party from signing responses to interrogatories, the attorney may file the interrogatories without the party's signature if an affidavit is filed simultaneously stating that properly executed responses to interrogatories will be filed within twenty (20) days. Such time may be extended by order of the Court.
>
> (c) In the event any question cannot be fully answered after the exercise of reasonable diligence, the party shall furnish as complete an answer as he can and explain in detail the reasons why he cannot give a full answer, and state what is needed to be done in order to be in a position to answer fully and estimate when he will be in that position.
>
> In the event a party opponent fails to answer an interrogatory fully and offers an explanation therefor, the opposing party shall respond to said explanation within ten (10) days after its receipt if he disagrees with the same.
>
> (d) If there is more than one plaintiff or more than one defendant in a case, each interrogatory must be answered separately for each unless the answer is the same for all.

(e) Each interrogatory shall be set forth immediately prior to the answer thereto.

(2) **Interrogatories**

(a) Identify all persons who you believe have knowledge of relevant facts and describe the issues upon which you believe they have knowledge.

(b) Identify each person whom you expect to call as an expert witness at the trial of this case, and, as to each expert so identified, state the subject matter on which he is expected to testify, the substance of the facts and opinions to which he is expected to testify, and a summary of the grounds for each opinion.

(c) Identify all persons or legal entities who have a subrogation interest in the cause of action set forth in your complaint [or counterclaim], and state the basis and extent of said interest.

(d) If [name of party to whom the interrogatory is directed] is a partner, a partnership, or a subsidiary or affiliate of a publicly owned corporation, list the identity of the parent corporation, affiliate, partner, or partnership and the relationship between it and [the named party]. If there is a publicly owned corporation or a holding company not a party to the case that has a financial interest in the outcome, list the identity of such corporation and the nature of the financial interest.

(e) If the defendant is improperly identified, give its proper identification and state whether you will accept service of an amended summons and complaint reflecting the information furnished by you in answer hereto.

(f) If you contend that some other person or legal entity is, in whole or in part, liable to [the plaintiff or defendant] in this matter, identify that person or legal entity and describe in detail the basis of said liability.

> (g) Set forth the names and addresses of all insurance companies that have liability insurance coverage relating to the matter alleged in the complaint [or counterclaim], the number or numbers of said policies, the amount of liability coverage provided in each policy, and the named insured in each policy.
>
> (h) If you contend that you have been injured or damaged, describe the injuries and damages.
>
> (i) If you are seeking an award of any sum of money, whether by damages or otherwise, state the full amount of money you seek and describe the manner in which the amount was calculated. Your description should include each element of damage or component of recovery that you seek, the amount sought for each element or component, the manner in which each element or component of the calculation was determined, and should identify the source of each number used in the calculation.

The process of negotiating and resolving requests for common blanket protective orders also produces avoidable discovery costs. A substantial amount of lawyer time is spent arguing over the form of protective order in cases where both sides agree to the need for such an order. These arguments are often resolved by the Court on motion. A local rule adopting a standard form of protective order would eliminate unnecessary costs incurred in negotiating the form of common protective orders and in resolving disputes over that form. The order would be entered upon motion by either party, absent a showing of good cause by the party opposing entry of the order. To implement this proposal, the Advisory Group recommends that the Court adopt the form of protective order attached as Appendix F to this report and include this form as an appendix to the local rules. We further recommend that the Court adopt the following addition to Local Rule 26:

(c) Protective Orders.

> Upon motion by any party the court shall enter a protective order in the form set out in Appendix "__", absent a showing of good cause by any party opposing entry of the order.

A third readily avoidable discovery cost occurs in negotiating and obtaining entry of videotape deposition orders. In its present form, Rule 30(b) of the Federal Rules of Civil Procedure requires a party seeking to record deposition testimony by nonstenographic means to first obtain permission of the court or agreement from all other counsel. Videotape depositions are prevalent today. A local rule granting blanket approval to videotape depositions would more accurately reflect current practice. To further reduce unnecessary costs incurred in negotiating over videotape deposition procedures, the local rule should also provide standard guidelines for taking videotape depositions. These procedures could only be altered by the agreement of all parties or upon motion and a showing of good cause. To implement this proposal, the Advisory Group recommends that the Western District adopt the following addition to Local Rule CV-30:

> (g) Leave of Court is granted for videotaped and audiotaped depositions in all civil cases. If the deposition is to be recorded solely by videotape or audiotape, the notice or subpoena must so state to allow anyone desiring stenographic recordation to arrange for it. If the deposition is to be recorded by videotape or audiotape, the party noticing the depositions or subpoenaing the witness shall be responsible for ensuring that the equipment used is adequate to produce a clear record. If the deposition is to be recorded by videotape, the procedures set out in Appendix "_

"[47] shall govern the deposition proceedings, except upon stipulation of the parties or order of the Court upon motion and showing of good cause.

Another source of avoidable cost in the discovery process is disagreement over deposition procedures. By specifying in advance permissible deposition practices, the Court would reduce disputes over depositions. The minimum standards that the Court would adopt should reflect local practice. To implement this proposal, the Advisory Group recommends that the Western District adopt the following addition to Local Rule CV-30:

(c) **Notice.** The notice for the deposition should state the identity of persons who will attend other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition. If any party intends to have any other persons attend, that party must give reasonable notice to all parties of the identity of such other persons.

(d) **Objections.** Unless the parties otherwise agree, objections during depositions should be limited to form and responsiveness or on the basis of privilege. Objections to form should be "Object to the form of the question" or similar wording; objections to responsiveness should be "Object to the responsiveness of the answer" or "Object to the responsiveness of the answer beginning with _____" or similar wording; and on objections as to privilege and instruction, "Object, calls for privileged communications; instruct not to answer."

(e) **Exhibits.** All exhibits identified during depositions should be numbered sequentially regardless of the deposition in which they are used.

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[47]We have attached as Appendix G to this report proposed guidelines that we recommend to the Court for inclusion in the local rules.

(f) **Attendance by telephone.** Counsel for any party other than the party noticing the deposition may elect to attend the deposition by telephone at that counsel's expense.

Finally, we believe the Court could reduce avoidable discovery-related costs in the Western District by clarifying the procedure necessary to present claims of privilege to the Court. Rule 26(b) of the Federal Rules of Civil Procedure identifies claims of privilege as a basis for avoiding discovery, but does not specify the procedure required for presenting claims of privilege. Given that claims of privilege are among the most common sources of discovery disputes, a local rule clarifying the procedure for presenting such claims would reduce uncertainty (and costs relating to undue caution arising from uncertainty) in presenting such claims. To implement this proposal, we recommend that the Court adopt the following addition to Local Rule CV-26:

(d) A party claiming a privilege with respect to a particular document has the following burdens when presenting their claim to the Court:

(1) The claimant must state the particular rule of privilege upon which the claim is based. This may be done by the use of an identification code if such a code is set out.

(2) There must be appended to the claim any information, in addition to that in the document itself, necessary to establish the factual elements required by the privilege rule invoked. The information must be sufficiently detailed to permit decision on the claim and must be verified by affidavit by a person or persons having knowledge of the facts asserted.

(3) In connection with a government privilege, in addition to the substantiating material required by subparagraphs (1) and (2) herein, a statement shall be provided from the appropriate official in the department on behalf of which the privilege is claimed, stating that the official has examined the documents or has been given a detailed review of them, and personally approves the assertion of the privilege.

When a privilege is a qualified one, once the asserting party satisfies the burden of demonstrating that the material falls within the privilege, the burden is then on the party opposing the privilege to establish reasons why the materials should be disclosed. For the work product privilege, this burden entails satisfying the standards in Rule 26(b)(3) of the Federal Rules of Civil Procedure.

For qualified government privileges other than the presidential privilege, this burden entails showing that the relevant interests justifying disclosure outweigh the relevant interests justifying nondisclosure.

When a document contains both privileged and unprivileged material, the unprivileged material must be disclosed to the fullest extent possible without thereby disclosing the privileged material. If a privilege is asserted with regard to part of the material contained in a document, the party claiming the privilege must clearly indicate the portions as to which the privilege is claimed.

2. Effort by Parties to Resolve Discovery Disputes

The Act requires the Advisory Group to consider "conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matter set forth in the motion."[48] This procedure is already well established in the Western District's practice. The

[48]28 U.S.C. § 473(a)(5).

local rules for the Western District provide that "[a] judge may refuse to hear a motion relating to pre-trial discovery unless movant advises the Court within the body of the motion that counsel for the parties have first combined in a good faith attempt to resolve the matter by agreement."[49]

3. Client Approval of Deadline Extensions

The Act requires the Advisory Group to consider "a requirement that all requests for extensions of deadlines for the completion of discovery or for the postponement of trial be signed by the attorney and the party making the request."[50] Given that the attorney is already required to sign such motions, the purpose for such a requirement is obviously to ensure that clients are kept informed. We have no reason to believe that the distrust of the attorney-client relationship reflected by this proposal is justified. Nor is the proposal likely to contribute materially to the reduction of cost and delay in civil litigation. Moreover, attorneys in Texas have a professional obligation to consent to certain requests for extensions by opposing counsel regardless of their client's position. We therefore reject the requirement suggested by the Act.

Nevertheless, we see little harm in adopting a more reasonable means to ensure that litigants have input into requests for material extensions. For example, the Court could require that counsel certify in any motion seeking a material

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[49]W.D. Tex. R. CV-7(i).

[50]28 U.S.C. § 473(b)(3).

extension (30 days or more) in a discovery deadline or seeking to postpone a trial setting that counsel has conferred with his client and what his client's position is. This requirement might provide some marginal benefit and would cause no harm. To implement this proposal, we recommend that the Court adopt the following addition to Local Rule CV-16:

> (c) All motions seeking an extension of more than 30 days of the deadline to complete discovery and all requests to reschedule a trial setting must be accompanied by a certificate that counsel has consulted with his or her client. The certificate must identify the position of the movant's client on the request. In the event that counsel is unable to include such a certificate, counsel must show good cause for failing to do so. Attorneys representing governmental entities are excluded from this requirement.

4. Voluntary Disclosure and Cooperative Discovery

The Act mandates that the Advisory Group consider encouraging cost-effective discovery through "voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices."[51] Both lawyers and their clients have a responsibility to ensure that discovery is conducted in a responsible and cost-effective manner. Information subject to discovery should be provided informally when so requested.

Proposed amendments to Rule 26 of the Federal Rules of Civil Procedure go beyond relying on professional responsibility to ensure cooperation in discovery.

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[51] 28 U.S.C. § 473(a)(4).

Revised Rule 26 would require litigants to disclose, without any request, three types of basic information that at present are almost invariably obtained through discovery requests or as a result of standard pretrial provisions and local rules. Failure to make the required disclosures can lead not only to traditional sanctions, but also to preclusion of the use of evidence and notification to the jury that evidence was not disclosed as required, much as in the situation of spoliation of evidence. The parties are required to update these disclosures on the basis of information learned during the litigation.

Early in the case -- within 30 days after a defendant has answered, unless the court sets another time -- the parties must identify the persons likely to have significant information about the claims and defenses, must describe the documents likely to bear significantly on these issues, must provide information concerning any damages they claim, and must provide insurance information. Formal discovery ordinarily will not commence until after these disclosures have been made. The rule permits the time for disclosure to be accelerated when, for example, answers are being delayed for an extensive period of time awaiting a ruling under Rule 12 of the Federal Rules of Civil Procedure.

A third type of required disclosure relates to expert testimony. At an appropriate point during pretrial proceedings, a party expecting to use expert testimony must, unless excused by the court, provide other litigants with a written report from its expert. The report must be detailed and complete -- in essence, a preview of the direct testimony from such person, including any exhibits to be used

to summarize or support the person's opinions. After the report has been provided, the expert can be deposed, though it is expected that, given the detailed nature of the report, there will often be little need for such a deposition. Before trial, litigants must disclose any changes in such information, and the direct examination of the expert at trial will be limited to that which has been so disclosed.

The reaction of many members of the Advisory Group to the proposed amendments to Rule 26 has been negative. The proposed amendments raise several troublesome questions. Would the amendments require a party to disclose information that is harmful as well as helpful? Does the automatic nature of the disclosure preclude objections, such as objections to providing telephone numbers of former employees of a corporate party? What information is "significant"? In addition to raising these questions and others, the required disclosures may actually increase the cost of discovery by requiring disclosure even in those cases where no discovery is necessary and in requiring costly expert witness reports. Given these concerns, the Advisory Committee takes no position on the proposed amendments to Rule 26 and does not recommend their adoption at this time by local rule in the Western District.[52]

[52]We note that Magistrate Judge Primomo is currently experimenting with mandatory disclosures in actions pending before him. We encourage him to continue this experiment.

C. Dispositive Motions

The Court's inability to rule promptly on motions, particularly dispositive motions, is perhaps the most costly consequence of our present lack of sufficient judicial resources. The Advisory Group has considered and rejected a number of proposals aimed at relieving the Western District's motion backlog. One proposal would seek to impose mandatory deadlines on judges for resolving dispositive motions. Practically speaking, however, there would be no effective way to enforce mandatory deadlines. Even if enforceable, unrealistic and rigid deadlines could distract judges from other important matters demanding their attention.

While we reject mandatory deadlines for ruling on dispositive motions, we do recommend that the Court adopt target deadlines for resolving motions. We suggest that every judicial officer exercise his or her best efforts to resolve dispositive motions within at most 60 days after briefing is complete. We further suggest that judicial officers resolve all dispositive motions at least 30 days before trial. To assist the judicial officers in reaching these targets, we recommend that district judges and magistrate judges seek and be authorized to retain one additional law clerk on each of their staffs. A primary function of law clerks is to assist judges in resolving motions. Expanding the size of each judicial officer's staff is a relatively easy and inexpensive means of increasing the capacity of our judicial officers. One judge told the Advisory Group that the recent addition of a third law clerk to his staff had been an invaluable aid in disposing of motions pending in his court.

We recognize that in the present circumstances, compliance with the targets we suggest will not always be possible. But we believe that the mere existence of the targets will reinforce the critical importance of resolving dispositive motions. To assist the judges in monitoring their progress, we recommend that the Clerk's Office develop a reliable system for tracking dispositive motions. The goal should be to generate a monthly report that will provide each judicial officer with an accurate analysis of his or her pending motions, including the aging of each judge's motions. We further recommend that this report of each judge's progress be made available to the other judges and to the public at large. This procedure will allow judges to monitor their own progress and the progress of their colleagues.

Earlier in our report we concluded that attorneys share much of the blame for the motion backlog. To deter attorneys from filing frivolous motions, we encourage the Court to exercise its authority to impose sanctions under Rule 11 of the Federal Rules of Civil Procedure when appropriate. We further recommend that the Court consider using oral argument more frequently to assist it in separating those motions with merit from those that are frivolous. Federal Rule of Civil Procedure 56(c) contemplates oral argument on motions for summary judgments: "[t]he motion shall be served within 10 days before the time fixed for hearing." Rule 78 gives the Court power to order summary judgment without a hearing and we recognize that the Court usually is required to carefully research dispositive motions. But an initial oral screening of the motions might be a useful mechanism for quickly separating the wheat from the chaff. Indeed, we recommend that the Court consider experimenting

with expanded use of oral argument in connection with nondispositive motions as well.

D. Trial Procedures

While fewer than five percent of the cases filed nationally eventually result in trials, studies suggest that more than 40 percent of judge time is spent in trial proceedings. More efficient trials could significantly increase judicial capacity, which might mean more trials faster. Faster trial settings would likely result in quicker settlements and cost savings throughout the system. Given the Advisory Group's responsibility to consider means of reducing unnecessary cost and delay in civil litigation, we considered a number of proposals to streamline civil trials, including a number of proposed amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

We conclude, however, that many of the proposed procedural reforms that purport to shorten the litigation process and to reduce costs make little sense and can be implemented only at the risk of substantially undermining the right of litigants to a fair trial. Proposals that would restrict drastically the opportunity of citizens to obtain and present evidence to support or defend claims are fundamentally inconsistent with the very notion of due process of law. Moreover, several of these proposals are gimmicky short-cuts offering no realistic prospect of significant savings in costs or time. Finally, we have concluded that the trial phase of the litigation process has not itself been a significant cause of unnecessary cost and delay in the

Western District. Trials in the Western District are already among the most efficient in the nation, with the vast majority consuming fewer than three days.

1. Limiting Witnesses

The power of a court to limit the number of witnesses a proponent may present to support any particular fact issue is grounded in the court's power to limit the extent to which cumulative evidence will be admitted.[53] This power is already aggressively exercised in some Courts in the Western District. Some judges in the Western District limit the number of character witnesses defendants may call in criminal cases. And at least one judge routinely limits the parties in civil trials to two witnesses per fact issue and two expert witnesses on any specific topic. Proposed amendments to Rule 16 of the Federal Rules of Civil Procedure would further enhance the court's authority to limit witnesses by allowing a court to impose a

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[53]Manbeck v. Ostrowski, 384 F.2d 970, 972-73 (D.C. Cir. 1967) (the trial court prohibited any more than ten of twenty-five proffered witnesses to testify on the issue of whether the defendant made an alleged defamatory statement), *cert. denied*, 390 U.S. 966 (1968); *see also* United States v. Sullivan, 803 F.2d 87, 89 (3d Cir. 1986) (the determination of whether the exclusion of testimony infringes a proponent's Sixth Amendment due process right is not based on how much time the testimony would consume, but on whether the testimony would be cumulative), *cert. denied*, 479 U.S. 1036 (1987). Fed. R. Evid. 611(a) (the "court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment"); Fed. R. Evid. 403 (a court may exclude evidence "if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

"reasonable limit" on the number of witnesses that may be presented by any one party.

The Advisory Group for the Western District recommends against imposing limits in advance of trial on the number of witnesses a party may call. Certainly such limits could shorten trials. They could also preclude the adequate presentation and development of a party's claims. Those witnesses who should be eliminated can already be eliminated when, at trial, the Court concludes that the witnesses's testimony is needlessly cumulative of evidence already presented.

2. Limiting Time

Judges now possess substantial power to impose time limits on case presentations.[54] Time limitations, however, must be flexible and should not be

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[54]*See* Ruiz v. Estelle, 679 F.2d 1115, 1129 (5th Cir.) ("[The judge] may, when in his sound discretion he deems it advisable, . . . maintain the pace of trial by interrupting or setting time limits on counsel. He must not usurp the role of counsel, but he may manage the trial's course to achieve a 'just, speedy, and inexpensive determination' of the action"), *amended in part and vacated in part*, 688 F.2d 286 (5th Cir. 1982). Generally, time limitations are upheld if they are "reasonable" under the circumstances so as to allow the parties a fair trial. *See, e.g.*, Juneau Square Corp. v. First Wisconsin Nat'l Bank, 475 F. Supp. 451, 465-66 (E.D. Wis. 1979) (holding that time constraints placed upon the litigants in presenting their cases were reasonable in light of all of the facts and circumstances of the case and did not deny the plaintiffs a fair trial in the case); MCI Communications Corp. v. American Tel. & Tel. Co., 85 F.R.D. 28, 30-32 (N.D. Ill. 1979) (finding that a district court had the authority to impose reasonable time limits upon the conduct of the trial in a protracted antitrust dispute).

rigidly applied.[55] In the Western District, at least two judges have employed this method to accelerate case dispositions. The proposed amendments to Rule 16 would allow judges to issue orders in advance of trial establishing reasonable limits on the length of time allotted to the parties for the presentation of evidence.

For several reasons, we recommend against increasing the authority of judges to limit the time for case presentations in the manner suggested by proposed Rule 16. One certain effect of time limits on case presentations is that lawyers become slaves to the minute hand, potentially to the detriment of a fair presentation of their client's cases. The Seventh Circuit has disapproved of "the practice of placing rigid hour limits on a trial" because it would "engender an unhealthy preoccupation with the clock."[56] As noted by one commentator, "the inevitable tendency will be to cut -- the lawyer's art will be sacrificed to 'get it in the record.'"[57]

Undoubtedly, many lawyers waste time, bore jurors, and lose their clients' cases as a result. The Court already has and should exercise the authority to cut these lawyers off at trial. Arbitrary time limits imposed in advance of trial are a

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[55]Flaminio v. Honda Motor Co., 733 F.2d 463, 473 (7th Cir. 1984) (declaring that "[a]lthough in this era of crowded district court dockets federal district judges not only may but must exercise strict control over the length of trials, and are therefore entirely within their rights in setting reasonable deadlines in advance and holding the parties to them, . . . we disapprove of the practice of *placing rigid hour limits* on a trial. The effect is to engender an unhealthy preoccupation with the clock.") (citations omitted).

[56]Flaminio v. Honda Motor Corp., 733 F.2d 463, 473 (7th Cir. 1984).

[57]Powell, *The Docket Movers: A Critique of Proposed Amendments to the Federal Rules of Civil Procedure*, 1 JOURNAL OF THE AMERICAN BOARD OF TRIAL ADVOCATES 1, 7 (1991).

different matter. They are a bad idea. They should not be imposed by judges and should not be sanctioned by the Federal Rules of Civil Procedure.

3. Narrative Presentations of Direct Testimony

In some cases, courts have required that the direct testimony of some or all witnesses be presented in a narrative or affidavit form. One method allows counsel to summarize the relevant portions of a witness's deposition testimony in a short narrative, which is then provided to opposing counsel. Opposing counsel then has an opportunity to review the proposed summary and deposition for accuracy. After the court resolves any disputes concerning the contents of the summary, the offering attorney reads the narrative to the jury. A second method involves reading a prepared narrative statement of a witness's direct testimony while the witness is in court and under oath. Under either method, opposing counsel is permitted to cross-examine the witness after the narrative direct testimony is read to the jury.

The proposed amendments to Rule 43 of the Federal Rules of Civil Procedure would specifically authorize this practice in nonjury cases. The basic concept underlying the proposed rule change is a good one. Some witnesses are routine, less important or perhaps for some reason the opponent will not attack their credibility. The most common examples include records custodians to prove a business records predicate, document identification witnesses, witnesses proving the reasonableness

and necessity of expenses, and witnesses testifying to factual admissibility predicates for decision by the court under Rule 104(a) of the Federal Rules of Evidence.[58]

To the extent use of the procedure specifically authorized by proposed Rule 43 is limited to allowing voluntary use of affidavits with respect to witnesses whose credibility is not at issue, it is an acceptable means of expediting trials. This objective is already usually achieved through use of stipulations in the pretrial order. We recommend against, however, any requirement that a party put on a witness by affidavit, statement, report or deposition during direct examination. Because the demeanor and presentation of a witness while testifying is such a critical part of the evaluation of his or her credibility, such a requirement could be materially unfair to the calling party. If forced by the court to put on a witness by affidavit, the proponent would lose the persuasive impact of a good witness. It is not enough to say that the good witness will have a chance to display his or her credible demeanor on cross-examination. The cross-examiner will control the cross. An effective cross-examination, allowing the witness to respond only "yes" or "no" to precise leading questions, leaves the witness with no platform to display his or her credible demeanor. No proponent of a witness would feel comfortable in relying upon the

[58]*See, e.g.*, Tex. R. Civ. Evid. 902(10); Tex. Civ. Prac. & Rem. Code Ann. § 18.001 (Vernon Supp. 1991); Cal. Evid. Code §§ 1561-62; *see also* In re Air Crash Disaster at Stapleton Int'l, 720 F. Supp. 1493, 1504 (D. Colo. 1989).

opponent's cross-examination to demonstrate how believable the witness is. By redirect it may be too little and too late.[59]

We further recommend against permitting any party to put on a witness in this manner where the credibility of the witness may be at issue. Direct examination by affidavit may be unfair to the cross-examiner because it may serve to enhance the credibility of a bad witness. Though we already endure this problem when we allow the proponent to read a deposition to the jury, the rules manifest a clear preference for live testimony over deposition testimony by requiring proof of unavailability before reading of the deposition.[60] And the deposition testimony is, at least, in the words of the witness, spontaneous, and subject to all the perils of eliciting testimony from a lay witness. The reality of testimony by affidavit is that the lawyer will draft the affidavit. Even a terrible witness can be made to sound credible, confident, articulate and persuasive. The affidavit will display clarity, cogency, logic and good grammar. There will be no slips, no mistakes, no hesitation and no backtracking. Every evil underlying the proscription against leading a witness on direct will find expression in the affidavit.[61]

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[59]Powell, *The Docket Movers: A Critique of Proposed Amendments to the Federal Rules of Civil Procedure*, 1 JOURNAL OF THE AMERICAN BOARD OF TRIAL ADVOCATES 1, 38-43 (1991).

[60]*See* Fed. R. Evid. 804(b)(1); Fed. R. Civ. P. 32.

[61]Powell, *The Docket Movers: A Critique of Proposed Amendments to the Federal Rules of Civil Procedure*, 1 JOURNAL OF THE AMERICAN BOARD OF TRIAL ADVOCATES 1, 38-43 (1991).

4. Presenting Testimony By Deposition

Permitting parties to make increased use of depositions at trial would be an appropriate means of reducing costs and expediting trial proceedings. Rule 32 of the Federal Rules of Civil Procedure already authorizes parties to use depositions at trial in a variety of ways, such as to present testimony of an unavailable witness or to impeach or limit an adverse witness's testimony. The Texas Rules of Civil Procedure permit even broader use of depositions by providing that "[u]navailability of the deponent is not a requirement for admissibility."[62] We conclude that amending the Federal Rules to eliminate unavailability of the witness as a condition for use of depositions would be a desirable change. Presenting testimony by deposition is generally more efficient than by live testimony. If the proponent chooses to present an otherwise available witness by deposition, there is no harm to allowing this more efficient means of eliciting testimony given that opposing parties can call the witness live for cross-examination. In the event that Rule 83 of the Federal Rules of Civil Procedure is amended to permit local rules inconsistent with the federal rules, we recommend that the Court adopt this proposal by addition to Local Rule CV-32.

The parties should have the right, however, to present evidence by live testimony and should not be required to present evidence by deposition. Restricting testimony by deposition deprives the parties of the opportunity to present evidence in what is usually the most effective, revealing manner -- through live testimony. Moreover, deposition testimony makes trial less interesting for jurors, less

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[62]Tex. R. Civ. P. 207(1)(a).

spontaneous, and makes the factfinder's evaluation of witness credibility more difficult. For these reasons, we recommend against any standard required use of deposition testimony.

5. Multi-Tracked Trials

During complex, lengthy trials some courts have used a separate procedure for handling evidentiary disputes that could impede progress of the trial. Trial proceeds as usual on one "track," but a magistrate judge handles a "second track," ruling on evidentiary issues outside the jury's presence. We recommend against this procedure. We recognize that in certain long, complex cases a multi-tracked trial procedure might be possible, but even in those cases this procedure would reduce the power or control of the district court judge, would increase the number of attorneys needed to try a case, and would create confusion and logistical problems for counsel who have to conduct "two trials at the same time." The Court could resolve such issues more efficiently during the pre-trial process, and that would provide greater predictability in scheduling witnesses and presenting evidence.

6. Bifurcated Trials

Judges should consider use of bifurcation as provided by Federal Rule of Civil Procedure 42(b) where appropriate. Bifurcation can significantly shorten trial time where the damage and 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.[63]

7. Jury Selection and Comprehension

Based on a survey the Advisory Group has conducted of over 300 jurors in the Western District, we have concluded that the Court should furnish jurors with a copy of the jury instructions to follow while the judge delivers them. Seventy-four percent of the jurors we surveyed either agreed or strongly agreed with the statement

> It would have been helpful for each juror to have a copy of the judge's instructions to follow while the judge delivers them.

We also recommend that the Clerk's Office mail the juror information sheet attached as Appendix H to prospective jurors several weeks before they are scheduled to appear for service. The completed sheets could then be provided to attorneys to assist in the jury selection process. A principal objection to this procedure is that it would inconvenience and intrude upon the prospective jurors. In our survey of actual

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[63]*See* Schwartz, *Severance - A Means of Minimizing the Role of Burden and Expertise in Determining the Outcome of Litigation*, 20 VAND. L. REV. 1197 (1967).

jurors, however, 91 percent agreed that completing the juror information sheet would be "an acceptable process of obtaining relevant information." Only 4.3 percent believed that "[r]equiring potential jurors to complete the juror information sheet would be unduly burdensome" and only 4 percent believed that "[r]equiring potential jurors to complete the juror information sheet would unduly intrude into the personal affairs of jurors."

Aside from their opening statements and closing arguments, attorneys are limited to presenting evidence during the trial. One proposal considered by the Committee would allow attorneys a specified amount of "persuasion time" to use during the course of the trial. The attorney would be able to use this argument time as he or she desired. For example, if an attorney had two hours of persuasion time, the attorney could spend 15 minutes on an opening statement, 45 minutes on a closing argument, and one hour during trial commenting on testimony. In our survey of jurors, 50.8 percent believed that allowing persuasion time during trial would assist jurors in understanding the case. These were jurors who served primarily in brief trials, lasting no more than three days. In more lengthy cases, support among jurors presumably would have been higher. We encourage the Court to experiment with this proposal in appropriate cases, particularly in cases involving lengthy testimony and complex factual issues.

E. Alternative Dispute Resolution

The Act requires the Advisory Group to consider "authorization to refer appropriate cases to alternative dispute resolution programs that have been designated for use in a district court . . . including mediation, minitrial, and summary jury trial."[64] The Act further mandates that we consider a program of early neutral evaluation. Such a program provides 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."[65]

The Western District already has in place a highly successful court-annexed arbitration program.[66] Based upon the success of this program, as well as that of other less formal alternative dispute resolution ("ADR") programs already used in the Western District, the Advisory Group recommends a substantial expansion of ADR in the District. Increasing the number of cases disposed of through ADR is likely to reduce the cost and delay incurred in resolving these cases. It is also likely to relieve pressure on our limited judicial resources and thus allow more prompt and cost-efficient resolution of other cases as well.

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[64]28 U.S.C. § 473(a)(6).

[65]28 U.S.C. § 473(b)(4).

[66]W.D. Tex. R. CV-87.

1. Existing ADR Programs in the Western District

The Western District is one of ten districts nationally that is specifically permitted by federal statute to compel court-annexed arbitration. Court-annexed arbitration in the Western District has proven highly successful in causing or contributing to settlements. Cases referred to arbitration are, for the most part, civil cases seeking money damages of less than $150,000 exclusive of interest, costs and attorneys' fees.[67] From June 1, 1990 to July 31, 1991, only 2 of the 89 arbitrable cases closed (2 percent) required trial by court or jury. Of the remaining 87, only 2 cases required an arbitration hearing. Sixteen cases settled after referral and after a hearing was set. The truly phenomenal statistic is that 69 cases settled after referral, but before a hearing was set. The court-annexed arbitration program does not require the parties to bear the cost of obtaining neutrals. The Clerk of Court has compiled a list of neutrals from which the parties select arbitrators. The only limit on the program is that the Court is restricted in the kind of cases that can be referred. We note that the present court-annexed arbitration program has only been implemented in the Austin and San Antonio Divisions. We recommend that the Court expand this implementation to all divisions within the Western District.

Two settlement weeks have been conducted in the Austin Division, modeled after the settlement week procedures implemented by local state courts. The Austin Division has invoked its general power of supervision over cases to implement and conduct this effort, given the absence of specific federal legislation authorizing the

[67]*See* W.D. Tex. R. CV-87.

program. The Austin Division has an active ADR Committee which is composed of lawyers who have served both on the settlement week committee for the local state courts, as well as the court-annexed arbitration panel for the Western District. A substantial motive for lawyers to participate is that service in an ADR proceeding may exempt an attorney from a criminal appointment.

Available statistics on settlement week reveal that this process has not been as successful as the court-annexed arbitration program. The District Clerk's office has furnished us with information on the settlement week held October 1, 1990. Of 100 cases referred, 13 were relieved from mediation, 3 were closed by the Court and 1 was transferred. Of the remaining 83 cases, 14 were mediated during the settlement week. Of these 83 cases, 14 cases (17 percent) settled prior to mediation, 16 cases (19 percent) settled during or after mediation, 7 (8 percent) partially settled, and 26 cases (55 percent) did not settle. Thus, of the 83 cases referred for settlement week mediation, 30 cases (36 percent) settled and were removed from the docket.

The Court has referred an increasing number of cases to mediation in the Western District. The Court appoints trained mediators from those determined to be qualified and placed on a master list. This effort has also been implemented by the Court invoking its general power to supervise cases. Although at present statistics are not available to evaluate the success of mediation in the Western District, the Advisory Group's preliminary assessment indicates that the procedure has been successful. The only significant problem seems to be providing a mediator for litigants who are unable to pay a mediation fee. One division credits service as

mediator as service on an appointed criminal case as a means of encouraging pro bono service. The Court could also require each mediator on the master list to contribute services pro bono on a ratable basis as a condition for being listed as eligible for appointment.

2. Authority to Adopt ADR Programs

The Western District has authority to implement a wide range of alternative dispute resolution programs. Compulsory nonbinding arbitration in the Western District is authorized by the Judicial Improvements and Access to Justice Act of 1988.[68] No other federal legislation specifically authorizes compulsory ADR procedures. But Rule 16 of the Federal Rules of Civil Procedure suggests that federal courts have authority to compel parties to participate in nonbinding ADR. Under Rule 16(b)(5) the court may include in its scheduling order "any other matters appropriate in the circumstances of the case." One appropriate matter would seem to be the referral of the case to nonbinding ADR given that one purpose of the Rule 16 conference is "facilitating the settlement of the case." Moreover, one of the subjects to be discussed at the Rule 16 conference is "the use of extrajudicial procedures to resolve the dispute."[69] This construction of Rule 16 is consistent with Rule 1, which provides that all Federal Rules of Civil Procedure shall be "construed to secure the just, speedy, and inexpensive determination of every action."

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[68]28 U.S.C. §§ 651-658.

[69]Fed. R. Civ. P. 16(a)(5), (c)(7).

Rule 16 of the Federal Rules of Civil Procedure expressly authorizes courts to conduct settlement conferences. There are only two limits on a court's discretion in directing parties to participate in these settlement conferences. First, numerous courts have held that a court cannot coerce a settlement. A compelled settlement would, of course, violate due process as well as any constitutional right to a jury trial. Second, the Eleventh Circuit has recently held that a court lacks authority to order non-party insurers, which are in control of litigation, to provide an individual with full settlement authority at settlement conferences.[70]

In addition to authority conferred by legislation, federal courts have broad inherent authority "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[71] Citing this inherent authority, the Sixth Circuit has held that district courts have the power to adopt local rules requiring nonbinding mediation as a means of encouraging settlement.[72] The Sixth Circuit has also concluded, however, that courts lacked inherent authority to impose penalties for failure to accept the recommendation of a mediator.[73]

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[70]*See* In re Novak, 932 F.2d 1397, 1401-08 (11th Cir. 1991).

[71]*See* Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962).

[72]*See* Rhea v. Massey-Ferguson, Inc., 767 F.2d 266 (6th Cir. 1985).

[73]*See* Tiedel v. Northwestern Michigan College, 865 F.2d 88 (6th Cir. 1988).

There is a split of authority on whether a court has authority to require a summary jury trial as a means of encouraging settlement.[74] The Seventh Circuit has held that federal trial courts lack authority to order an unwilling party to participate in a summary jury trial.[75] The Seventh Circuit's decision has been widely criticized by proponents of ADR, however, and most believe that other circuits, and ultimately the Supreme Court, will uphold the right of the court to compel summary jury trials as a part of the settlement process.

The United States Attorney has objected to mandatory participation in ADR proceedings which require the government to pay part of the cost of the proceedings or if the amount exceeds $100,000. The authority for this opposition is found in the Department of Justice ("DOJ") Guidelines.[76] The DOJ is presently working on amendments to give more latitude to the United States Attorneys, and, hopefully, permit them to engage in the full range of ADR.

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[74]*Compare* Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc., 123 F.R.D. 603, 604 (D. Minn. 1988) (holding that a district court can compel a summary jury trial); McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 44-46 (E.D. Ky. 1988) (upholding local rule authorizing compelled summary jury trials); Arabian American Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988) (the summary trial is "a legitimate device to be used to implement the policy of this Court to provide litigants with the most expeditious and just case resolution") *with* Strandell v. Jackson Co., 838 F.2d 884, 887-88 (7th Cir. 1987) (holding that a district court lacks authority to order an unwilling party to participate in a summary jury trial).

[75]838 F.2d at 887-88.

[76]38 C.F.R. 50.20.

3. An Expanded ADR Program

In recommending an expanded program of ADR in the Western District, we have confronted several basic issues. First, should participation in ADR be mandatory? Though there was substantial sentiment among members of the Advisory Group that participation in ADR should be voluntary, a majority of the Advisory Group concluded that to have a substantial effect in reducing delay and cost in the Western District, the Court must have the authority to compel parties to evaluate the advisability of participating in ADR in their particular case and, indeed, ultimately to compel mandatory participation in ADR proceedings.

A second basic issue is what ADR procedure should be used? A wide variety of ADR devices are available, including early neutral evaluation, mediation, mandated settlement conferences, settlement week, case valuation, nonbinding arbitration, minitrial, and summary jury trial. Early neutral evaluation is a nonbinding and confidential procedure wherein a lawyer experienced in similar cases meets with the parties early in the proceedings to evaluate the case. The process is similar to a pre-trial conference under Rule 16 of the Federal Rules of Civil Procedure, except that it is conducted by a lawyer and not the judge, and the lawyer will inform the parties of his or her evaluation of the case. The principal disadvantage of early neutral evaluation is that inaccurate neutral intervention may translate into unrealistic client expectations.

Mediation differs from early neutral evaluation because the mediator does not evaluate or otherwise predict the outcome of the case for the parties and their

counsel. Rather the mediator encourages the litigants and their counsel to consider all relevant aspects of the dispute and to reach a settlement, if possible. This approach might be more helpful in cases where the parties or their counsel are resistant to a preliminary evaluation. The mediator's function is to facilitate communication, not to substitute the mediator's own judgment on the issues for that of the parties.

Nonbinding arbitration is well known in the Western District under Local Rule CV-87. It differs from early neutral evaluation and mediation in that it uses a panel of mediators, envisions a presentation by all sides to the panel, and permits the panel to issue an advisory opinion. The moderated settlement conference also uses a panel of moderators, envisions a presentation by all sides to the panel and permits an advisory opinion. The moderated settlement conference is, however, broader than our current court-annexed arbitration program, in that the panel engages the parties in settlement discussions. A moderated settlement conference is thus not only a forum for case evaluation, but also for realistic settlement negotiations.

A minitrial or minihearing procedure involves a presentation of the case in summary by each side to decision-makers for each party who have settlement authority. After the presentations, these decision-makers meet and attempt to settle the case. The emphasis is upon giving the decision-makers for each party a first hand look at the other side's case. A minitrial may be conducted either with or without the presence of a neutral or neutrals. It may or may not include an advisory opinion by the neutral or neutrals.

The summary jury trial procedure uses an advisory jury and abbreviated trial procedures to facilitate settlement in cases which may require protracted trials. Jurors are selected from the regular jury pool, with appropriate voir dire and challenges, and conducted by a judge or magistrate. There is no reason, however, why a neutral could not conduct a summary jury trial. No better way exists to predict the outcome of an actual trial than through use of a summary jury trial, but it probably should be considered as the last of the possibilities. Because of the burdens it imposes on the parties, the Court, and private citizen juries, summary jury trial creates efficiencies only if the actual trial might require an inordinate amount of time to complete.

A basic principle of dispute systems design is to match the dispute with the most appropriate process for resolution. Rather than initially dictate an ADR procedure to the parties, we believe the Court should first allow the parties to consider whether ADR is appropriate or necessary in their case. If they conclude that it is, they should have an initial opportunity to select a method they deem appropriate and to resolve the dispute with that method. If they are unsuccessful, the Court should only then have the discretion to order the parties to try another method. Given that no particular method of ADR is most appropriate in any case, the Court should have wide discretion to select from available procedures.

A third basic issue is how should neutrals be selected, qualified, and paid? Preferably the parties should select a neutral or neutrals and participate in a voluntary ADR procedure. In the absence of an agreement to voluntarily participate

in ADR, however, the Court should provide a neutral or neutrals in connection with any court-ordered ADR procedure. The Court should accept applications from those seeking inclusion within a pool of available neutrals and accept those deemed qualified. The San Antonio Division has already begun preparing and using a list of mediators the Court has found qualified. The list is used to appoint mediators in accordance with the standing practice in that Division. The San Antonio Division maintains both a list of arbitrators as well as a list of mediators and we recommend that dual lists be maintained for a district-wide ADR program. Inclusion on the list which includes mediators should require certain minimum qualifications, including completion of at least forty hours training in alternative dispute resolution courses approved by the State Bar of Texas Minimum Continuing Legal Education Department. The Court should, however, retain discretion under any ADR program to waive training and other qualifications in any case, and to appoint non-lawyers where the Court in its discretion believes that doing so would be appropriate.

Arbitrators under the court-annexed arbitration program are paid $100 per day and reimbursed for expenses by the Administrative Office of United States Courts, which provided funding for the program. Mediators in the San Antonio Division are compensated by the parties. Mediators in the Austin Division settlement week program are also compensated in the sense that their service will earn them credit against appointment in criminal cases. We believe that qualified neutrals appointed by the Court should be compensated by the parties pursuant to a fee schedule

enacted by the Court,[77] but the Court should endeavor to provide neutrals at no cost to parties unable to bear the expenses of ADR. The Court could require reasonable pro bono service from neutrals as a condition for placement on the Court's approved list of neutrals. The Court could also credit pro bono service as a neutral against appointment in criminal cases.

The Advisory Group recommends that the Western District implement this expanded ADR program by adopting the following proposed Local Rule CV-88:

> RULE CV-88. ALTERNATIVE DISPUTE RESOLUTION
>
> (a) **ADR Report.** Upon order of the Court entered early in the case, the parties shall submit a report addressing the status of settlement negotiations, disclosing the identity of the person responsible for settlement negotiations for each party, and evaluating whether alternative dispute resolution is appropriate in the case. In the event the parties conclude that ADR is appropriate and agree upon a method of ADR and a neutral, they should identify both the method of ADR and the neutral they have selected, the method by which the neutral was selected, and how the neutral will be compensated. If the parties agree upon an ADR method and neutral, the Court will defer to the parties' agreement unless the Court finds that another ADR method or neutral is better suited to the case or the parties.
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> (b) **Referral to ADR.** The Court on its own motion or upon the motion of either party may order the parties to participate in a nonbinding alternative dispute resolution proceeding, including nonbinding arbitration, early neutral evaluation, mediation, minitrial, or moderated settlement conference. The order may further direct the parties to bear all expenses relating to alternative dispute resolution proceedings in such amounts and such proportions as the Court finds appropriate, but in no event should apportioning of costs constitute a penalty for failing to arrive at a settlement. The alternative dispute

[77]We will endeavor to provide the Court a recommended fee schedule in a supplement to this report.

resolution proceeding shall begin at a date and time selected by the neutral or neutrals, but in no event later than 45 days after entry of the order compelling participation in the proceeding.

(c) **Attendance.** Party representatives with authority to negotiate a settlement and all other persons necessary to negotiate a settlement must attend the ADR proceeding.

(d) **Certification of Neutrals.** The Court will appoint three members to a standing panel on ADR neutrals and designate one member as chairperson. The panel will review applications from providers and annually prepare a roster of those qualified under the criteria contained in this rule. This roster shall be maintained separately from the list of arbitrations maintained in the Office of the Clerk pursuant to Local Rule CV-87.

(1). To be eligible for listing on the roster of neutrals provided for by this rule, neutrals must meet the following minimum qualifications:

(a) the person must be a member of the bar of the United States District Court for the Western District of Texas or a member of the faculty of an accredited law school within Texas; and

(b) the person must have been a member of the bar of the highest court of any state or the District of Columbia for at least five years; and

(c) the person must have completed 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.

A neutral denied listing may request a review of that decision.

(e) **Selection of Neutral.** Upon entry of an order compelling participation in alternative dispute resolution, the Clerk shall forthwith furnish to each party a list of neutrals. If the compelled procedure is nonbinding arbitration or moderated settlement conference, the list shall include five neutrals whose names have been selected from the roster of neutrals maintained in the Clerk's Office. If the compelled procedure is other than nonbinding arbitration or moderated settlement conference, the list shall include three neutrals selected from this same roster. The

parties shall then confer with each side entitled to strike one name from the list. The parties may by agreement reject the list furnished by the Clerk and instead select a neutral or neutrals from the roster. Failure of counsel to timely notify the Clerk of their strikes or selection shall result in the selection of the neutral or neutrals by the Clerk.

The Clerk shall promptly notify the neutral or neutrals selected. If any person selected is unable or unwilling to serve, the Clerk shall submit an additional list of names to the parties until a neutral or complete panel of neutrals is selected. When a neutral or full panel of neutrals have been selected and have agreed to serve, the Clerk shall promptly notify the neutral or neutrals and parties of the selection.

No person shall serve as a neutral of any if the circumstances specified in 28 U.S.C. § 455 of the Judicial Code of Conduct exist, or if the neutral believes in good faith that such circumstances exist. Any person whose name appears on the roster maintained in the Clerk's Office may ask at any time to have his or her name removed, or, if selected to serve in any case, decline to serve but remain on the roster.

Upon its own motion or upon motion and showing of good cause by any party, the Court may order appointment of a neutral or neutrals from outside the roster of qualified neutrals maintained by the Clerk's Office.

(f) **Relief from Referral.** Any party may obtain relief from an order compelling participation in an alternative dispute resolution proceeding upon a showing of good cause. Good cause may include a showing that the expenses relating to alternative dispute resolution would cause undue hardship to the party seeking relief from the order. In that event, the Court may in its discretion appoint a neutral or neutrals to provide ADR services without fee and at no cost to the party or parties.

(g) **Confidentiality.** Except as otherwise provided herein, a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(1) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(2) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

(3) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the Court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the Court or whether the communications or materials are subject to disclosure.

(h) **Summary Jury Trial.** In cases where alternative dispute resolution procedures have proven unsuccessful and a complex and lengthy trial is anticipated, the Court may conduct a summary jury trial provided that the Court finds that a summary jury trial may produce settlement of all or a significant part of the issues and thereby effect a saving in time, effort and expense for all concerned. The Court should develop procedures for such summary jury trial with the advice of counsel.

(i) **Report.** At the conclusion of each ADR proceeding, the neutral or panel of neutrals shall submit to the Court a notice of outcome, including the style and number of the case and whether the case has settled.

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

To implement this ADR program, we recommend that the Court develop a number of forms, including perhaps standard forms for use by the parties in making

the ADR evaluations mandated by proposed Local Rule CV-88, forms to allow the parties to provide anonymous evaluation of neutrals and the program, and literature to be used in recruiting neutrals. We will endeavor to provide the Court with recommended forms for use in implementing the program in a supplement to this report.

In addition to adopting proposed Local Rule CV-88, we recommend that the Western District should also promote awareness of ADR procedures. In particular, we recommend that the Western District amend Local Rule AT-(1)(b) as follows:

> (b) Application for admission shall be made on the form approved by the Court and in compliance with instructions therein. The Clerk shall provide, upon request, the approved application form and instructions. Completed applications shall be filed with the Clerk. Three letters of reference concerning the applicant's character and standing from licensed attorneys in the Western District of Texas must be included. If the attorney resides in another Federal District, such letters must be from attorneys licensed in that district. In addition, a statement by the attorney which illustrates willingness to appear before the committee or members of the Bar should be provided <u>as well as a statement that they are familiar with alternative dispute resolution procedures and will advise their clients in any actions pending in this Court regarding alternative dispute resolution procedures.</u>

Furthermore, we recommend that the Court order all attorneys currently licensed to practice in the Western District to acquaint themselves with ADR procedures and to advise their clients in any action pending now and in the future in the Western District regarding those procedures.

Attorneys must be constantly vigilant to bear in mind that resolution of disputes is the end and purpose of their efforts, and that trial is only one of the

possible means to that end. Sincere commitment to the ADR process should be made, and effort expended in that direction, as a prelude to expensive pretrial procedures including motion practice and discovery. The concept of trial preparation in the traditional sense should take the back seat to settlement efforts and procedures outlined in this report.

F. Efficient Use of Personnel

We have already explained at length why more district judges and magistrate judges are needed in the Western District. Because of the shortage of judicial resources, full utilization of available judicial officers is particularly important. One means of relieving docket pressure on the district judges in the Western District, for example, would be to shift some of their responsibilities to magistrate judges. But doing so will only help if magistrate judges are currently underutilized. We have found no evidence to suggest that they are and indeed much to suggest that our magistrate judges are already fully utilized. More than one district judge has expressed reluctance to shift more responsibilities to the magistrate judges because they are already busy. Nevertheless, to the extent magistrate judges are available to handle additional responsibilities, we believe there are desirable means of shifting to them some of the work of district judges.

1. Civil Trials before Magistrate Judges

The authority of magistrate judges to conduct civil trials is conditioned by statute on the consent of the parties.[78] Certain safeguards are included in the statute to prevent parties from being pressured into consenting. The notice to parties of their right to consent to trial before a magistrate judge is sent by the Clerk of Court and the decision by the parties is communicated to the Clerk.[79] After the parties have communicated their decision to the Clerk, "either the district court judge or the magistrate may again advise the parties of the availability of the magistrate," but there is an obligation in doing so to inform the parties that "they are free to withhold consent without adverse substantive consequences."[80]

Historically, few civil litigants in the Western District have consented to trial before magistrate judges. In our judgment, this historical reluctance has nothing to do with the quality of civil justice available in proceedings before magistrate judges. Instead, a principal reason is the substantial docket backlog in several of our divisions. Defendants in civil actions recognize that if they consent to trial before a magistrate judge, they are likely to receive a more prompt trial. Many defendants simply do not want a more prompt trial and thus withhold their consent. In those divisions where the district judge has no backlog on his docket, there is no advantage to consenting to trial before a magistrate judge.

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[78]28 U.S.C. § 636(c)(1).

[79]28 U.S.C. § 636(c)(2).

[80]*Id.*

We perceive two distinct advantages to be gained by adopting procedures that would encourage civil litigants to consent to trial before magistrate judges. First, increased use of magistrate judges in appropriate cases would help relieve pressure on the dockets of our district judges. Second, increasing the opportunity for magistrate judges to try civil cases would add diversity to their workload and prestige to their office. The Advisory Group thus encourages lawyers and litigants to consider the availability of magistrate judges as an alternative means of trial. District judges should also encourage litigants, in an appropriate manner, to consent to trial before magistrate judges. One means of doing so would be to also assign a magistrate judge to each case when the case is assigned to a district judge. This would enable the parties to evaluate whether to consent based on more complete information about their choice.

We have no illusion that either our encouragement or that of the district judges will dramatically increase consents to trial before magistrate judges. But we do believe that consents would likely increase if parties were provided a meaningful incentive to consent to trial before a magistrate judge. We thus recommend that the Western District create a "rocket docket" and assign that rocket docket to the full-time magistrate judges. For those attorneys and litigants who believe that practice in federal court is unduly burdensome because of judicial interference in pretrial preparations, the rocket docket should offer several benefits. We recommend that no Rule 16 scheduling orders be issued in rocket docket cases. This would simply require amending Local Rule CV-16(b) to add rocket dockets cases as an additional

exemption from the scheduling order requirement of Rule 16.[81] We also recommend that the Court excuse parties who consent to being placed on the rocket docket from filing pretrial orders. Instead, parties on the rocket docket would simply supply proposed findings and conclusions in nonjury cases and proposed instructions for a general charge in jury cases.

For those attorneys and litigants who believe that motion practice in federal court often creates undue expense because of excessive briefing requirements, the rocket docket should offer the benefit of oral hearings with whatever limited briefing the parties agree to submit on nondispositive motions. For those attorneys and litigants who believe that mandatory alternative dispute resolution would interfere with a litigant's right to traditional trial, the rocket docket should offer the benefit of exemption from proposed Local Rule CV-88. And most importantly, for those litigants and attorneys who want their dispute promptly resolved, the rocket docket should offer the guarantee of a trial within four months of consent. If the magistrate judge cannot guarantee a trial within four months, the magistrate judge should promptly notify the parties of the earliest available firm trial setting. Any party should be permitted to withdraw its consent to placement on the rocket docket at that point if that party so elects. The sole condition to being placed on the rocket docket and achieving these benefits should be that the parties consent to trial before a magistrate judge.

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[81]We note that Rule 16 expressly authorizes individual districts to exempt appropriate categories of cases from the scheduling order requirement.

To implement the proposed rocket docket, we recommend that the Western District adopt the following addition to Local Rule CV-16:

> **(e) Election of Accelerated Trial.** By written stipulation filed within thirty days after the filing of all responses to the complaint, all parties to any civil action may jointly consent to the action being assigned to the Accelerated Trial Docket. The stipulation shall include the express consent of all parties to trial before a magistrate judge, a joint estimate of the time required to complete a trial, and suggested dates for trial, with an explanation of any extraordinary scheduling conflicts that would preclude trial on certain dates. Upon receipt of this written stipulation, the Court shall assign the action to a magistrate judge who shall then promptly schedule a firm trial date no later than four months from the date of the stipulation. In no event shall the magistrate judge schedule a trial date sooner than three months from the date of stipulation except upon consent of all parties.
>
> The magistrate judge may, within thirty days of filing of the stipulation, refuse a stipulated election of accelerated trial if the magistrate judge (i) is unable to provide the parties a firm trial setting within four months from the date of stipulation, or (ii) the action is not appropriate for accelerated trial based on such factors as its complexity and the time required for trial. In the event the magistrate judge cannot provide the parties a firm trial date within four months from the date of stipulation, the magistrate judge may inform the parties of the earliest available firm trial date. Any party may then elect to withdraw consent to assignment to the Accelerated Trial Docket. If no party withdraws consent, the case will remain on the Accelerated Trial Docket with the later trial date.
>
> Actions assigned to the Accelerated Trial Docket shall be excused from all scheduling order requirements, shall be exempt from the alternative dispute resolution requirements of Local Rule CV-88, and shall be excused from filing a pretrial order, except that the Court may require the parties to file proposed findings and conclusions and jury instructions. Parties who elect assignment to the Accelerated Trial Docket shall restrict to the extent possible the filing of pretrial motions with the Court. No brief is required in Accelerated Trial Docket cases for any motion filed pursuant to Rules 26, 29, or 37 of the Federal Rules of Civil Procedure. Any such motion as well as any other motion within

the scope of Local Rule CV-7(a) shall be promptly determined following a hearing before the Court.

An increase in civil trials before magistrate judges will require that they receive additional support. In addition to upgrading the inadequate courtroom facilities currently used by magistrate judges and discussed earlier in our report, additional court reporters will likely be needed. Presently, only two electronic equipment operators (reporters) are assigned for the seven magistrate judge courts. We recommend that the Court seek additional funding to secure necessary support for increased utilization of magistrate judges.

This proposal is designed, in part, to encourage civil litigants to consent to trial before magistrate judges. But it is designed to achieve another goal as well -- that of offering an inexpensive but traditional dispute resolution alternative for those cases that can be quickly prepared for trial. We believe that offering such an alternative would further achieve the "systematic, differential treatment of cases" recommended by the Act.[82]

2. Use of Magistrate Judges to Resolve Nondispositive Motions

We encourage district judges to increase the use of magistrate judges to resolve nondispositive pretrial motions in civil actions. The parties can appeal magistrate judge determinations to the district court resulting in a duplication of work and a waste of resources. But the experience in districts that make extensive use of

[82]*See* 28 U.S.C. § 473(a)(1).

magistrate judges to resolve, for example, discovery motions is that parties seldom choose to incur the expense of challenging discretionary rulings on nondispositive motions.

3. Use of Masters

District judges in the Western District could also increase existing judicial capacity by expanding their use of masters to assist with pretrial matters. A district judge may designate a magistrate judge to serve as a special master in certain civil cases.[83] And with the consent of the parties, a magistrate judge may be designated by a judge to serve as a special master in any civil case. District courts also may appoint masters who are not magistrate judges to assist in resolving discovery disputes. A district court may appoint such masters pursuant to Rule 53 of the Federal Rules of Civil Procedure and pursuant to the court's inherent power as a court of equity.[84] The referral of matters to a master, however, is an exception to the general court practice and must be used only in "exceptional" circumstances.[85]

Private masters can assist both district judges and magistrate judges by resolving preliminary matters and discovery disputes, allowing district judges and magistrate judges more time for in-court proceedings, dispositive motions, and trials.

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[83]*See* 28 U.S.C. § 636(b)(2); Fed. R. Civ. P. 53.

[84]*See* Ruiz v. Estelle, 679 F.2d 1115, 1159-60 (5th Cir.), *amended in part and vacated in part*, 688 F.2d 266 (5th Cir. 1982).

[85]*See* Fed. R. Civ. P. 53(b); *Ruiz*, 679 F.2d at 1159-60; Western District Court Rules, Appendix "C," Local Rules for the Assignment of Duties to the United States Magistrates, Rule 1(g).

Although master fees increase costs in individual cases, masters can operate outside of the courthouse setting, without the overhead expenses that district judges and magistrate judges require. Thus, use of private masters increases the judicial system's capability for dispute resolution without requiring additional federal budget expenditures. On the other hand, we recognize that fees of masters increase the costs for litigants. Generally, only wealthy litigants can afford to pay for masters. To some extent, "privatizing justice" in this manner creates unequal access for litigants who cannot afford to use masters. Another danger is that use of local attorneys as masters can put those attorneys in a position of undue influence vis-a-vis fellow practitioners. We encourage the expanded use of masters to resolve preliminary matters in appropriate and exceptional cases, but the Court should exercise care in appointing masters to minimize bias or influence problems created by the use of local attorneys.

4. Creation of a Limited Master Trial Calendar

We recommend that the Court consider use of a Limited Master Trial Calendar as a means of more efficiently using available judicial resources to avoid rescheduling civil trials to accommodate the press of criminal trials. The Limited Master Trial Calendar concept envisions use of available judges to try civil cases when scheduled even though the judges did not supervise pre-trial stages of the case. The source of judges for this Limited Master Trial Calendar would be active judges in the Western District whose scheduled docket has been cleared by settlements, visiting judges, and

senior judges. The principal benefit of such a calendar would be added flexibility in working toward firm trial settings.

IV. RECOMMENDATIONS CONCERNING LEGISLATION

We have included in our proposed Expense and Delay Reduction Plan for the Western District recommendations that the Court itself has the authority to implement. We have a number of additional recommendations that either address existing legislative proposals or will require action by the legislative and executive branches. This part of our report outlines each of these additional recommendations.

A. Criminal Procedures

Given the role of the criminal docket in delaying disposition of civil actions, it is appropriate and perhaps necessary that we consider means of reducing unnecessary burdens associated with the criminal docket. Though our Advisory Group members sharply disagreed in assessing what can and should be done to prevent federal criminal law enforcement from eliminating civil justice in federal courts, a majority of the Advisory Group approved each of the following recommendations. A dissenting viewpoint prepared by the United States Attorney for the Western District and representing the perspective of several members of the Advisory Group is attached as Appendix I to this report.

1. Mandatory Minimum Sentences

We recommend that the legislative and executive branches repeal mandatory minimum sentences, whereupon the United States Sentencing Commission should reconsider the guidelines applicable to the affected offenses. Our proposal is based

upon two considerations. First, mandatory minimum sentences likely increase the burdens associated with our criminal docket by discouraging plea bargaining and by encouraging federal prosecution in cases where the conduct at issue violates both state and federal law. Second, according to a unanimous resolution adopted by the district judges of the Fifth Circuit, mandatory minimum sentences "often require the imposition of sentences which are manifestly unjust." Mandatory minimum sentences allow widely different sentences for the same conduct and the same sentences for widely different conduct. For example, a first offender convicted of robbing two banks with an unloaded gun would face a mandatory minimum of 25 years in prison, but no minimum if he used a toy gun. The mandatory minimum for possession of more than five grams of crack cocaine is five years in prison; the maximum sentence for possession of five grams or less is one year. Given the adverse impact of mandatory minimums on our docket and their detrimental impact on justice in sentencing, we join the Judicial Conference of the United States, twelve federal circuit courts, the District Judges of the Fifth Circuit, the Federal Courts Study Committee, the American Bar Association, and the United States Sentencing Commission in recommending their repeal.

2. Sentencing Guidelines

We recommend that the guidelines issued pursuant to the Sentencing Reform Act not be treated as compulsory rules but, rather, as general standards that identify the presumptive sentence. For the reasons that we have outlined earlier in this

report, there is near unanimous agreement that the federal sentencing guidelines have increased the complexity of federal sentencing and thus the judicial resources consumed by criminal prosecutions. At the same time that they have increased the burdens associated with our criminal docket, the sentencing guidelines have failed to make the sentencing process more rational. The guidelines fail to give the sentencing judge clear or adequate authority to adjust sentences based on many factors the judges and others regard as pertinent to a just sentence. The guidelines do not, for example, authorize the court to adjust the sentence based on the defendant's personal history, including such factors as age and employment history. The result is more, not less, arbitrariness in sentencing. We support the goal of the guidelines, but not their actual effect as implemented.

3. Judicial Impact Determinations

The Act mandates that we "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts."[86] As we have previously detailed, by unnecessarily federalizing a wide range of offenses already covered by state law, Congress has significantly contributed to cost and delay in civil litigation. Federal drug legislation, in particular, has criminalized conduct already criminalized under state law. Just as legislation affecting the environment is required to carry an environmental impact statement, _proposed criminal legislation should include a judicial impact statement. We recommend that Congress

[86]28 U.S.C. § 472(c)(1)(D).

implement procedures mandating that before any new federal crime is created, Congress will assess the impact of the legislation on the courts, the extent to which the conduct addressed by the proposed legislation is already criminalized under existing federal and state legislation, and the ability of state governments to effectively regulate the conduct.

We were unable to isolate any particular federal legislation that had disproportionately impacted the Western District's civil docket. It is clear, however, that civil legislation, over time, has dramatically increased the burden on the civil docket. A vast array of civil legislation creating causes of action has been enacted in recent years in the areas of civil rights, RICO, and ERISA to name but a few. We endorse the Federal Courts 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."[87]

4. Use of Magistrate Judges

We recommend that whenever possible, greater use be made of magistrate judges in criminal proceedings. We encourage defense counsel to consent to use of magistrate judges in selection of juries in felony criminal cases. We further recommend that 18 U.S.C. § 3401 be amended to allow magistrate judges to conduct hearings on revocation of supervised release where the magistrate judge initially imposed the supervised release. Magistrate judges should be authorized to accept

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[87]*See* REPORT OF FEDERAL COURTS STUDY COMMITTEE 89 (1970).

guilty pleas in felony cases, and the requirement that the parties must consent if misdemeanors are to be heard before magistrate judges should be eliminated. Finally, we recommend that the legislative branch consider legislation that would eliminate the need for magistrate judges, and indeed federal district judges, to preside over the trial of prosecutions of traffic tickets issued in federal enclaves. For several magistrate judges in the Western District, these traffic ticket prosecutions involve significant burdens.

5. Discovery Practices

An accused facing stiff penalties is often asked to plead guilty without basic information concerning the identity of the government's witnesses and the contents of their expected testimony. As a consequence, not only does the system take on the appearance of unfairness, there is a disincentive for the accused citizen to even consider settlement. Because of this disincentive, the system is unnecessarily burdened with criminal trials in cases that should settle.

The government is not presently required to disclose the identity of its witnesses or provide witness statements prior to trial. Prior to 1975, several courts had held that Rule 16 of the Federal Rules of Criminal Procedure required the government to disclose witness lists as well as "rap sheets" of perspective government

witnesses.[88] In 1975, Congress rejected a proposed amendment to Rule 16 that would have expressly provided for such disclosure. Given this congressional act, prior decisions interpreting Rule 16 to require such disclosures are of questionable validity.[89] Several courts, however, have held that while Rule 16 does not require disclosure, the trial court has discretion to order the government to disclose the names of its witnesses, provided that doing so would not endanger the witnesses.[90] As one court noted:

> Congress did not require mandatory disclosure of the names and addresses of government witnesses as had been proposed. Neither did it mandate nondisclosure. Thus, there remains a narrow area of authority in the trial court allowing for the exercise of discretion to order pretrial disclosure of government witnesses. Our decision made clear that the use of this authority is to be reserved for the rare criminal case in which the defense can conclusively demonstrate a compelling need for disclosure such as to overcome the government's strong interest in nondisclosure.[91]

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[88]United States v. Baum, 482 F.2d 1325 (2d Cir. 1973); United States v. Richter, 488 F.2d 170, 175 (9th Cir. 1973); United States v. Leichtfuss, 331 F. Supp. 723 (N.D. Ill. 1971); United States v. Palmisano, 273 F. Supp. 750, 752 (E.D. Pa. 1957); United States v. Moceri, 359 F. Supp. 431 (N.D. Ohio 1973).

[89]*See* United States v. Krohn, 558 F.2d 390 (8th Cir. 1977). *See also* Weatherford v. Bursey, 429 U.S. 545, 559 (1977) ("It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably.").

[90]United States v. Higgs, 713 F.2d 39 (3rd Cir. 1983); United States v. Richter, 488 F.2d 170 (9th Cir. 1973); United States v. Price, 448 F. Supp. 503, 508-18 (D. Colo. 1978). *See also* Will v. United States, 389 U.S. 90, 100-01 (1967); United States v. Anderson, 481 F.2d 685, 93 (4th Cir. 1973), *aff'd*, 417 U.S. 211 (1974).

[91]United States v. Holmes, 346 F.2d 517, 519 (D.C. Cir. 1975).

The Jencks Act precludes discovery of the statement of a government witness until after the witness has testified on direct examination.[92] This prohibition is subject only to such voluntary disclosures as the individual prosecutor may choose to make; courts are without power to order earlier disclosure, even when it is manifestly proper to do so. The Jencks Act procedure is subject to numerous criticisms. First, strict adherence to its requirements may infringe on constitutional due process rights. Second, the procedure causes costly in-trial delays occasioned by defense counsel's need to study documents first disclosed after the direct examination. Requiring counsel to perform this essential task amid the pressures of the courtroom is inherently unfair. Third, the Jencks Act procedure requires counsel to use other, more costly methods to fulfill their constitutionally mandated duty to investigate their cases.

The traditional arguments for retention of the Jencks Act procedure are not persuasive. The argument that early discovery promotes perjury and fabricated defenses has been fully discounted over the years by informed observers. Further, several provisions of the criminal code have created sanctions against any witness intimidation, including extraordinarily broad criminal sanctions for tampering with, or retaliating against a witness, a victim or an informant,[93] and a provision permitting pretrial detention without bail of one who poses a threat to a witness or

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[92]18 U.S.C. § 3500(a).

[93]18 U.S.C. §§ 1512-1513.

juror.[94] The experience in certain divisions of the Western District and in other Districts that have "open file" policies belies any concern over improper contact of government witnesses. Finally, the trial court has discretion under Rule 16(d)(1) of the Federal Rules of Criminal Procedure to enter a broad range of protective orders in appropriate cases.

We recommend that the legislative and executive branches amend Rule 16(a)(1) as follows:

> (E) Upon request of the defendant the government shall provide the names and addresses of any and all witnesses the government intends to call in its case in chief. Also upon the request of the defendant the government shall produce for the examination and use of the defendant any statement of any witness the government intends to call in their case in chief that is in their possession and relates to the subject matter of their expected testimony.

To impose reciprocal disclosure obligations on defendants, we recommend that Rule 16(b)(1) be amended as follows:

> (C) If the defendant requests disclosure of witnesses under subdivision (a)(1)(E) of this rule, upon compliance with such request by the government, the defendant, upon request of the government, shall provide the names and addresses of any and all witnesses, other than the defendant, that the defendant intends to call in their case in chief. If the defendant requests disclosure of statements under subdivision (a)(1)((E) of this rule, upon compliance with such request by the government, the defendant, upon request of the government, shall produce for the examination and use of the government any statement of any defense witness, other than the defendant, in their case in chief

[94]18 U.S.C. § 3142(f)(2)(B).

that is in their possession and relates to the subject matter of their expected testimony.

To carry out these amendments, we further recommend that 18 U.S.C. § 3500 and Rule 26.2 of the Federal Rules of Criminal Procedure be repealed and that Rule 16(b)(2) be amended as follows:

> **(2) Information Not Subject to Disclosure.** Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case. ~~or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.~~

6. Plea Bargaining

We recommend that greater use be made of Rule 11(e)(1)(C), of the Federal Rules of Criminal Procedure, § 9-16.310 of the U.S. Attorney's Manual, Chapter 6 of the Federal Sentencing Guidelines Manual, and DOJ Memorandum entitled "Plea Bargaining Under the Sentencing Reform Act," which would allow plea bargaining for specific sentences, where appropriate. Such agreements are rarely negotiated in the Western District despite the fact that they might be fair and would encourage settlement.

B. Expediting Service of Process

Rule 4(j) of the Federal Rules of Civil Procedure presently allows, without justification or penalty, up to four months to complete service of process. We recommend that this period from filing to service be shortened, absent a showing of good cause, because it is excessive and because it needlessly delays the progress of cases. To implement this recommendation, Rule 4(j) should be amended as follows:

> **(j) Summons: Time Limit for Service.** If a service of the summons and complaint is not made upon a defendant within ~~120~~ 90 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

C. Court-Annexed Arbitration

As detailed earlier in this report, the court-annexed arbitration program implemented in the Western District pursuant to the 1988 Judicial Improvements and Access to Justice Act has been highly successful. The Court's authority to compel participation in court-annexed arbitration pursuant to this statute is presently limited to civil actions where the relief sought consists only of money damages not in excess of $150,000.[95] Given the success of the program in the Western District, we recommend that the legislative and executive branches amend 28 U.S.C. § 652 to

[95]28 U.S.C. § 652(a)(1)(A).

expressly provide district courts with discretion to refer any suitable civil case to court-annexed arbitration.

V. CONCLUSION

With this report, the Advisory Group completes the first phase of its responsibilities under the Act. The 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 whether additional action is appropriate.[96] The Advisory Group looks forward to assisting the United States District Court for the Western District of Texas in carrying out this ongoing responsibility.

[96]*See* 28 U.S.C. § 475.

APPENDIX A: Biographical Sketches of Advisory Group Members

APPENDIX A

ADVISORY GROUP MEMBERS

Ernest Angelo, Midland,

B.S. Petroleum Engineering, 1956, Louisiana State University. Employed by Gulf Oil Corporation at Crane and Midland, Texas 1956-1962 and by Sohio Petroleum at Midland 1962-1964. Self employed petroleum engineer 1964 to present. Mr. Angelo was named "Engineer of the Year" in 1973 by the Permian Basin Chapter of the Texas Society of Professional Engineers. Active in church, civic and community affairs, he served as Mayor of Midland for four terms from 1972 through 1980. Mr. Angelo has served as the Republican National Committeeman for Texas since 1976 and currently serves as a Vice Chairman of the Republican National Committee.

Roy R. Barrera, Sr., Nicholas and Barrera, Inc., San Antonio,

LL.B. St. Mary's University School of Law, 1951; Recipient of the Distinguished Law Alumnus Award, St. Mary's University School of Law, 1975. Mr. Barrera has been Assistant District Attorney and Chief Prosecutor for Bexar County and has served as President of the Board of Trustees of the Edgewood Independent School District. He was appointed Secretary of State of Texas by the Governor in 1968 and has served as Vice President of the Texas State Historical Survey Committee. Born in San Antonio, Texas, Mr. Barrera has been a member of the Governor's Criminal Justice Council, the Governor's Committee on Human Relations, the Board of Directors of the Texas Educational Foundation, Inc., and the Interim Committee to Study Systems

of Licensing and Examining Boards. He has been President of the San Antonio Bar Association and an active member of the American Bar Association, the State Bar of Texas and the Texas Criminal Defense Lawyers Association. Mr. Barrera is Board Certified in Criminal Law by the Texas Board of Legal Specialization.

Judith R. Blakeway, Matthews & Branscomb, San Antonio,

Judith R. Blakeway was born in Greenville, Ohio, on June 6, 1952. She and her husband Wiley have one daughter, Amy Elizabeth. Ms. Blakeway received a Bachelor of Arts degree, summa cum laude, from Trinity University in 1974. She then attended the University of Texas where she received a Juris Doctor degree, with honors, in 1977. She is a member of Phi Beta Kappa and the Order of the Coif. While in law school, she served as a member of the Legal Research Board and the Texas Law Review. Ms. Blakeway was admitted to the State Bar of Texas in 1977 and is admitted to practice before the United States District Courts for the Western, Southern and Northern Districts of Texas, and the U.S. Court of Appeals for the Fifth and Eleventh Circuits. Ms. Blakeway is a member of the William S. Sessions American Inns of Court, the Texas Association of Defense Counsel, and the Defense Research and Trial Lawyers Association. Ms. Blakeway has previously served on the Federal Bar Admissions Committee and the State Bar of Texas Admissions Committee, District 10. In her trial and appellate practice, Ms. Blakeway has largely represented corporate defendants in civil litigation.

Gary L. Bledsoe, State of Texas, Assistant Attorney General, Austin,

B.A. with honors, University of Texas, 1973; J.D. University of Texas, 1976. Since graduating from law school, Mr. Bledsoe has served as Assistant City Attorney for Austin, Texas, and more recently as Assistant Attorney General for the State of Texas. He is assigned to the County Affairs Section where he provides legal assistance to county and state law enforcement officials. He is also Chief of County Affairs involving constitutional litigation. In 1991, Mr. Bledsoe was elected President of the State of Texas NAACP. He has received numerous awards for community service including the Arthur DeWitty Award from the Austin NAACP in 1988, the Austin Young Lawyers Association Lawyer of the Year Award in 1989, and the Villager Newsmaker Award in 1989. He is the Chairman of the Travis County Democratic Party, is a member of the Attorney General's Gang Task Force, and is the President-Elect of the NAACP state conference of NAACP branches.

A. Richard Bonner, Shafer, Davis, McCollum, Ashley, O'Leary & Stoker, Odessa,

Born Brownfield, Texas, 1953; admitted to the State Bar of Texas in 1979; B.J. with high honors, University of Texas, 1975; J.D. University of Texas 1979. Mr. Bonner is a former law clerk for the Honorable Lucius D. Bunton, Chief Judge of the Western District of Texas. Mr. Bonner was a member of the Ector County Judicial Evaluation Committee from 1983 to 1989. He was Chairman of the Ector County Fee Dispute Committee from 1984 to 1988. He is presently the Chairman of the Admissions Committee of the United States District Court for the Western District of Texas,

Midland - Odessa Division and has been a member of the committee since 1985. He is a member of the Ector County and American Bar Associations and the State Bar of Texas. He is a member of the Texas Bar Foundation and the Defense Research Institute. He is a Director of the Texas Association of Defense Counsel. In his trial and appellate practice, he has largely represented corporate defendants in civil litigation.

Jim D. Bowmer, Chairman, Bowmer, Courtney, Normand and Moore, an office of Naman, Howell, Smith & Lee, a professional corporation, Temple,

B.A., cum laude, Baylor University, 1940; LL.B., cum laude, Baylor University School of Law, 1942. Mr. Bowmer served in the Judge Advocate General's Department in World War II, served as County Attorney of Bell County (1946-47), and served as adjunct professor at Baylor University School of Law. He served as President of the Bell-Lampasas-Mills Counties Bar Association (1954-55). He has written legal articles on various subjects. He is a distinguished alumnus both of Baylor University School of Law and Baylor University, and is a Past President of the Baylor Law School Alumni Association. He has been both Chairman of the Board and President of the State Bar of Texas. He is a Life Member of the American Law Institute and a member of, and former delegate to, the American Bar Association. He is a fellow of the Texas Bar Foundation, the American College of Trial Lawyers and the American College of Trust and Estate Counsel. He was a member of the U.S. Fifth Circuit Judicial Nominating Commission, Western Panel (1977-79). He served as Chairman of the Liaison Committee of the National College of Criminal Defense

Counsel and Public Defenders. He was the Governor's appointee to the Texas Strip Mining Commission, the Battleship Texas Commission, and the Texas Sesquicentennial Commission. He was a charter member of the Board of the National Park Foundation and a member of the Texas Historical Commission.

Lucien B. Campbell, Federal Public Defender, Western District of Texas, San Antonio,

B.A., J.D., University of Texas at Austin, 1967. Formerly an assistant criminal district attorney of Bexar County (San Antonio), Texas, Mr. Campbell has been Federal Public Defender for the Western District of Texas since 1975. He is board certified in criminal law by the Texas Board of Legal Specialization. Mr. Campbell has served as a member of the Federal Defender Advisory Committee, and as chair of the legislative subcommittee of the advisory committee. He has also served as federal defender representative to the Criminal Law and Probation Administration Committee of the Judicial Conference of the United States. Mr. Campbell is a contributing author of *Practice Under the New Federal Sentencing Guidelines* (Prentice-Hall 1988), and he has taught criminal procedure at the University of Texas at San Antonio. He is a member, American Bar Association and criminal justice section; member, Bar Association of the Fifth Federal Circuit; member and subcommittee chair of the Federal Courts Committee, San Antonio Bar Association; and former treasurer and director, William S. Sessions American Inn of Court.

David H. Donaldson, Jr., Graves, Dougherty, Hearon & Moody, Austin, B.A., summa cum laude, Texas A&M University 1973; J.D. with High Honors, University of Texas 1976. Associate Editor, *Texas Law Review*, 1975-1976. Mr. Donaldson clerked for the Honorable Thomas Gibbs Gee, U.S. Court of Appeals for the Fifth Circuit, prior to joining the Graves, Dougherty law firm. Although he has a wide range of civil litigation cases, he has been especially active in the area of First Amendment law on behalf of media clients and intellectual property law for a variety of individual and corporate clients. Mr. Donaldson makes frequent appearances before professional and civic organizations and has contributed his expertise to numerous seminars in the areas of intellectual property law, First Amendment law, freedom of information issues, civil trial practice and federal court practice. He has served on the Texas Supreme Court's *Ad Hoc* Committee on Sealing of Court Records. In addition to the Civil Justice Reform Act Advisory Committee, Mr. Donaldson serves on Judge Nowlin's Committee for the Administration of the United States District Court for the Western District of Texas.

Ronald F. Ederer, United States Attorney, Western District of Texas, B.B.A. North Texas State University, 1965; J.D. St. Mary's School of Law, 1969. Mr. Ederer served as a law clerk to United States District Judge Ernest Guinn in El Paso, Texas from 1971 to 1972. From 1972 until 1976 he was an Assistant United States Attorney in El Paso for the Western District of Texas before his appointment as the part-time United States Magistrate in El Paso from 1976 until 1980. He

served as President of the El Paso Chapter of the Federal Bar Association 1977-78 term. From 1980 until November 1989, Mr. Ederer was in the private practice of law in El Paso with the firm of Ederer, Holmes, and Neill. Mr. Ederer was nominated by the President of the United States to be the United States Attorney for the Western District of Texas, was sworn in as Acting United States Attorney on November 6, 1989, and then as the United States Attorney on February 16, 1990.

Gerald H. Goldstein, Goldstein, Goldstein and Hilley, San Antonio,

B.B.A. Tulane University of Louisiana, 1965; LL.B. University of Texas, 1968. Mr. Goldstein has been an adjunct professor at the University of Texas Law School and a faculty member of the National Criminal Defense College. He has served as general counsel for the Texas Civil Liberties Union and on the Board of Directors for the Texas Death Penalty Resource Center for the Fifth Circuit. Mr. Goldstein is also Chairman of the Legal Committee of the National Organization for the Reform of Marijuana Law. A member of the Texas Trial Lawyers Association, Mr. Goldstein is board certified in criminal law by the Texas Board of Legal Specialization and has served as Vice President of the National Association of Criminal Defense Lawyers and the Texas Criminal Defense Lawyers Association.

John A. Grambling, Grambling & Mounce, p.c., El Paso,

B.A. University of Texas, 1942; LL.B. University of Texas, 1948. Specializing in civil trial and insurance litigation, Mr. Grambling is a member of the Texas Association of Defense Counsel and the Association of Insurance Attorneys. Mr. Grambling has been the President of the El Paso and American Bar Associations, was a charter member of the Texas Bar Foundation and served as a Lieutenant in the U.S. Navy.

Richard F. Gutierrez, Attorney at Law, Del Rio,

B.A. University of Texas at Austin, 1976; J.D. University of Texas, 1979. Since graduating from law school, Mr. Gutierrez has been in private practice in Del Rio, Texas, concentrating on criminal defense. He has been Chairman of the Admissions Committee for the United States District Court, Western District of Texas-Del Rio Division, President of the Val Verde County Bar Association, Chairman of the Val Verde County Child Welfare Board, and has served on the District Committee of Admission to the State Bar of Texas. He is presently a member of the Texas Criminal Defense Lawyers Association and the American Bar Association.

James H. Heidelberg, Schulman, Walheim, Beck & Heidelberg, Inc., San Antonio,

B.A. University of Texas, 1968; LL.B. University of Texas School of Law, 1969. Mr. Heidelberg commenced the practice of law in 1969 as a staff attorney with the Mexican-American Legal Defense and Educational Fund, Inc. in San Antonio, Texas, and for the next five years, primarily represented plaintiffs and plaintiff groups in

litigation relating to employment rights, voting rights and equal access to educational facilities throughout the States of Texas, Colorado, Arizona, New Mexico and California. Thereafter, he entered private practice, and was primarily involved in litigation on behalf of plaintiffs in employment and labor law matters. In 1981, Mr. Heidelberg accepted the position of Litigation Coordinator of East Texas Legal Services in Nacogdoches, Texas, and for the next year and a half, supervised staff attorneys in offices located in the eastern portion of the State of Texas from Texarkana to Beaumont. Upon returning to San Antonio in 1982, Mr. Heidelberg joined the firm of Branton & Mendelsohn, Inc., later to become Mendelsohn, Heidelberg & Beer, Inc., where he was primarily involved in a civil trial practice involving employment, labor and general civil litigation. In 1988, Mr. Heidelberg joined his present firm of Schulman, Walheim, Beck & Heidelberg, Inc., where he practices civil trial law, representing many school districts, and also plaintiffs in employment litigation. Mr. Heidelberg has lectured on numerous occasions in matters regarding employment law and litigation.

Charles F. Herring, Jr., Jones, Day, Reavis & Pogue, Austin,

B.A. with Highest Honors, University of Texas 1972; J.D. with Honors, University of Texas 1975; Texas Law Review. Law Clerk to Judge Owen D. Cox, United States District Judge (1975-76). Mr. Herring is a member of the Texas Supreme Court's Advisory Committee, and is Chairman of the Texas Supreme Court's Task Force on Sanctions. He is also a member of the Advisory Committee of the United States

District Court for the Western District of Texas, Austin Division. Mr. Herring is the author of over forty articles on litigation topics, is a contributing author to *Texas Torts and Remedies* (Matthew Bender), and is author of a book on legal malpractice and legal ethics, *Texas Legal Malpractice and Lawyer Discipline* (American Lawyer Media, L.P. 1991). He also is a member of the Board of Contributors of *Texas Lawyer*, and is founder and editor of *Travis County Trial Reports*, which for ten years has reported all jury verdicts in state district court in Travis County. He is Board Certified in Civil Trial Law, and is a Fellow in the Texas Bar Foundation. Mr. Herring's practice has been in commercial litigation, antitrust, commercial torts, products liability, legal malpractice defense, trade secrets, and various class action matters.

Harry Lee Hudspeth, United States District Judge, Western District of Texas, El Paso,

B.A. with honors, University of Texas, 1955; J.D. with honors, University of Texas, 1958; Order of the Coif. Judge Hudspeth was appointed District Judge for the Western District of Texas in 1979 by President Carter. He has been a Trial Attorney for the Department of Justice, and an Assistant U.S. Attorney for the Western District of Texas. He practiced law with Peticolas, Luscombe & Stephens in El Paso. Judge Hudspeth previously served as a United States Magistrate for the Western District of Texas. He has been President of the Kiwanis club and has served on the Board of Directors for the Sun Carnival Association. Judge Hudspeth is on the Board of Directors for the El Paso Metropolitan YMCA and serves on the Executive Council

of the University of Texas Ex-Students Association. He is a member of the American Bar Association, the State Bar of Texas, the Federal Bar Association, and the El Paso Bar Association.

LaNelle L. McNamara, McNamara & McNamara, Waco,

B.A., summa cum laude, Baylor University, 1966; M.A. Emory University, 1969; Ph.D. Emory University, 1971; J.D., cum laude, Baylor University, 1979; Baylor Law Review. Ms. McNamara served as a briefing attorney for the Tenth Court of Civil Appeals in Texas and has lectured at Baylor University School of Law. She is a member of the Waco-McLennan County and American Bar Associations, the State Bar of Texas and the Texas Bar Foundation.

Gilbert Moreno, NCNB Texas Bank, Austin,

Mr. Moreno is Executive Vice President of NCNB Texas Bank. He presently serves as departmental manager of the Texas Special Asset Bank.

S. Mark Murray, Pape, Murray, McClenahan & Sparr, Inc., San Antonio,

B.A. History with Honors, University of Texas, 1974; J.D., with honors, University of Texas Law School, 1977. After graduation from law school, Mr. Murray served as an associate with Martin & Drought, Inc. Mr. Murray served as a partner in that firm from 1980 through 1984 when he left to establish a law firm of Murray & Moore. That firm subsequently evolved and merged into the present firm of Pape, Murray,

McClenahan & Sparr, Inc. Mr. Murray has, since his graduation from law school, focused his attention on civil litigation with concentration specifically in the area of commercial litigation dealing primarily with, and relating to, financial institutions, and/or real estate. Mr. Murray is admitted to practice before the United States District Courts for the Southern and Western Districts of the State of Texas, as well as the United States Courts of Appeal for the Fifth and Eleventh Circuits and the United States Supreme Court. Mr. Murray is a member of the Association of Trial Lawyers of America, of the Texas Trial Lawyers Association, the Texas Association of Bank Counsel, and serves on the Standing Committee for Magistrate election for the Western District of Texas, as well as Civil Justice Administration Committee for the Western District of Texas.

John W. Primomo, United States Magistrate Judge, Western District of Texas, San Antonio,

B.A. with honors University of Texas, 1974; J.D. with distinction St. Mary's University School of Law, 1976. Judge Primomo has been a United States Magistrate Judge in San Antonio since July, 1988. Prior to his judicial appointment by the district judges of the Western District of Texas, he was a briefing attorney for United States District Judge H. F. Garcia for 8 years and a private practitioner for 3 years.

Robert Ramos, Hill & Ramos, El Paso,

B.A. University of Texas at El Paso, 1965; J.D. University of Texas at Austin, 1972; Delta Theta Phi. Specializing in criminal litigation, Mr. Ramos is a member of the El Paso and Federal Bar Associations, the State Bar of Texas and the National Association of Criminal Defense Lawyers.

Rolando L. Rios, San Antonio,

J.D. Georgetown University; B.A. University of Texas; Mr. Rios was admitted to the State Bar of Texas in 1979. He has had substantial involvement with the Southwest Voter Registration Project.

Fred Shannon, Shannon & Weidenbach, Inc., San Antonio,

B.B.A. Loyola University, 1965; J.D. University of Texas, 1968. Member of the American Bar Association; State Bar of Texas; San Antonio Bar Association (President 1988-89; Vice President 1985); Federal Bar Association; San Antonio Bar Foundation (Chairman 1984); Honorary Member, Phi Delta Phi Legal Fraternity; Master, San Antonio Inns of Court; Arbitrator, Court Annexed Arbitration Program of the Western District of Texas. Former United States District Judge of the Western District of Texas, 1980-1984. Former Judge of the 131st District Court of Bexar County, Texas, 1975-1980. After serving as a partner with the law firm of Martin, Shannon & Drought from 1984-88, he established the law firm of Shannon & Weidenbach, Inc. in 1988, where he is involved primarily in civil litigation.

Charlotte T. Slack, Pecos,

B.A. University of Texas at Austin, 1951; LL.B. University of Texas at Austin, 1953. Mrs. Slack has served in many capacities as a volunteer on local, regional, state and national levels, including member of the Board of Directors of the Pecos Chamber of Commerce, elected member of the Charter Commission of the Town of Pecos City, past president of the Permian Basin Girl Scout Council, past president of the Legislative Ladies in Austin (her husband served twenty-eight years in the Texas House of Representatives), member of the Board of Annuities and Relief of the Presbyterian Church (US) and charter member of the Board of Pensions of the reunited Presbyterian Church (USA). She presently serves on the University of Texas of the Permian Basin Development Board and the Board of Directors of Friends of the Governor's Mansion. She has three children and four grandchildren.

Sarabelle S. Sutton, Uvalde,

B.A. Baylor University 1944 in Psychology and Business. Who's Who 1944. After rearing a family Mrs. Sutton returned for graduate study and taught school for 21 years. She served as president of Delta Beta Chapter of Delta Kappa Gamma International and presently is on the State Research Committee for this society of women educators.

William D. Underwood, Baylor University School of Law, Waco,

B.A., magna cum laude, Oklahoma Baptist University, 1981; J.D., summa cum laude, University of Illinois, 1985; Order of the Coif; Notes and Comments Editor, University of Illinois Law Review. Professor Underwood teaches courses in Discovery, Federal Practice, Remedies, and Contracts at the Baylor University School of Law. Prior to joining the faculty at Baylor, Professor Underwood practiced as a civil trial and appellate lawyer with Carrington, Coleman, Sloman & Blumenthal in Dallas, Texas. Professor Underwood has also served as a law clerk to the Honorable Sam D. Johnson of the United States Court of Appeals for the Fifth Circuit.

Paul J. Van Osselaer, Hughes & Luce, Austin,

B.A. University of Texas, 1971; J.D. University of Texas, 1975; Order of Barristers. Since serving as a law clerk to the Honorable John V. Singleton of the United States District Court for the Southern District of Texas, Mr. Van Osselaer has practiced commercial litigation in Austin, where he is a partner in the Austin office of Hughes & Luce, L.L.P. He has represented clients in a wide array of matters ranging from litigation avoidance to complex business litigants in such areas as fiduciary duty, antitrust, tax, securities, banking and real estate law. He also has represented clients accused of business crimes. Mr. Van Osselaer is a former President of the University of Texas Law School Alumni Association, has served as a member of the Fee Dispute Committee of the Travis County Bar Association, and is a member of the Austin Division's Admissions Committee. He also has written and spoken on

attorneys' legal ethical obligations relating to fees and billing. Mr. Van Osselaer is also a trained moderator.

Bill Whitehurst, Whitehurst, Harkness & Watson, Austin,

B.S. in Pharmacy, University of Oklahoma, 1968; J.D. University of Texas School of Law, 1970, Order of the Barristers. Past president of the State Bar of Texas and the Texas Young Lawyers Association, Mr. Whitehurst serves on the Executive Committee of the Texas Trial Lawyers Association and as a trustee for the Texas Bar Foundation. He is president of the Alliance for Judicial Funding, Inc., and co-founder of the national organization Bar Leaders for the Preservation of Legal Services to the Poor. In his trial and appellate practice he is board certified in personal injury trial law representing plaintiffs and specializing in medical malpractice and products liability. Mr. Whitehurst served on the faculty of the University of Texas School of Law for eight years as a lecturer in trial advocacy. He is a member of the American Board of Trial Advocates and serves in the American Bar Association House of Delegates.

APPENDIX B: Subcommittee Assignments

APPENDIX B

A. Subcommittee on Docket Assessment

1. This subcommittee will perform the assessment mandated by section 472(c)(1) of the Act. In particular, it should prepare a report to the committee that determines the condition of the civil and criminal dockets; identifies trends in case filings and in the demands being placed on the court's resources; identifies the principal causes of cost and delay in civil litigation; and examines the impact of new legislation on litigation cost and delay.

2. This subcommittee's report will be the focus of the committee meeting tentatively scheduled for June 7, 1991.

3. At least one member of each other subcommittee will serve on the Subcommittee on Docket Assessment.

B. Subcommittee on Burdens Created by the Criminal Docket

1. At the committee's initial meeting, an apparent consensus existed that the flood of criminal prosecutions initiated in the Western District was a principal cause of delay on the civil docket.

2. This subcommittee will consider proposals and make recommendations concerning civil delay caused by the criminal docket.

C. Subcommittee on Pretrial Practice

1. This subcommittee will perform the assessments mandated by Sections 473(a)(1)-(5) and 473(b)(1)-(3) of the Act. Based on these assessments, the subcommittee will propose appropriate recommendations for the committee's consideration.

D. Subcommittee on Trial Procedures

1. While fewer than five percent of the cases filed eventually result in trials, studies suggest that more than forty percent of judge time is spent in trial. More efficient trials would increase court capacity. This

might mean more trials faster, depending on existing court capacity in the Western District. Faster trial settings might mean quicker settlements and cost savings throughout the system.

2. This subcommittee would study whether there is a need to increase trial efficiency in the Western District as well as consider proposals for making trials more efficient.

E. Subcommittee on Alternative Dispute Resolution (ADR)

1. This subcommittee would perform the assessments mandated by Sections 473(a)(6) and 473(b)(4)-(5) of the Act, and make proposals based on these assessments as mandated by Section 472(b)(3).

F. Subcommittee on Court Personnel, Facilities, Equipment, and Docket Management Systems

1. This subcommittee will examine whether the Western District is presently making effective and efficient use of personnel resources, whether the District has any physical needs that might contribute to delay, and assess the current docket management system.

G. Subcommittee on Coordinating Activities of Subcommittees

1. Each subcommittee will elect a chairperson, who will automatically become a member of the Subcommittee on Coordinating Activities of Subcommittees.

2. This subcommittee will meet as early as possible to ensure that there is no duplication of effort among the subcommittees and to ensure that all of the committee's responsibilities are being carried out through a subcommittee.

APPENDIX C: Outline for Judicial Interviews

APPENDIX C

I. DOCKET ASSESSMENT

A. The judge's view concerning the state of his own docket.

1. Is the judge current, in his view?

2. What does current mean?

B. What trends exist with respect to the judge's docket?

1. Is it more or less crowded than three years ago? Five years ago?

C. To the extent the judge perceives problems with his docket, what are they?

D. What in his perception are the causes of these problems?

E. What measures, if any, has the judge taken to address these problems?

1. How effective have they been?

F. Is the judge aware of measures taken by other judges to resolve similar problems.

1. Has the judge considered these measures?

2. If so, why has he rejected them?

G. What measures would the judge like to see implemented, if any, that are not currently being used in the Western District?

II. PRE-TRIAL PROCEDURES

A. Does the judge have any ideas concerning how pre-trial proceedings could be streamlined to produce less costly litigation?

B. Does the judge use a standard scheduling order? If so, get a copy.

1. How does it compare with the orders used by other judges?

2. Why any deviation?

3. Does the judge use different forms of scheduling orders depending on the type of case? What are the differences? Why the different treatment?

4. How does the judge determine the dates for inclusion in his scheduling orders? Does he, for example, simply rely on dates agreed to by the parties?

5. Do scheduling orders produce any benefits? Cause any problems? Net benefit?

C. Does the judge conduct discovery conferences early in the litigation to plan, with the parties, the scope and pace of discovery?

1. If so, under what circumstances and why?

(a) What occurs at the conference?

2. If not, why not? Is there any class of case that the judge would view appropriate for such a conference?

3. What are the judge's views concerning the benefits and burdens associated with such conferences?

4. Does the judge have a view on the need for more (or less) judicial control of the discovery process?

(a) What would he like to see done? Is there any need for further regulation of discovery in the local rules?

D. Does the judge have any views on how pre-trial motion practice can be made less burdensome for the court as well as the litigants?

1. Does the judge have any suggestions for reducing the volume of pre-trial motions?

2. What are the judge's views on means of accelerating consideration of dispositive motions? Should there be an accelerated docket for regulation of these motions, for example?

3. What does the judge think of oral argument on motions as a substitute for briefing?

   (a) Might this reduce costs?

   (b) Are there any types of motions that are particularly suited for oral argument?

E. How firm are the judge's trial settings? How early? Should they be firmer? If so, how do we accomplish this? Should they be earlier? If so, how do we accomplish this?

III. TRIAL PROCEDURES

A. What trial and pre-trial procedures does the judge use to make trials in his court more efficient?

   1. What is the judge's experience with each of these techniques? Would he recommend it for district-wide implementation? For inclusion in a local rule?

B. What techniques or procedures has the judge considered but not implemented? Why not?

C. Is the judge aware of procedures implemented by other judges in this district? Any comments?

D. What use, if any, does the judge make of pre-trial conferences?

   1. What is his experience?

   2. Do such conferences reduce cost and delay?

   3. Is there a need for changes in the local rule regulating pre-trial conferences? What? Why?

IV. ALTERNATIVE DISPUTE RESOLUTION

A. What are the judge's views on settlement practices in his court? What impediments, if any, exist to early settlement? What, if anything, should be done to encourage prompt settlement.

1. Are there any class of cases particularly susceptible to early settlement? If so, what could be done to encourage early settlement in those cases?

2. What techniques has the judge employed in his court to encourage settlement? What has his experience been with these techniques?

3. What techniques has the judge considered but rejected? Why?

4. What does the judge know about various ADR techniques? His reaction to each?

5. What is the judge's view toward the need for more (or less) judicial management of the settlement process?

V. FACILITIES/PERSONNEL/EQUIPMENT

A. What are the Court's personnel needs, if any?

B. What use does the Court make of personnel already available? Magistrates? Special Masters?

1. How does his use compare with that of other judges? Reasons for any differences?

2. What is the appropriate role of magistrates? Of special masters?

C. Are the judge's physical facilities adequate? If inadequate, how? Does the inadequacy contribute to court capacity problems?

APPENDIX D: Results of Closed Case Survey

APPENDIX D

M E M O R A N D U M

TO: Judith R. Blakeway

CC: Kathy Tower

FROM: Patricia E. Donahue

DATE: August 26, 1991

RE: Judicial Advisory Committee Docket Analysis Supplement

Pursuant to your instructions, I have added the additional questionnaires which were recently received and calculated the percentages for the categories.

I will first update the attorney section of the questionnaire.

Total returned:	202	**Percentage**
Section I:		
1. Management of this litigation	190	94%
a. Intensive	7	4%
b. High	40	22%
c. Moderate	83	44%
d. Low	23	12%
e. Minimal	31	16%
f. None	3	2%
g. I'm not sure	2	1%
2. Case management activities		
a. Hold pretrial activities to a firm schedule	185	92%
1. was taken	111	62%
2. was not taken	34	18%
3. not sure	15	8%
4. not applicable	22	12%
b. Set and enforce time limits on allowable discovery	187	93%
1. was taken	119	64%
2. was not taken	26	14%
3. not sure	12	6%
4. not applicable	30	16%

c. Narrow issues through conferences or other methods	183	91%
1. was taken	46	25%
2. was not taken	87	50%
3. not sure	14	8%
4. not applicable	32	17%
d. Rule promptly on pretrial motions	185	92%
1. was taken	94	52%
2. was not taken	54	29%
3. not sure	11	6%
4. not applicable	24	13%
e. Refer the case to alternative dispute resolution, such as mediation or arbitration	186	92%
1. was taken	6	3%
2. was not taken	126	68%
3. not sure	2	1%
4. not applicable	52	28%
f. Set an early and firm trial date	186	92%
1. was taken	71	38%
2. was not taken	73	39%
3. not sure	12	6%
4. not applicable	30	16%
g. Conduct or facilitate settlement discussions	186	92%
1. was taken	20	11%
2. was not taken	116	62%
3. not sure	11	6%
4. not applicable	39	21%
h. Exert firm control over trial	183	91%
1. was taken	39	21%
2. was not taken	25	14%
3. not sure	3	2%
4. not applicable	116	63%

f. other (please specify)	49	24%
1. was taken	8	16%
2. was not taken	3	6%
3. not sure	2	4%
4. not applicable	36	73%

Section II:
Timeliness of this litigation

5. Factors contributing to delay of case	99	49%
a. Excessive case management	1	1%
b. Inadequate case management	9	9%
c. Dilatory actions (counsel)	9	9%
d. Dilatory actions (litigant)	8	8%
e. Court's failure to rule promptly on motions	23	23%
f. Backlog of cases on court's calendar	20	20%
g. Other (please specify)	29	29%

Section III:
Costs of this litigation

8. Fee arrangement	180	89%
a. Hourly rate	127	71%
b. Hourly rate with maximum	-0-	0
c. Set fee	3	2%
d. Contingency	15	8%
e. Other (please specify)	35	19%
9. Fees & costs incurred by client	164	81%
a. Much too high	19	12%
b. Slightly too high	14	9%
c. About right	119	73%
d. Slightly too low	8	5%
e. Much too low	4	2%

I will now update the litigant section of the questionnaires.

Total returned:	79	**Percentage**
1. Identification as party	74	94%
a. Plaintiff	31	39%
b. Defendant	43	54%
4. Fee arrangement	76	96%
a. Hourly rate	50	66%
b. Hourly rate with maximum	2	3%
c. Set fee	3	4%
d. Contingency	5	7%
e. Other (please specify)	14	18%
5. Reasonable fees	65	82%
a. Yes	50	77%
b. No	10	15%
c. I don't know	5	8%
6. Costs incurred by litigant	66	84%
a. Much too high	17	26%
b. Slightly too high	10	15%
c. About right	34	52%
d. Slightly too low	3	5%
e. Much too low	2	3%
8. Length of time to resolve	70	89%
a. Much too long	30	43%
b. Slightly too long	11	16%
c. About right	25	36%
d. Slightly too short	-0-	0%
e. Much too short	4	6%
10. Use of arbitration or mediation	73	92%
a. Yes	7	10%
b. No	66	90%

M E M O R A N D U M

TO: Judith R. Blakeway

CC: Kathy Tower

FROM: Patricia E. Donahue

DATE: August 23, 1991

RE: Judicial Advisory Committee Docket Analysis Questionnaires

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After compiling the questionnaire responses provided by attorneys and litigants who were involved in the cases selected by the Committee as representative of the docket of the Western District of Texas, the following information has been obtained:

197 questionnaires were returned by attorneys, although not all were completely filled out
67 questionnaires were returned by litigants, although not all identified themselves as Plaintiff or Defendant

Since the attorneys seemed to provide the most constructive suggestions for the Committee, I will deal with those responses first.

I. The first section the attorneys were asked to address was the management of the litigation. Here, they were first asked to rate the case management by the court in their respective cases in a range from intensive to none. Of the 197 questionnaires returned, 185 responded to this section as follows: Intensive - 7; High - 40; Moderate - 81; Low - 23; Minimal - 29; None - 3; and two responded that they were not sure. Secondly, they were asked to rate what case management actions, if any, were taken in their case.

The first action was "Hold pretrial activities to a firm schedule" and 181 attorneys responded. The majority (111) felt that this action was taken, while only 34 felt that it was not: 14 were not sure and 22 indicated it was not applicable to their case.

The next action they were asked to rate was "Set and enforce time limits on allowable discovery" and 182 responses were obtained. Once again, the majority indicated that this action was taken, 26 believed that it was not, 11 were not sure, and 29 indicated it was not applicable.

The third action they were asked to rate, "Narrow issues through conferences or other methods," obtained 178 responses as follows: the majority (87) felt this action was not taken, 46 believed it was, 14 were not sure and 31 noted "not applicable".

Contrary to comments later illicited from the respondents, the majority (94) of the 181 answers inquiring about the action "Rule promptly on pretrial motions" indicated that this action was taken, 53 believed it was not, 11 were not sure, and 23 indicated "not applicable".

The fifth case management action was "Refer the case to alternative dispute resolution, such as mediation or arbitration" to which the majority (122) of the 181 answers responded that it was not taken, 6 indicated it was, 2 were not sure, and 51 noted "not applicable".

There was no majority on the action to "Set an early and firm trial date": 69 of the 182 responses indicated this action was

taken, 71 that it was not, 11 were not sure, and 30 indicated "not applicable".

Of the 182 responses to "Conduct or facilitate settlement discussions", the majority (113) noted this action was not taken, 20 noted it was, 11 were not sure, and 37 noted "not applicable".

Finally, of the 178 answers to "Exert firm control over trial", ramarkably, the majority (112) noted that action was not applicable to their cases, while 39 indicated the action was taken, 24 that it was not, and 3 were not sure.

The final choice was answered by only 47 respondents. Here they were allowed to indicate what other case management action could, or should, have been taken, (or not, as the case may be). The majority (34) indicated this area was not applicable to their cases, 2 were not sure if any action was taken, 8 indicated some additional action was taken, and 3 indicated other case management actions were not taken.

II. The next section they were asked to complete dealt with the timeliness of the litigation. (There was a blank on the questionnaire which I believed was, perhaps, to have been filled in by the Committee which indicated the length of the case according to "our records". Many of the respondents filled in the blank with no other explanation. Whenever I encountered this, I presumed that this was the time in which their respective clients were involved in the case and noted accordingly.) By and large, the majority of the responses indicated that the time for their clients generally

should be almost one-half of the time they were actually involved in the case.

Some of the respondents indicated that the delay was not caused by any action of the court, but rather by administrative actions in Washington, D.C., by actions of their opponents, by bankruptcy filings, and by the need to obtain rulings on other pending actions which were being heard in other courts. Additionally, one of the questions specifically addressed the types of delays which could have been experienced. Remarkably, only 95 of the responses completed this section. Of those noting delays, the majority (29) noted that some reason other than the ones offered was the cause of the delay in their cases. The remainder (66), answered, using one of the choices given, as follows: excessive case management by the court (1); inadequate case management by the court (8); dilatory actions by counsel (9); dilatory actions by the litigants (7); Court's failure to rule promptly on motions (22); and backlog of cases on court's calendar (19).

Suggestions for reducing the delays experienced in disposing of civil cases were varied. By far the most often encountered suggestion was the addition of more judges and more law clerks, the establishment of separate civil and criminal courts, placing non-jury cases on a separate docket and narrowing of the issues to be litigated. The remainder of the suggestions can be grouped broadly into four categories: 1) the use of magistrates, 2) the handling of

motions and pre-trial activities, 3) the use of Alternative Dispute Resolution and 4) the use of timetables.

Regarding the use of magistrates, some respondents suggested 1) allowing magistrates to rule on pre-trial motions, 2) having a specially appointed magistrate to routinely review Summary Judgment and pre-trial motions, 3) using magistrates more frequently, 4) urging counsel to agree to disposition by magistrate, and 5) referring pre-trial proceedings to magistrates more aggressively.

In further discussion of pre-trial activities, the second group, the attorneys who responded felt that the following suggestions would lessen the delays currently being experienced: 1) prompt, expedited rulings on case-dispositive motions, 2) ruling as soon as possible on *D'oench* and *Triiad* in FDIC cases, 3) setting hearing on motions, 4) complying with deadlines regardless of the pendancy of motions, 5) ruling on all motions not requiring a hearing within 2 weeks, 6) allowing attorneys to set pre-trial motions on the docket, 7) establishing a presiding system similar to the state court system, 8) holding regular (weekly) docket calls to rule on pending motions, 9) obtaining a ruling from the bench at the conclusion of a hearing, 10) having fewer memoranda/opinions by judges disposing of motions by using simple orders granting or denying the relief requested, and 11) having the judges be more receptive to pre-trial dispositive motions.

The third group pertains to the use of Alternative Dispute Resolution. The ideas suggested were 1) emphasize ADR early in the case, 2) order more cases to mediation or arbitration, 3) have

more aggressive participation by trial judges to facilitate settlement "some arm-twisting within reasonable limits", and 4) use ADR to a greater extent.

The fourth, and final group, addressed workable timetables within the system. Most of the respondents placed the use of the scheduling order, or lack thereof, as a impediment to the swift conclusion of the lawsuit. Suggestions included 1) imposition of a court imposed scheduling order if the parties do not timely submit one, 2) compliance with the scheduling order deadlines by the parties regardless of the pendency of motions, 3) participation in a "final" pre-trial conference 30 days prior to trial. 4) setting the trial within a specific time after entry of the pre-trial order, 5) imposition of a scheduling order only at the request of the parties, 6) suspension of the scheduling order at the request of all parties, 7) limitations placed on the number, length and duration of depositions, 8) not forcing parties to prepare for trial if there are no judges to try the case, 9) not allowing parties more than one extension, 10) strict adherence to deadlines, possibly requiring greater supervision by the Chief Judge 11) establishment of more realistic trial schedules, 12) routine judicial intervention (120 days) to define controlling issues and to limit discovery as necessary, and 13) prompt dismissal of spurious claims and defenses.

Of special note, suggestions were made which specifically addressed RTC/FDIC matters: 1) utilization of a Special Master in RTC/FDIC law to process those matters, and 2) implementation of

standing orders or local rules addressing the following: a) within 30 of filing the lawsuit, the party must designate the individual who has authority to settle or is a member of a board with such authority; b) convene a group of creditor and borrower attorneys to prepare some type of financial statement or condition of accounts which would address the legitimate needs of the creditor but not put the borrower in a position to swear to a document which is impossible to answer accurately; c) develop a form "confidentiality letter", and d) address the number of suits in which the FDIC intervenes when claims are brought only against the successor institution.

Two additional comments concerning the delay in the current system were the lack of face-to-face contact with the judge handling the case and suggesting the use of Rule 12B to reduce the caseload.

III. The third section of the questionnaire dealt with the costs of litigation in the case. The range of amounts of money at stake in these cases ranged from none (sought injunctive relief) to multiple millions. Fee arrangements for the 175 responses received included hourly rates (122), set fees (3), contingency (15), other (35), most of which included government attorneys who were salaried. Of the 159 who answered the question concerning the fees and costs incurred by the client, 112 believed the amounts were about right, 17 believed they were much too high, 12 thought they were slightly too high, 8 indicated they were slightly too low, and 4 thought they were much too low.

The questionnaire requested suggestions for reducing the costs associated with litigation. In addition to the referring to the suggestions for reducing the delay of the docket, the attorneys also suggested the following: 1) standardize the page size and format for court reporters, 2) encourage litigants to mediate or arbitrate before contacting an attorney, 3) abolish local rules requiring briefs on most routine motions which wastes time and money, 4) stop trying to force parties to settle, 5) abate pre-trial schedule until pending motions are rules upon, 6) reduce pre-trial appearances, 7) review and note the abuse of discovery, 8) cut down on the time, length and number of depositions and punish the abusers, 9) do not have as many trial postponements, and 10) do not try cases piecemeal.

Additional comments included 1) developing a fast track, limited discovery, early trial schedule for smaller cases or as agreed to by parties (not arbitration, but a trial), 2) removing the redundancy in obtaining deposition testimony which is repetitious, 3) limit the number of experts per party, 4) limit duration of trials, 4) look for a better way to handle the relationship between Article III courts and the bankruptcy courts, 5) set civil docket call separate from criminal docket call, 6) penalize parties for taking frivolous positions for delay, and 7) be more liberal in granting protection from unnecessary discovery when requested.

As noted earlier, fewer litigants returned the questionnaires; therefore, the results were more limited. Of the 67 questionnaires

returned, 25 responded as Plaintiffs and 38 as Defendants. The costs of these cases covered the same range as indicated above, as well as the amounts at stake.

Regarding the fee arrangements between litigant and attorney, of the 64 who responded, the majority (40) indicated that there was an hourly rate, 2 had an hourly rate with a maximum, 3 entered into a set fee agreement, 5 used contingencies, and 14 indicated some other type of arrangement which also included those who appeared *pro se* or who had a combination of two or more of the above. When asked if this arrangement resulted in reasonable fees being paid to the attorney, 53 responded with 41 indicating yes, 7 saying no and 5 who did not know.

The questionnaires also inquired about the costs incurred in the matter. Of the 54 who indicated, the majority (30) believed the costs to be about right, 12 believing they were much too high, 8 saying slightly high, 2 responding slightly low, and 2 believing they were much too low.

Of those who believed the costs were too high, several suggestions were given to reduce the amount which seem to echo those given by the attorneys. The respondents proffered the following: 1) focus parties on settlement; 2) force government agencies to decide issues instead of side-stepping; 3) more timely action on motions filed and more expedited case-handling; 4) do not change judges; 5) encourage earlier communication between the parties; 6) get more judges; 7) try to limit repeated *pro se* filings; and 8) place limits on discovery.

The questionnaire next asked about the length of time taken to resolve the matter. Only 58 responded to this query, and of those, 24 believed it took much too long, 8 said it took slightly too long, 23 felt the time expended was about right, and only 3 believed the time was much too short.

The suggestions given to resolve the case more quickly included 1) place the case on the dismissal docket (to get action from the parties); 2) schedule status conferences earlier; 3) rule on dispositive motions earlier and issue scheduling orders immediately; 4) address and docket issues immediately; 5) get to the issues more quickly; 6) set realistic trial schedule; 7) asses costs against parties filing frivolous or delaying motions; 8) obtain more judges and reduce the backlog; and 9) force other side to be ready more quickly.

Regarding the use of arbitration in these cases, 5 indicated that arbitration was used, and 56 indicated that it wasn't.

Additional comments echoed earlier suggestions from both attorneys and litigants, but those which were different included 1) more use of Rule 11; 2) stronger, more punitive Rule 68, and 3) the use of arbitration before attorneys are called in.

As much as possible, I have attempted to use the wording provided by the respondents. Where clarification was needed, I modified the phrasing.

Should you need further assistance in this matter, please let me know. It has been an interesting project.

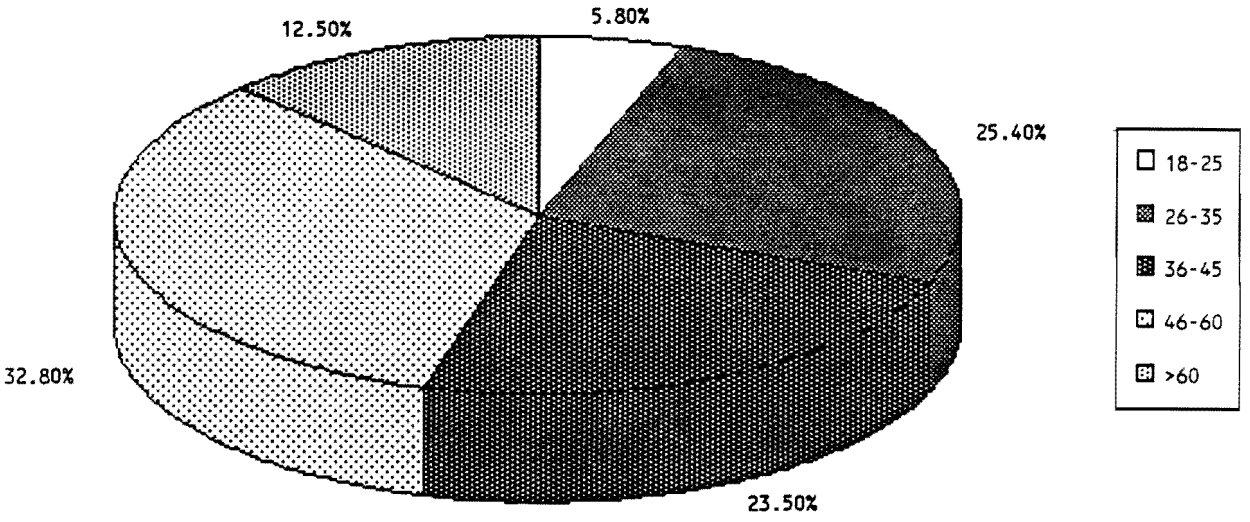
Allcott.

APPENDIX E: Results of Juror Survey

APPENDIX E

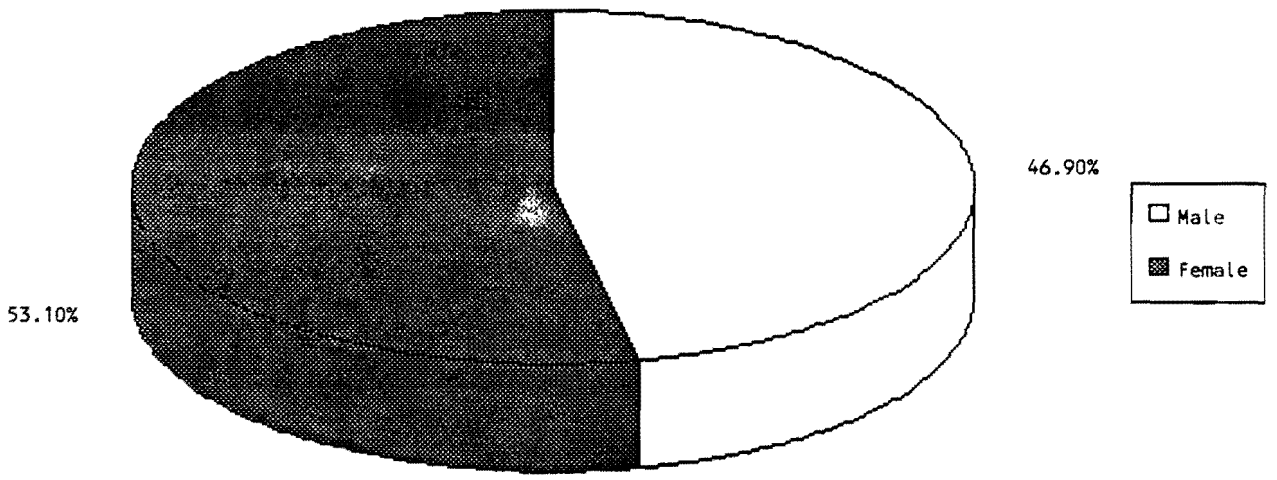
1. Age

Choices	Responses	Percentage
a. 18 to 25	18	5.8
b. 26 to 35	79	25.4
c. 36 to 45	73	23.5
d. 46 to 60	102	32.8
e. above 60	39	12.5



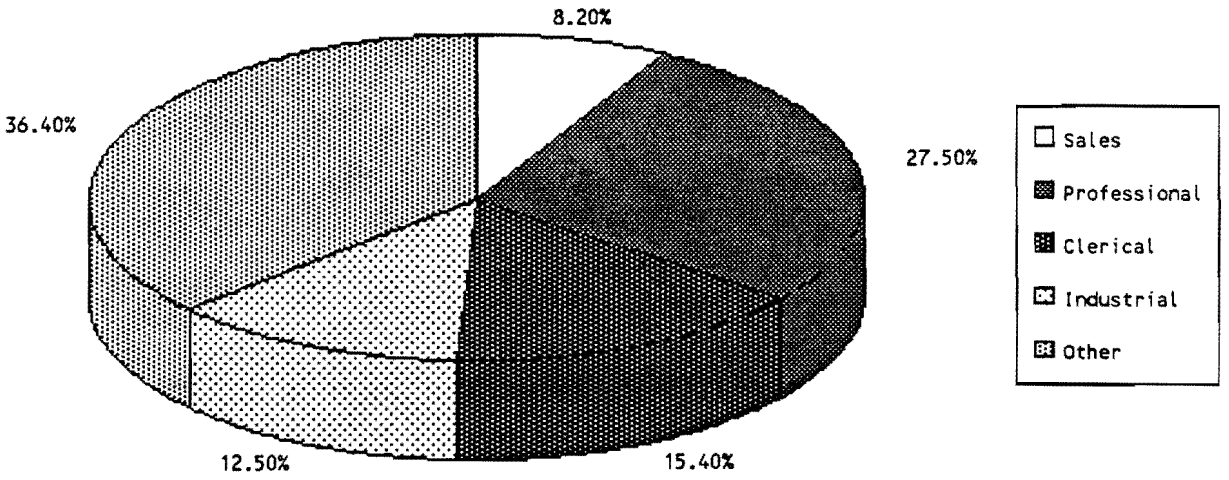
2. Sex

Choices	Responses	Percentage
a. Female	164	53.1
b. Male	145	46.9



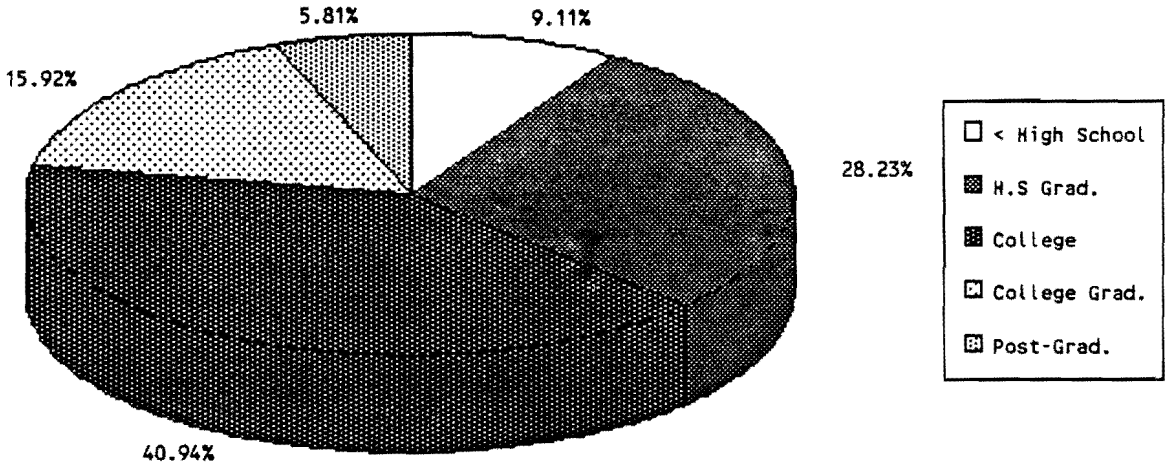
3. Occupation

Choices	Responses	Percentage
a. Sales	25	8.2
b. Professional	84	27.5
c. Clerical	47	15.4
d. Industrial	38	12.5
e. Other (Please specify)	111	36.4



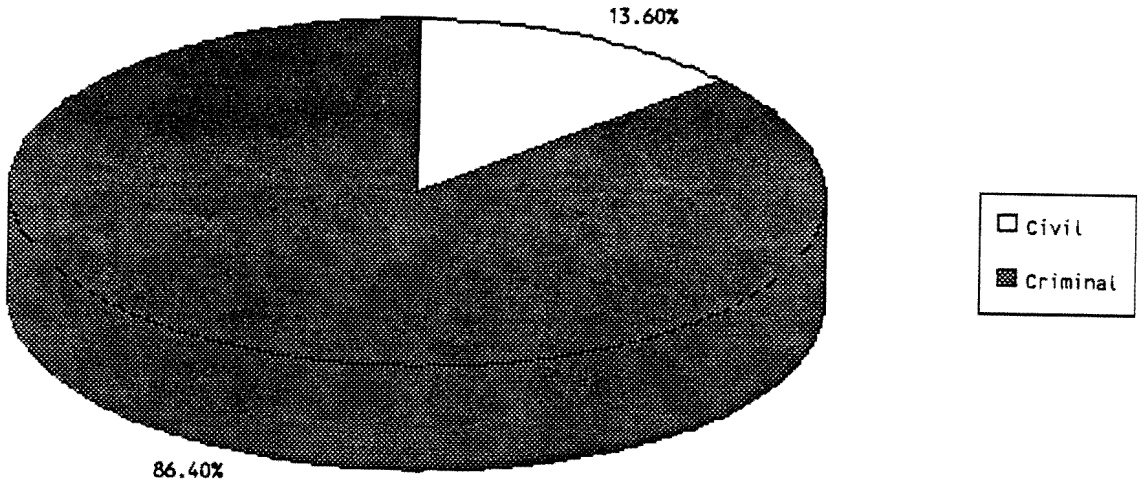
4. Education

Choices	Responses	Percentage
a. Less than High School	28	9.1
b. High School Graduate	87	28.2
c. Some College	126	40.9
d. Four-year College Graduate	49	15.9
e. Post-Graduate Degree	18	5.8



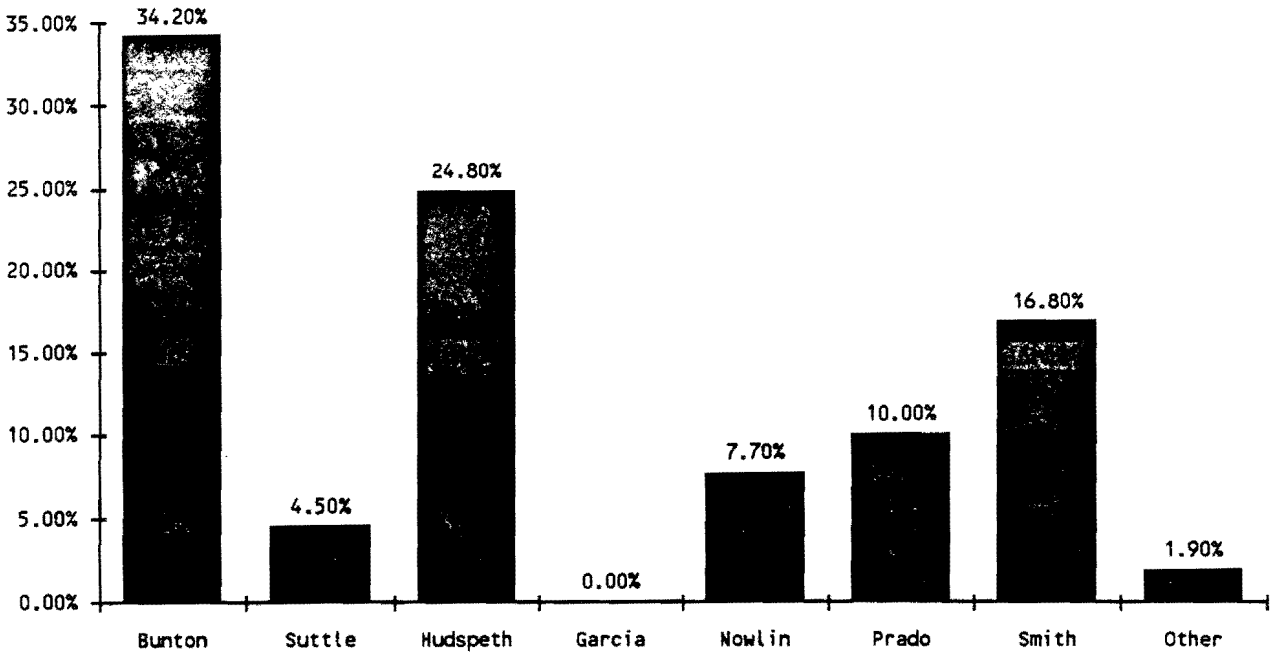
5. What type of case did you hear?

Choices	Responses	Percentage
a. Civil	42	13.6
b. Criminal	267	86.4



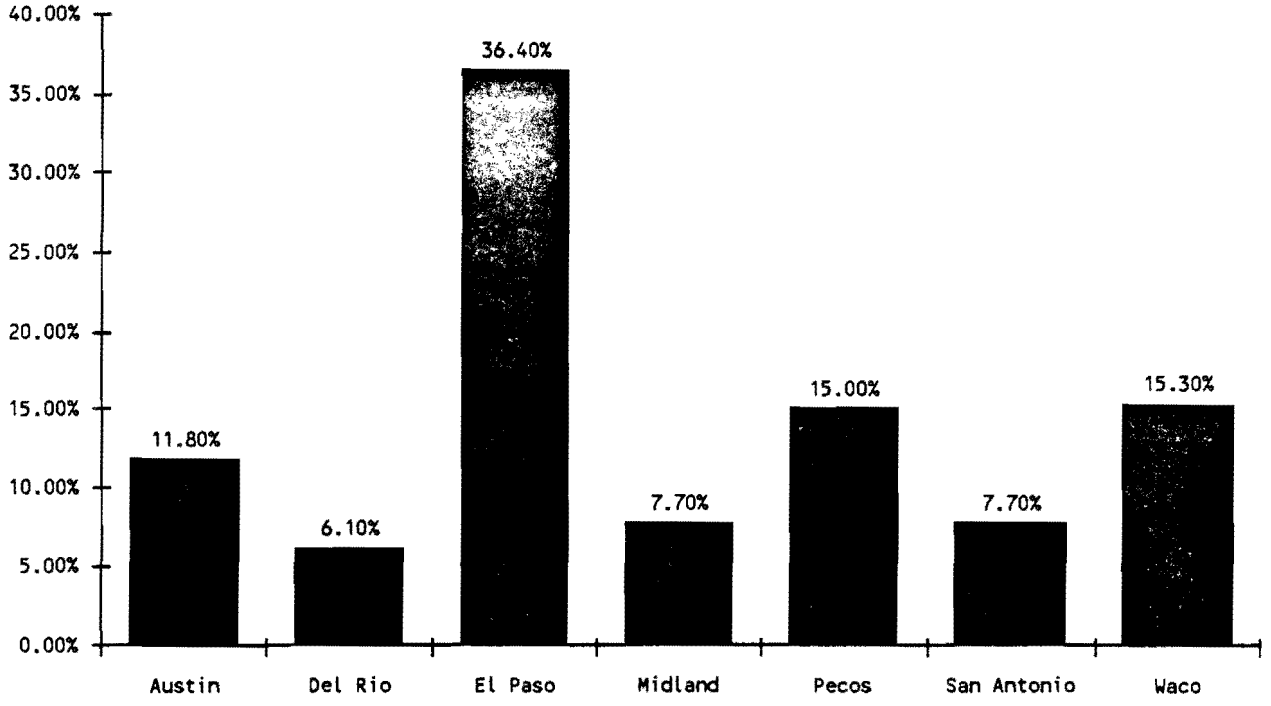
6. Which Judge presided over the trial you heard?

Choices	Responses	Percentage
a. Hon. Lucius D. Bunton III	106	34.2
b. Hon. D. W. Suttle	14	4.5
c. Hon. Harry Lee Hudspeth	77	24.8
d. Hon. H. F. Garcia	0	
e. Hon. James R. Nowlin	24	7.7
f. Hon. Edward C. Prado	31	10.0
g. Hon. Walter S. Smith, Jr.	52	16.8
h. Other (Please specify)	6	1.9



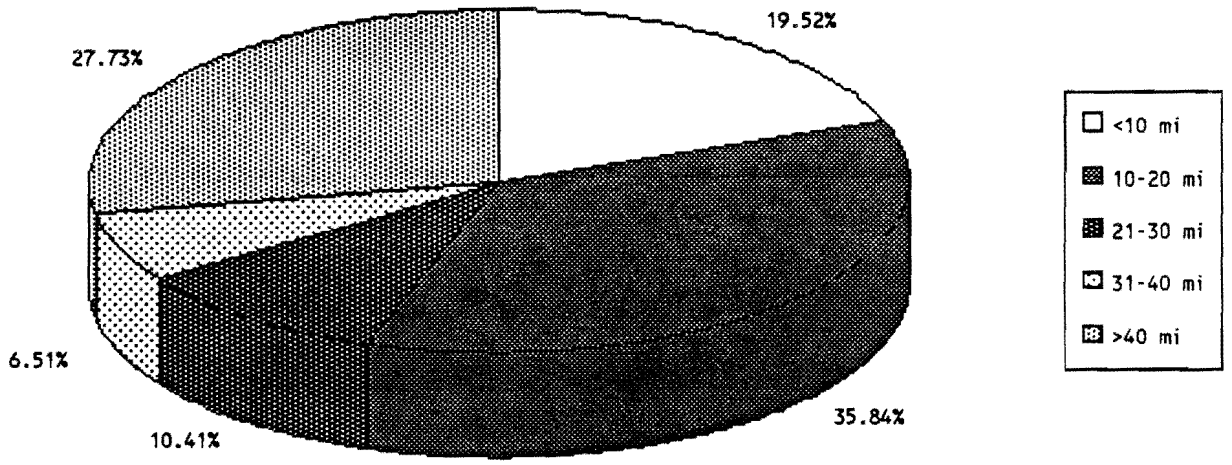
7. **Where was the trial of the case you heard held?**

Choices	Responses	Percentage
a. Austin	37	11.8
b. Del Rio	19	6.1
c. El Paso	114	36.4
d. Midland	24	7.7
e. Pecos	47	15.0
f. San Antonio	24	7.7
g. Waco	48	15.3



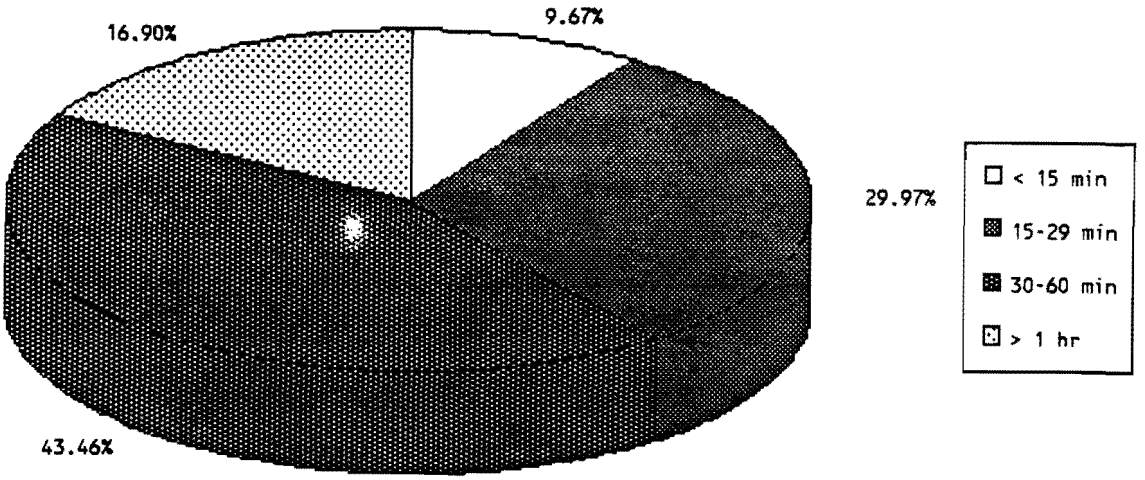
8. **How far did you travel from your residence to the courthouse?**

Choices	Responses	Percentage
a. Less than 10 miles	60	19.5
b. 10 to 20 miles	110	35.8
c. 21 to 30 miles	32	10.4
d. 31 to 40 miles	20	6.5
e. More than 40 miles	85	27.7



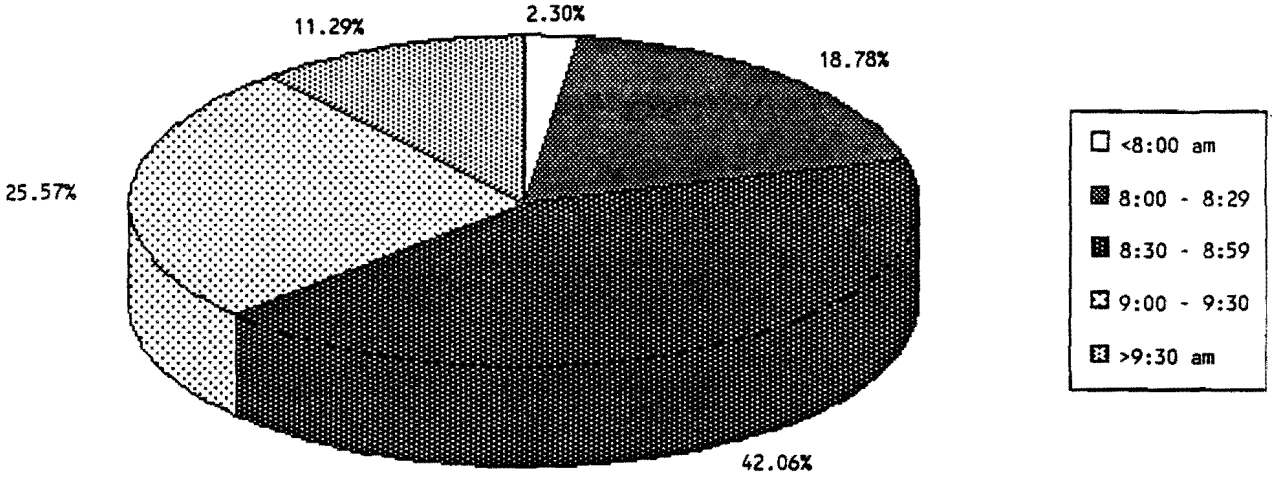
9. How long did it take you to travel from your residence to the courthouse?

Choices	Responses	Percentage
a. Less than 15 minutes	34	10.9
b. 15 minutes to 29 minutes	139	44.7
c. 30 minutes to 1 hour	83	26.7
d. More than 1 hour	55	17.7



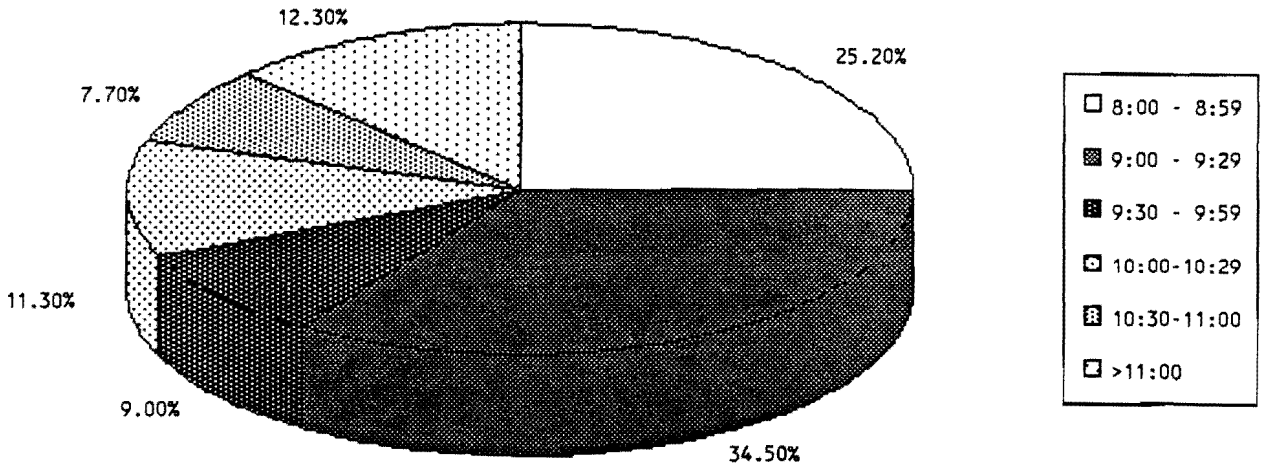
10. What time were you required to report for jury duty on the first day?

Choices	Responses	Percentage
a. Before 8:00 a.m.	7	2.3
b. 8:00 a.m. to 8:29 a.m.	58	18.8
c. 8:30 a.m. to 8:59 a.m.	130	42.1
d. 9:00 a.m. to 9:30 a.m.	79	25.6
e. After 9:30 a.m.	35	11.3



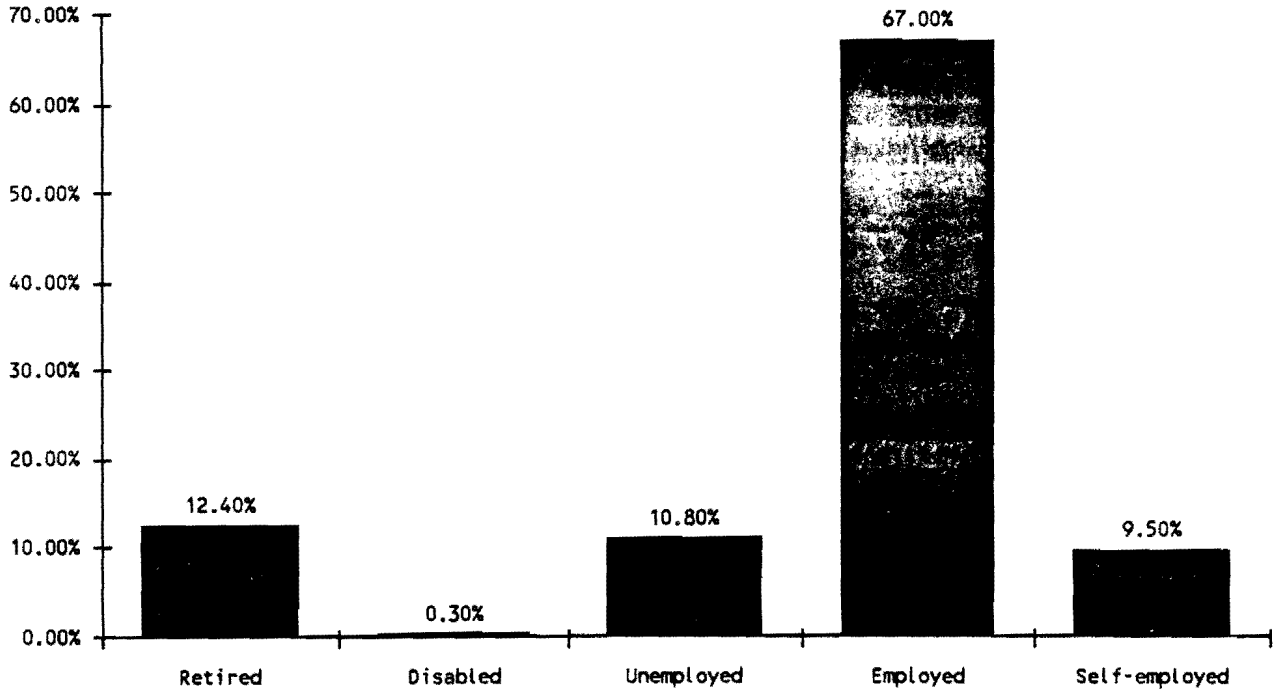
11. **What time were you actually summoned to begin the jury selection process on that first day?**

Choices	Responses	Percentage
a. 8:00 a.m. to 8:59 a.m.	78	25.2
b. 9:00 a.m. to 9:29 a.m.	107	34.5
c. 9:30 a.m. to 9:59 a.m.	28	9.0
d. 10:00 a.m. to 10:29 a.m.	35	11.3
e. 10:30 a.m. to 11:00 a.m.	24	7.7
f. After 11:00 a.m.	38	12.3



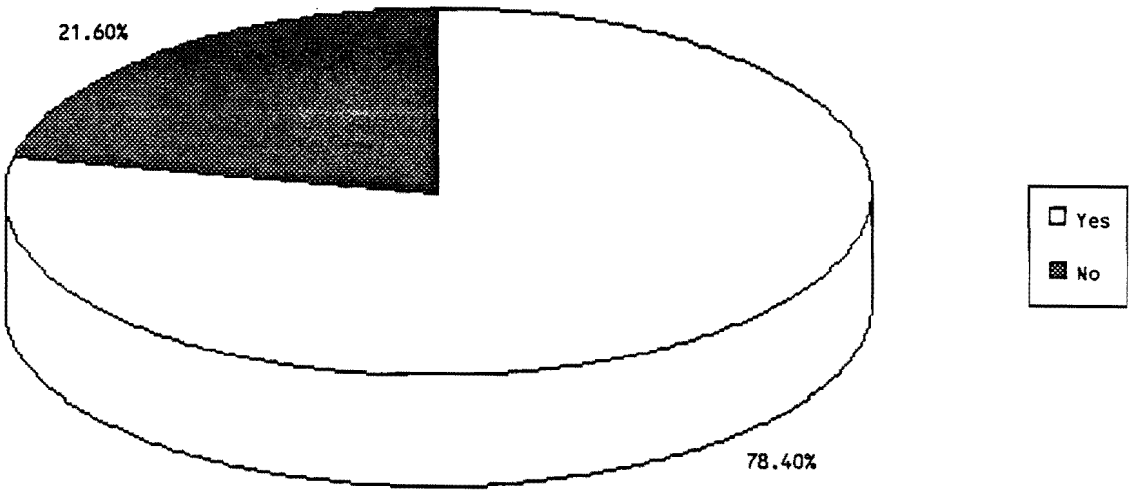
12. Which of the following best describes your employment status at the time of your jury service?

Choices	Responses	Percentage
a. Retired	38	12.4
b. Disabled	1	0.3
c. Unemployed	33	10.8
d. Employed	205	67.0
e. Self-employed	29	9.5



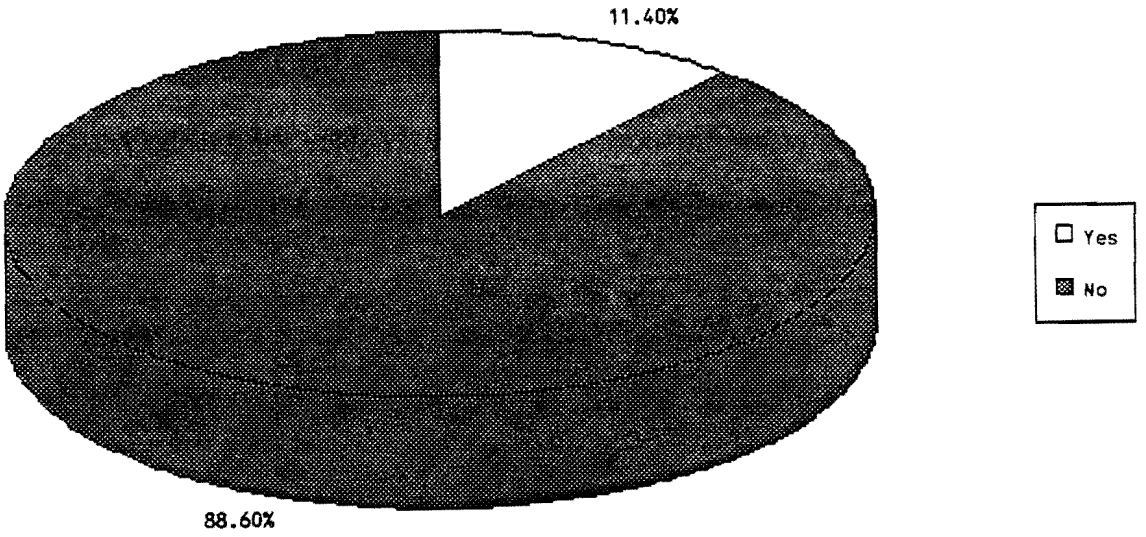
13. If you are employed, is your employer continuing to pay you your regular wages while you serve on jury duty?

Choices	Responses	Percentage
a. Yes	185	78.4
b. No	51	21.6



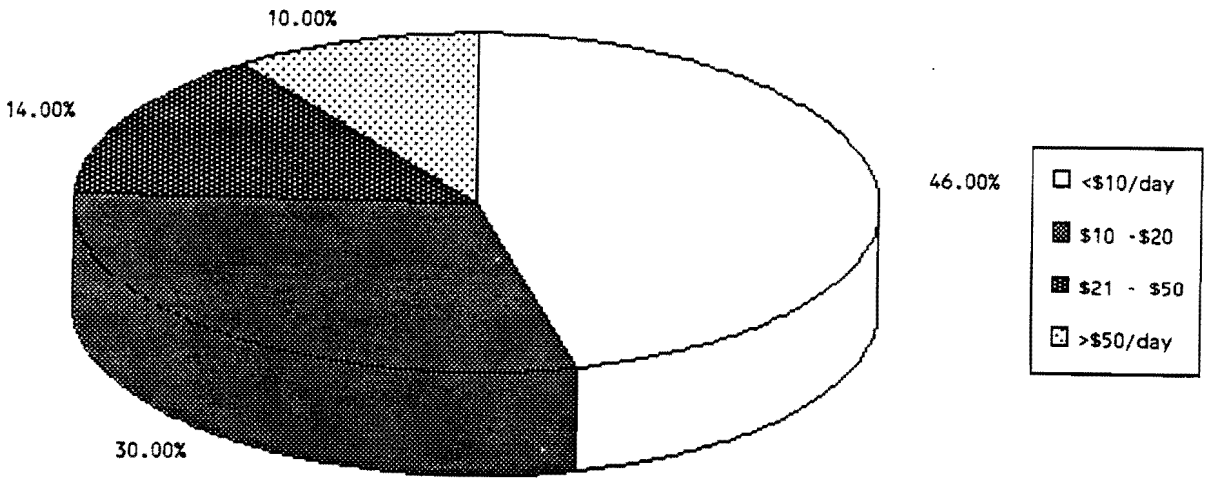
14. Were you required to make special arrangements for child care because of jury duty?

Choices	Responses	Percentage
a. Yes	34	11.4
b. No	263	88.6



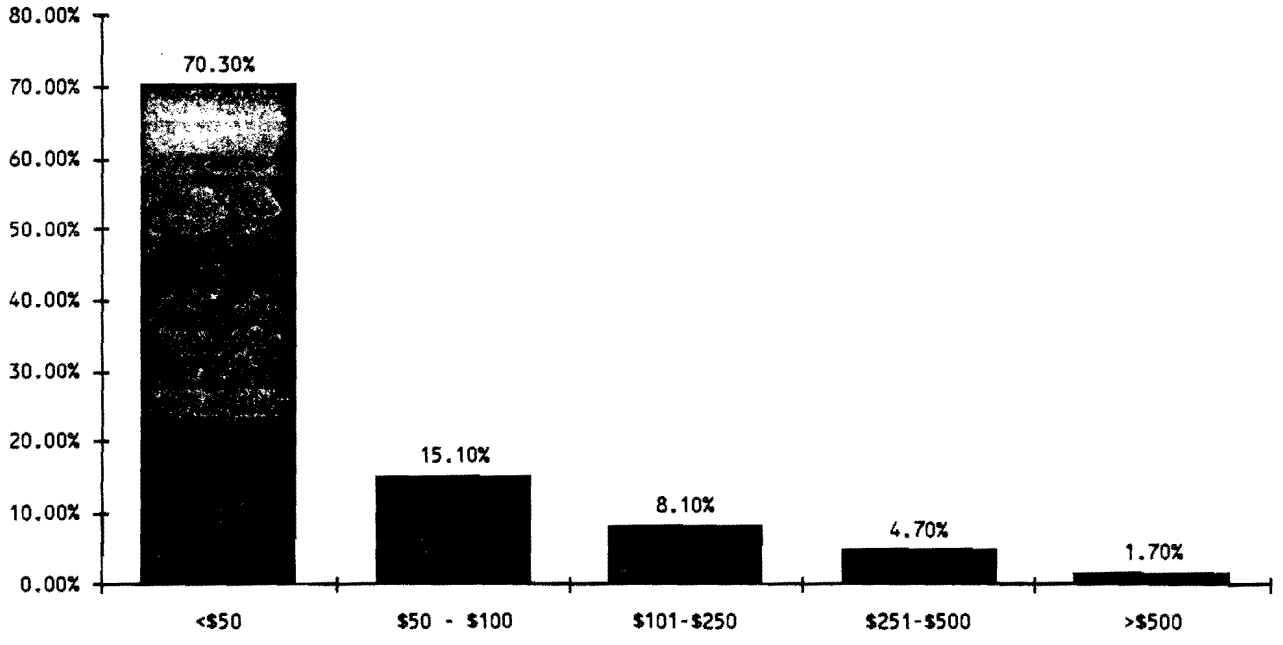
15. If your answer to the previous question was "yes," please indicate the cost of day care that you incurred because of jury service.

Choices	Responses	Percentage
a. Under $10 per day	23	46.0
b. $10 to $20 per day	15	30.0
c. $21 to $50 per day	7	14.0
d. Over $50 per day (Please specify)	5	10.0



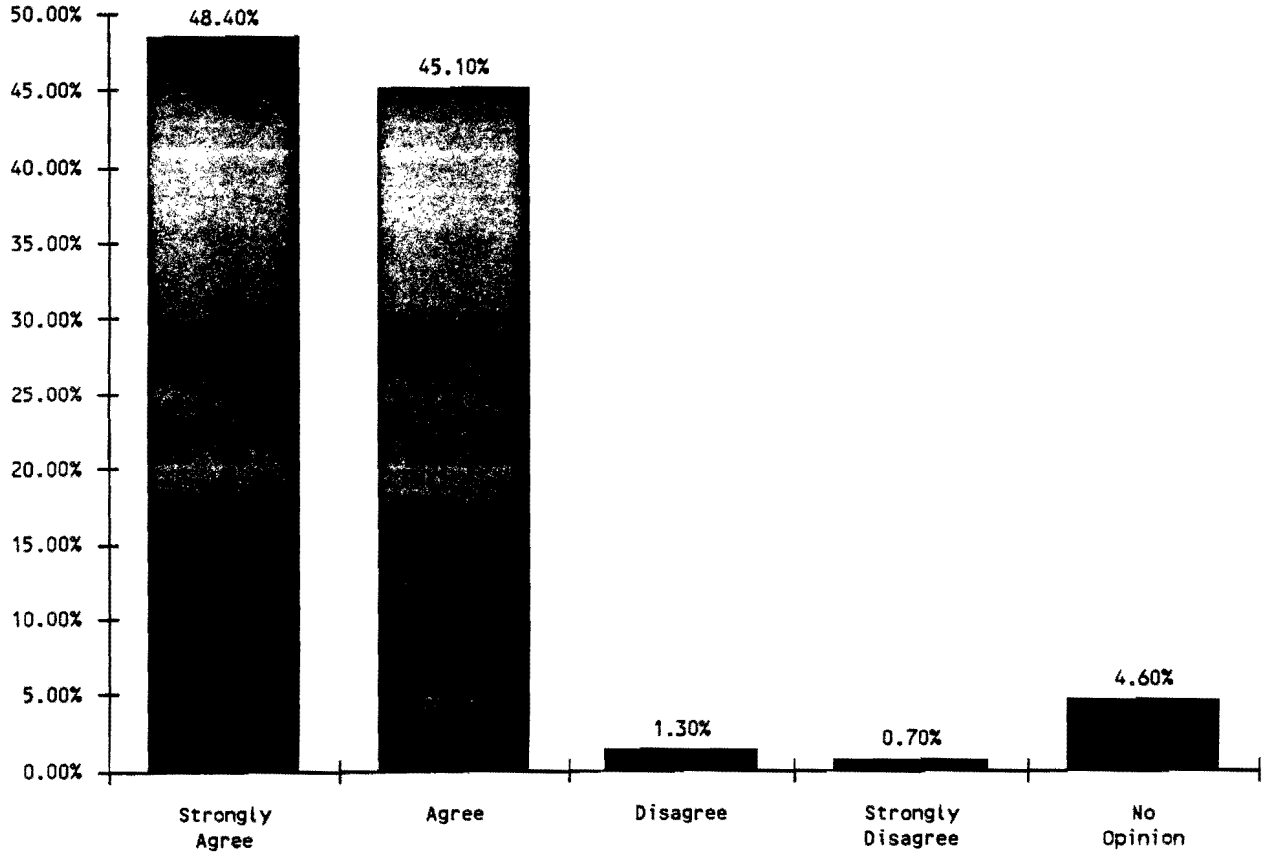
16. **How much do you estimate that it cost you in lost wages, child care, or other expenses, over and above the amount you received from the court system, to serve on the jury?**

Choices	Responses	Percentage
a. Under $50	121	70.3
b. $50 to $100	26	15.1
c. $101 to $250	14	8.1
d. $251 to $500	8	4.7
e. Over $500 (Please specify)	3	1.7



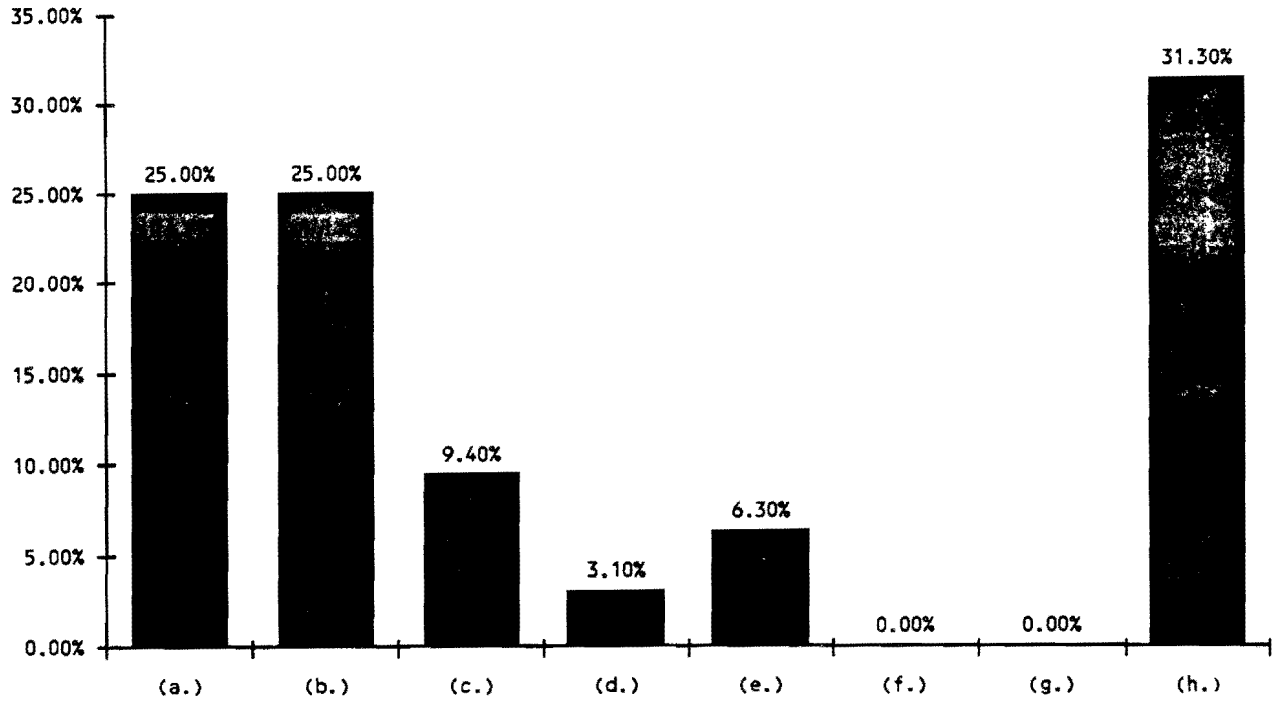
17. **'The court's new juror orientation program and/or the judge's introduction to the case adequately prepared me to perform my duties as a juror."**

Choices	Responses	Percentage
a. Strongly Agree	148	48.4
b. Agree	138	45.1
c. Disagree	4	1.3
d. Strongly Disagree	2	0.7
e. No Opinion	14	4.6



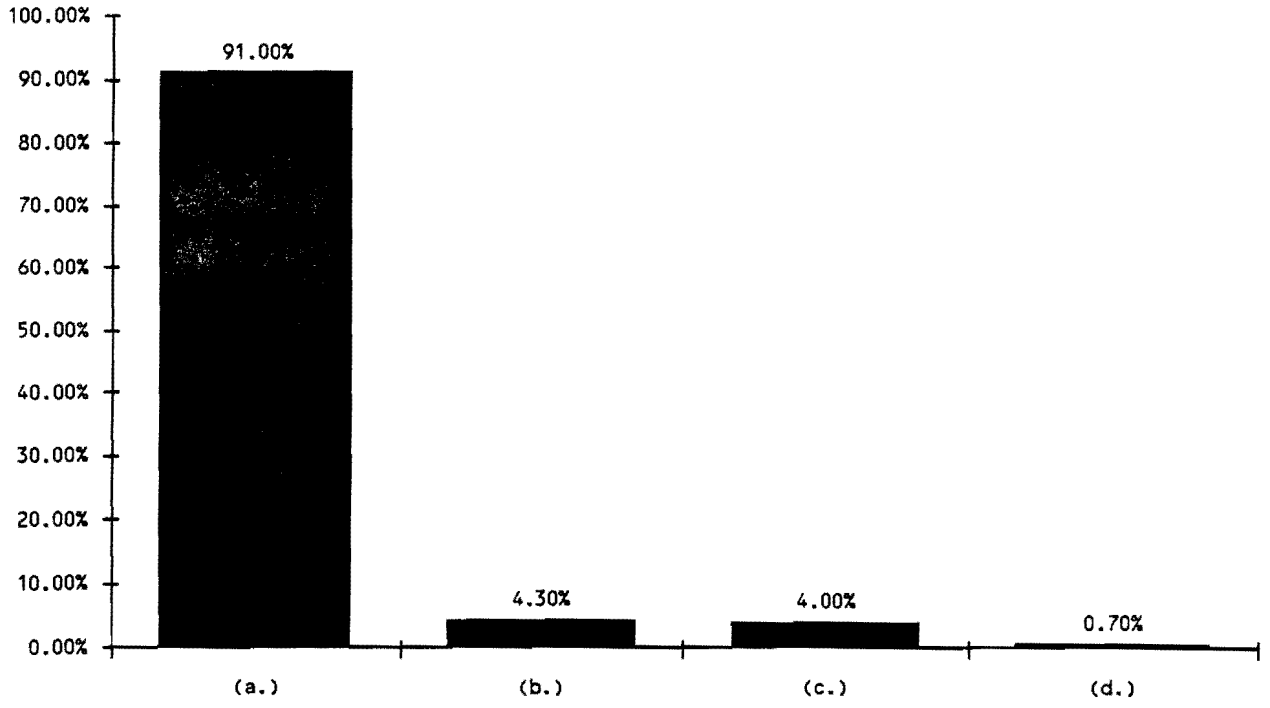
18. If you disagree or strongly disagree with the statement in question 17, identify the causes which contributed to the inadequacy.

Choices	Responses	Percentage
a. The rules of evidence were not sufficiently explained.	8	25.0
b. You were uncertain about the permissible scope of lawyer arguments and tactics.	8	25.0
c. Your role as juror was not sufficiently explained.	3	9.4
d. a, b, and c	1	3.1
e. a and b	2	6.3
f. a and c	0	0
g. b and c	0	0
h. Other (Please specify)	10	31.3



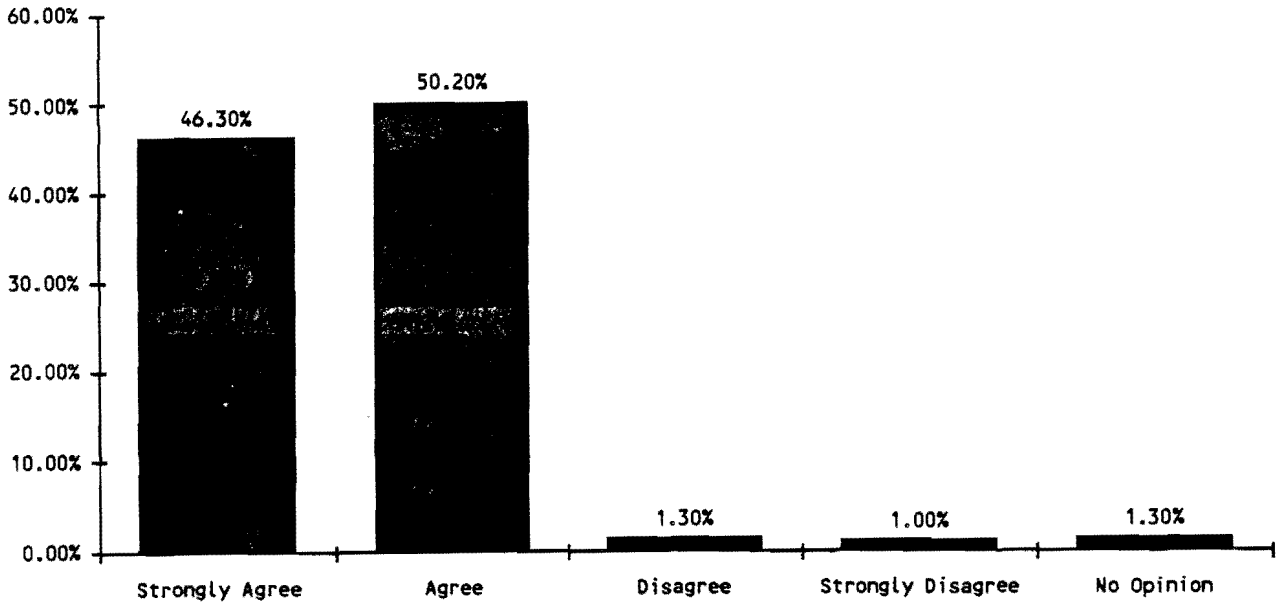
19. **It has been proposed that potential jurors complete the information sheet attached at the end of this questionnaire as a means of improving the process of selecting an impartial jury. Which of the following best describes your view concerning such a requirement?**

Choices	Responses	Percentage
a. The juror information sheet is an acceptable means of obtaining relevant information.	273	91.0
b. Requiring potential jurors to complete the juror information sheet would be unduly burdensome.	13	4.3
c. Requiring potential jurors to complete the juror information sheet would unduly intrude into the personal affairs of the jurors.	12	4.0
d. Other (Please specify)	2	0.7



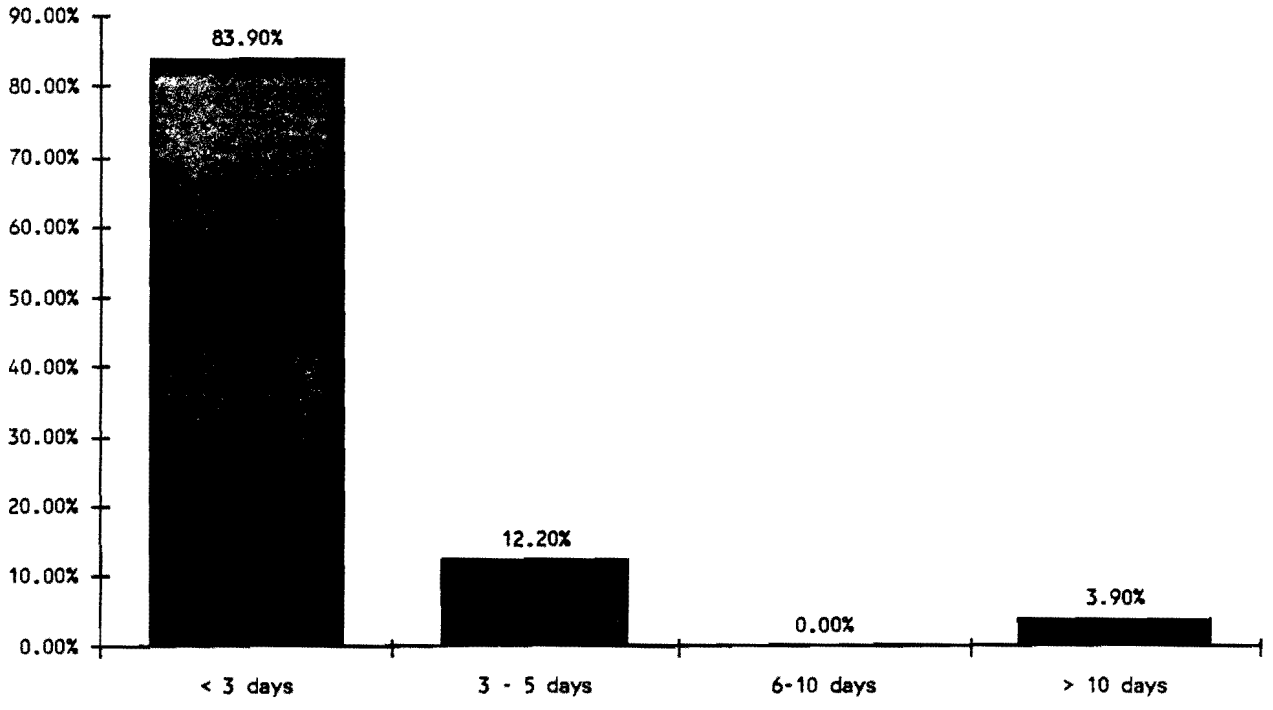
20. Overall, the jury selection process was well organized and efficient.

Choices	Responses	Percentage
a. Strongly Agree	142	46.3
b. Agree	154	50.2
c. Disagree	4	1.3
d. Strongly Disagree	3	1.0
e. No Opinion	4	1.3



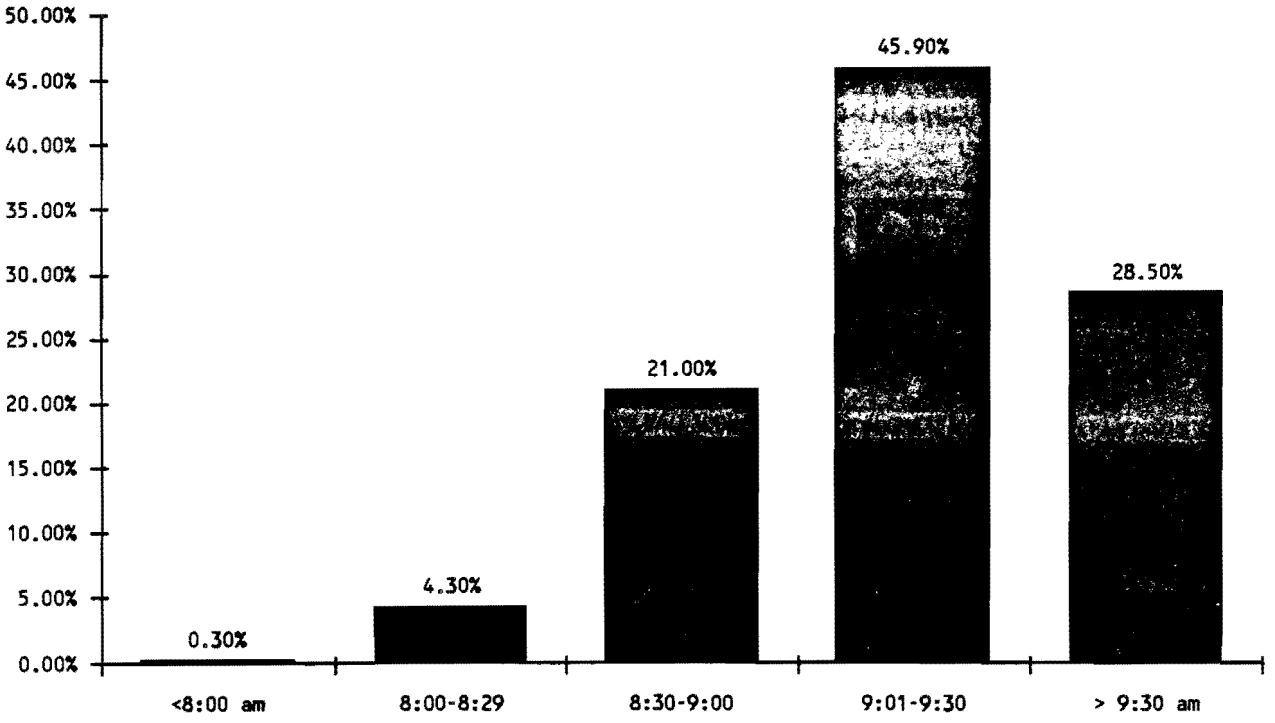
21. How long did it take to try the case that you heard?

Choices	Responses	Percentage
a. Less than 3 days of trial	260	83.9
b. 3-5 days of trial	38	12.2
c. 6-10 days of trial	0	0
d. More than 10 days of trial	12	3.9



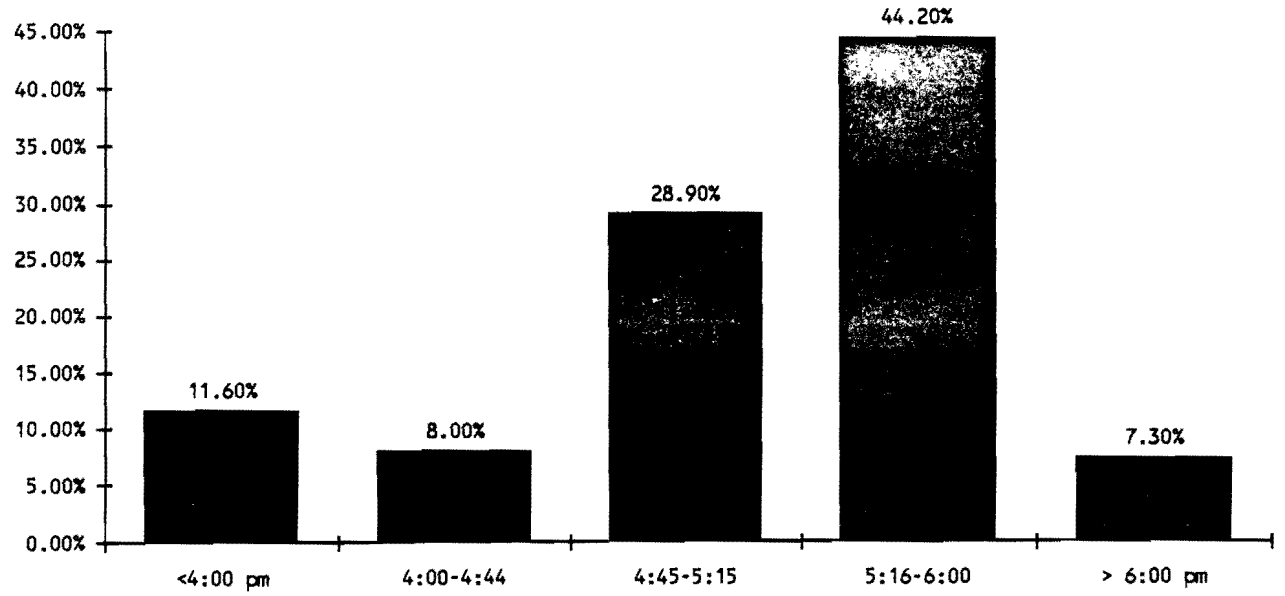
22. What time of the day did trial proceedings usually begin?

Choices	Responses	Percentage
a. Before 8:00 a.m.	1	0.3
b. 8:00 a.m. to 8:29 a.m.	13	4.3
c. 8:30 a.m. to 9:00 a.m.	64	21.0
d. 9:00 a.m. to 9:30 a.m.	140	45.9
e. After 9:30 a.m.	87	28.5



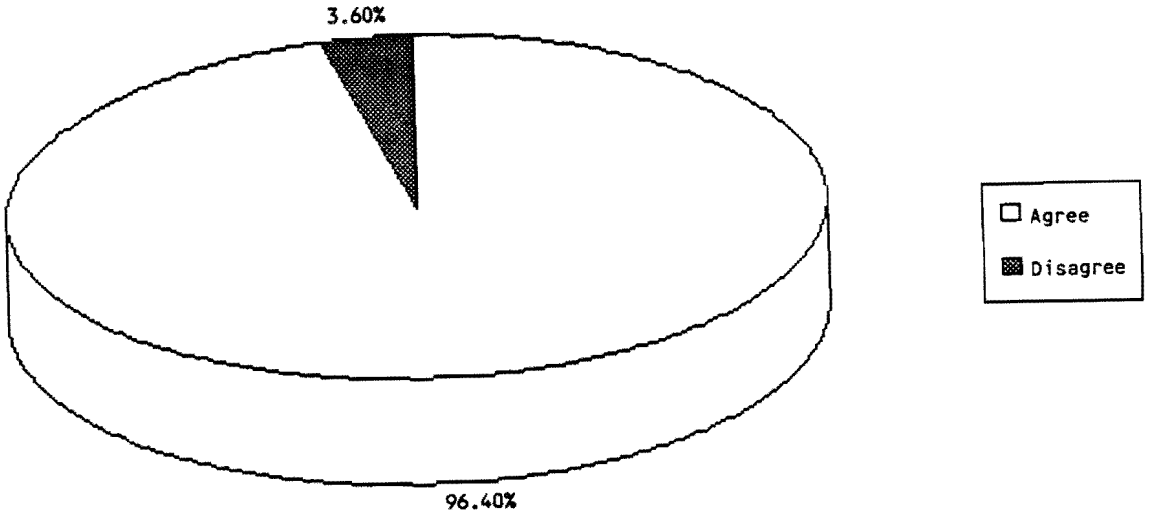
23. What time of day did trial proceedings usually end?

Choices	Responses	Percentage
a. Before 4:00 p.m.	35	11.6
b. 4:00 p.m. to 4:44 p.m.	24	8.0
c. 4:45 p.m. to 5:15 p.m.	87	28.9
d. 5:16 p.m. to 6:00 p.m.	133	44.2
e. After 6:00 p.m.	22	7.3



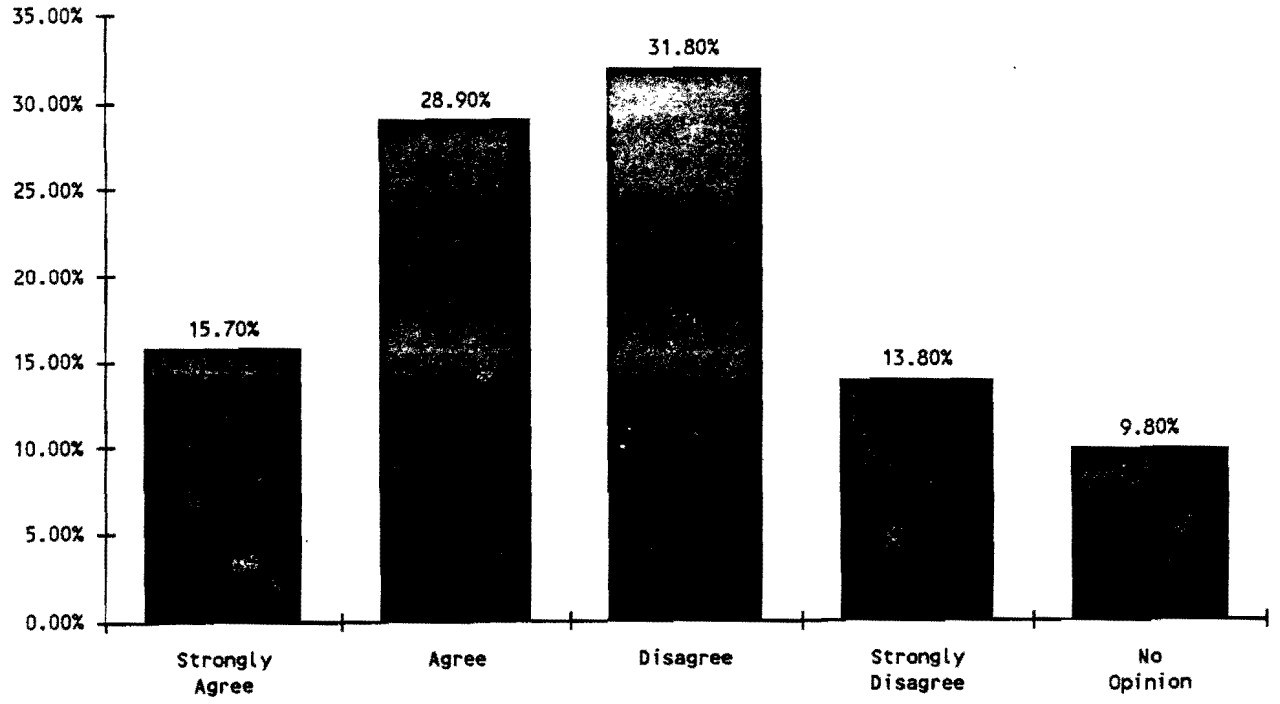
24. "As a juror, I understood that I was to refrain from discussing the case with other jurors until we began our deliberations at the end of trial."

Choices	Responses	Percentage
a. Agree	296	96.4
b. Disagree	11	3.6



25. **"As a juror, I would have found discussions with other jurors concerning the case as trial progressed helpful in deciding the case."**

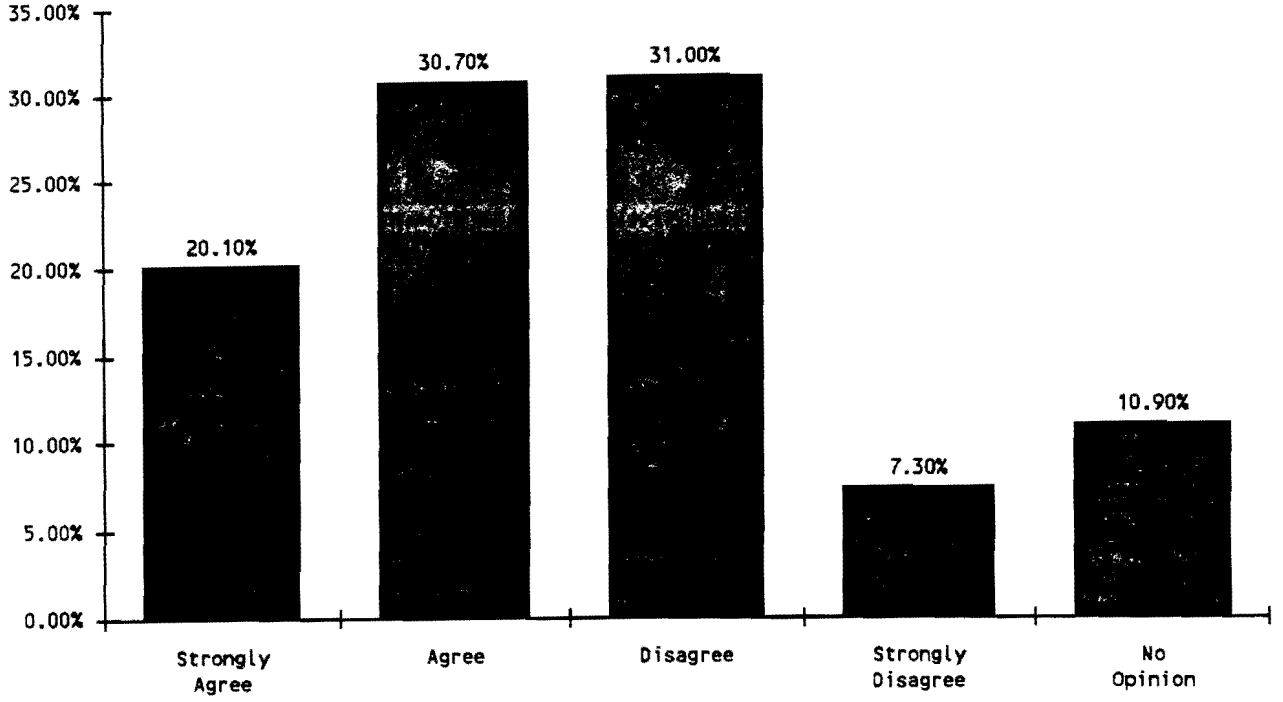
Choices	Responses	Percentage
a. Strongly Agree	48	15.7
b. Agree	88	28.9
c. Disagree	97	31.8
d. Strongly Disagree	42	13.8
e. No Opinion	30	9.8



26. **Aside from their opening statements and closing arguments, attorneys are limited to presenting evidence during the trial. It has been proposed that the attorneys be allowed a specified amount of "persuasion time" to use during the course of the trial. The attorney would be able to use this argument time as he or she desired. For example, if an attorney had two hours of persuasion time, he or she could spend 15 minutes on an opening statement, 45 minutes on a closing argument, and one hour during trial commenting on testimony.**

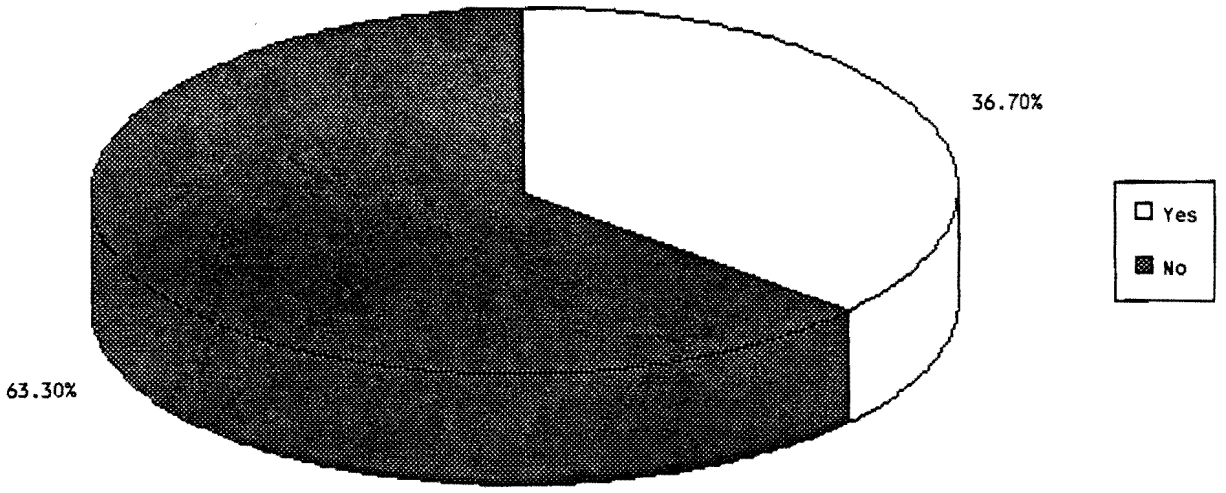
What is your opinion of this statement: "Providing persuasion time to attorneys during the trial would assist jurors in understanding the case."

Choices	Responses	Percentage
a. Strongly Agree	61	20.1
b. Agree	93	30.7
c. Disagree	94	31.0
d. Strongly Disagree	22	7.3
e. No Opinion	33	10.9



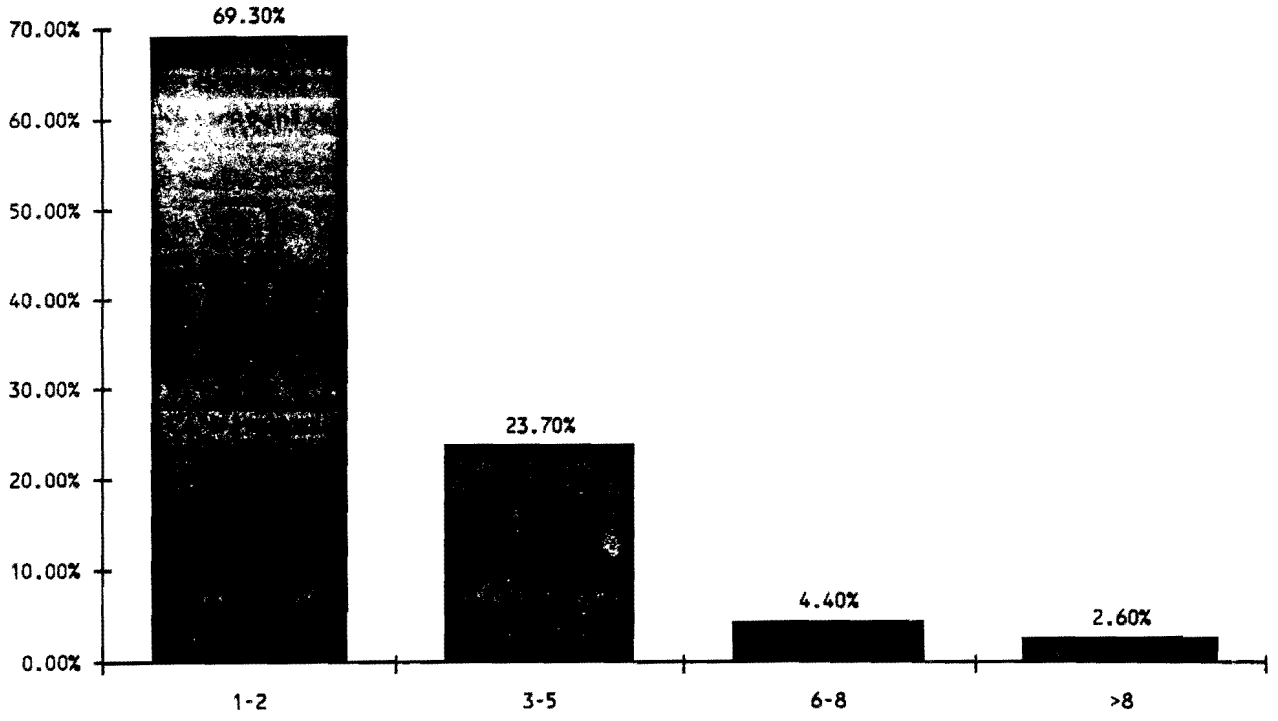
27. **During the trial you heard, did you experience at least one extended delay (more than 10 minutes) while court was in session. A delay is a break in proceedings (other than a regular lunch, midmorning, or midafternoon break) when no evidence was being introduced, when no arguments were being made to the jury, or when no instructions were being given to the jury.**

Choices	Responses	Percentage
a. Yes	111	36.7
b. No	191	63.3



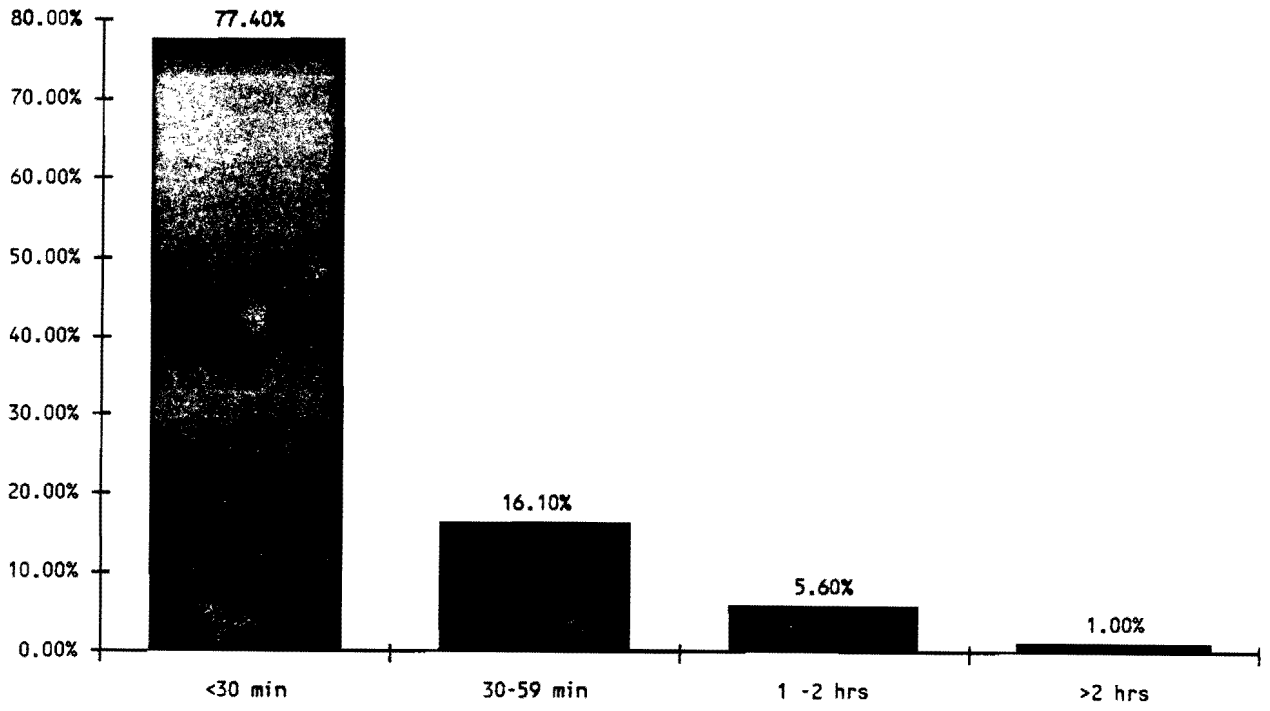
28. **If your answer to question 27 was Yes, approximately how many extended delays occurred during trial?**

Choices	Responses	Percentage
a. 1-2	79	69.3
b. 3-5	27	23.7
c. 6-8	5	4.4
d. More than 8 (Please specify)	3	2.6



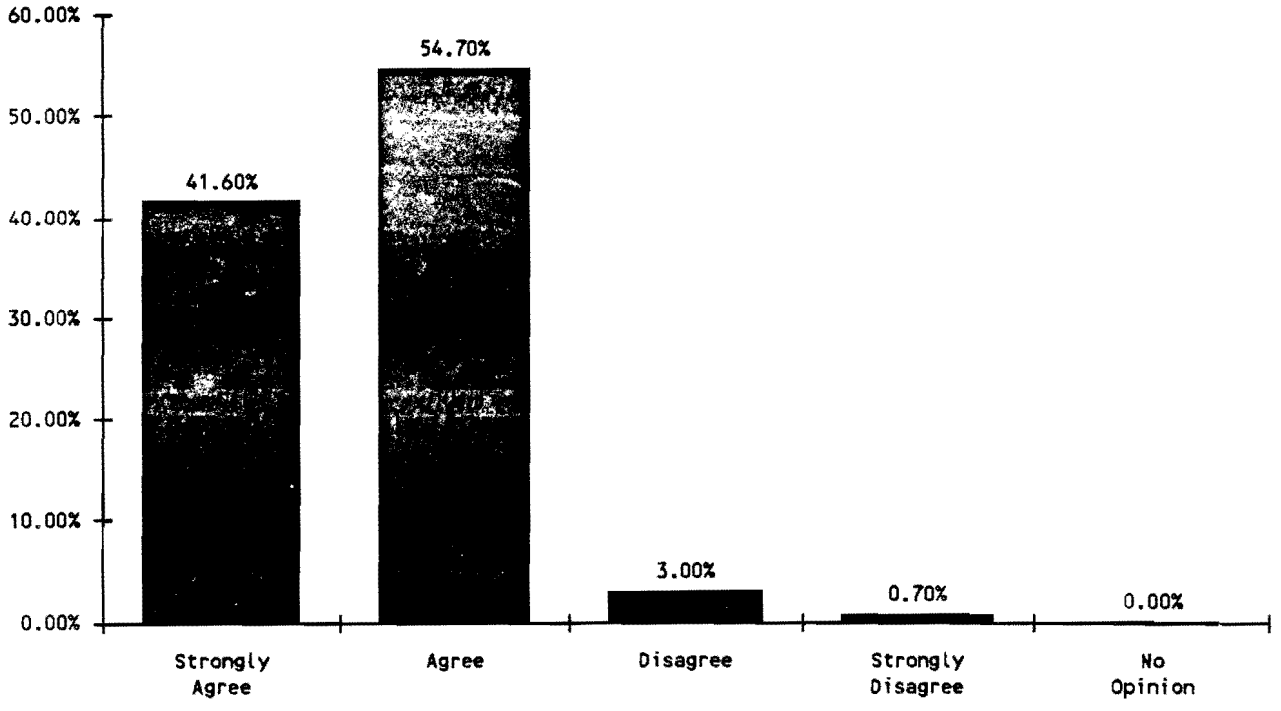
29. If your answer to question 27 was Yes, what was the approximate total time consumed by extended delays?

Choices	Responses	Percentage
a. Less than 30 minutes	96	77.4
b. 30 minutes to 59 minutes	20	16.1
c. 1 hour to 2 hours	7	5.6
d. More than 2 hours (Please specify)	1	1.0



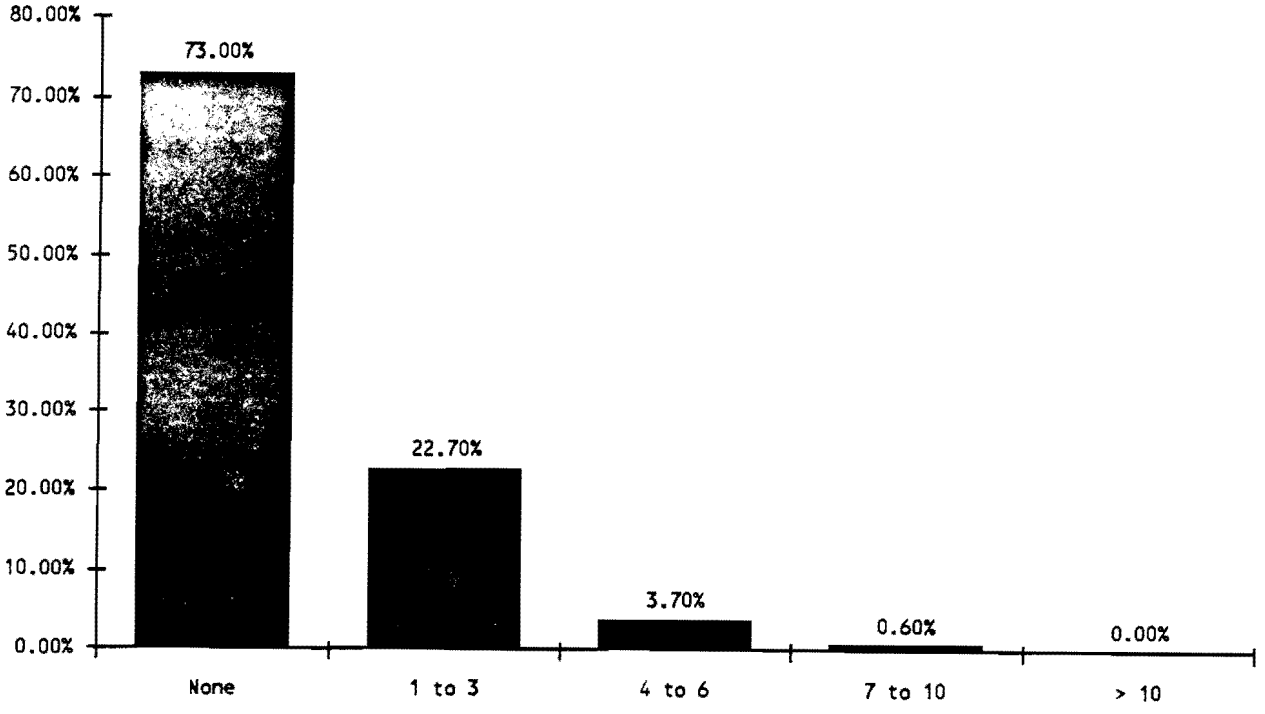
30. "The trial of the case I heard as a juror proceeded efficiently."

Choices	Responses	Percentage
a. Strongly Agree	124	41.6
b. Agree	163	54.7
c. Disagree	9	3.0
d. Strongly Disagree	2	0.7
e. No Opinion	0	



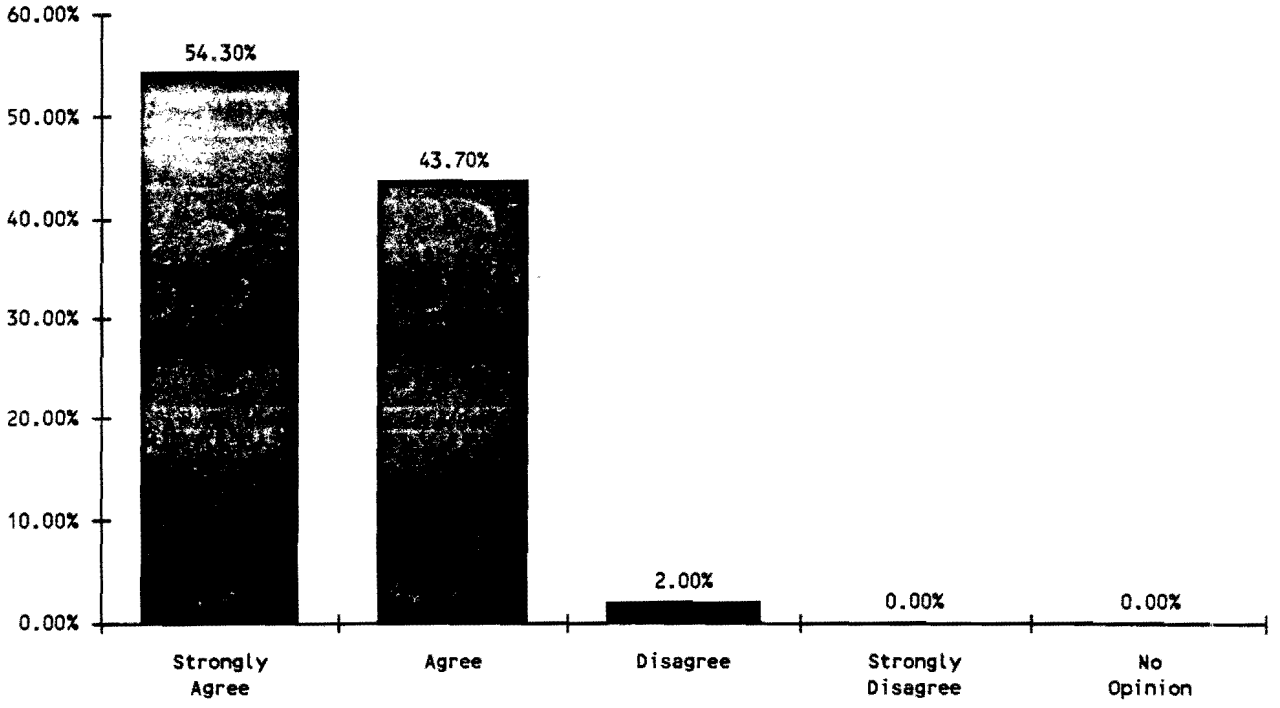
31. In the judge's instructions to the jury, how many words, terms or concepts did you have difficulty understanding?

Choices	Responses	Percentage
a. 0	219	73.0
b. 1 to 3	68	22.7
c. 4 to 6	11	3.7
d. 7 to 10	2	0.6
e. More than 10	0	



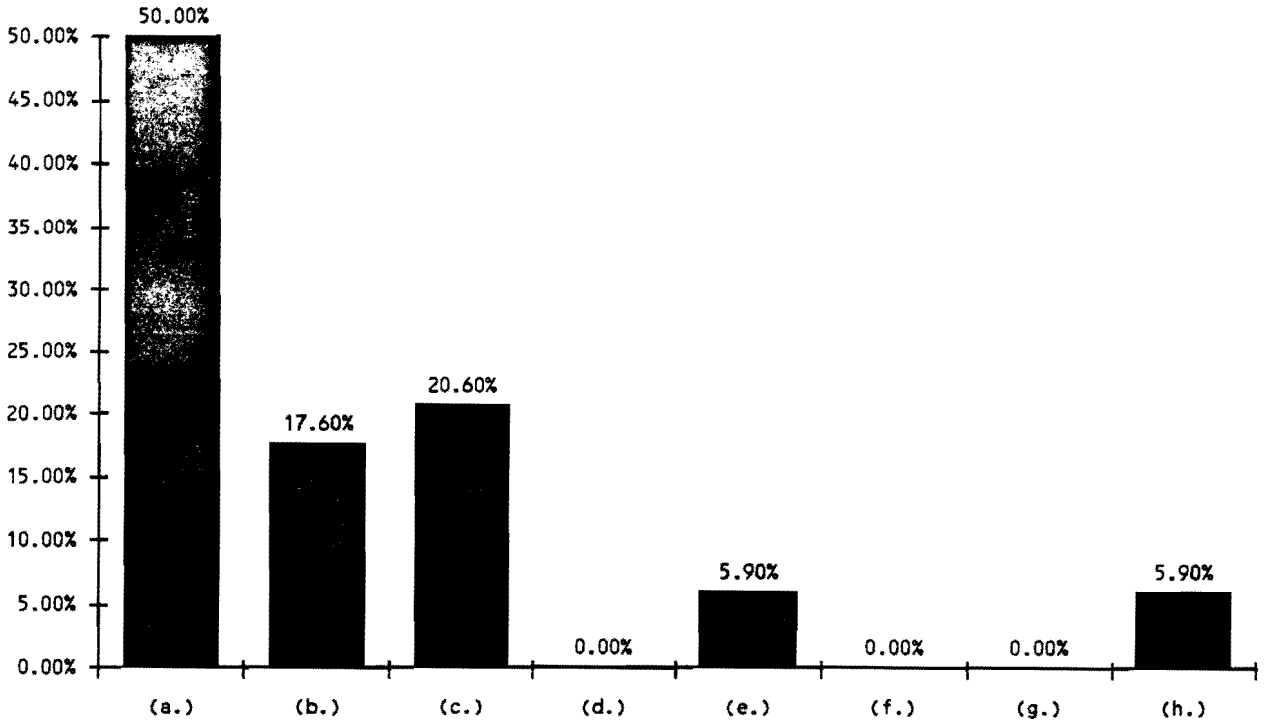
32. **"Overall, the judge's instructions were sufficiently understandable to apply them to our findings of fact."**

Choices	Responses	Percentage
a. Strongly Agree	164	54.3
b. Agree	132	43.7
c. Disagree	6	2.0
d. Strongly Disagree	0	
e. No Opinion	0	



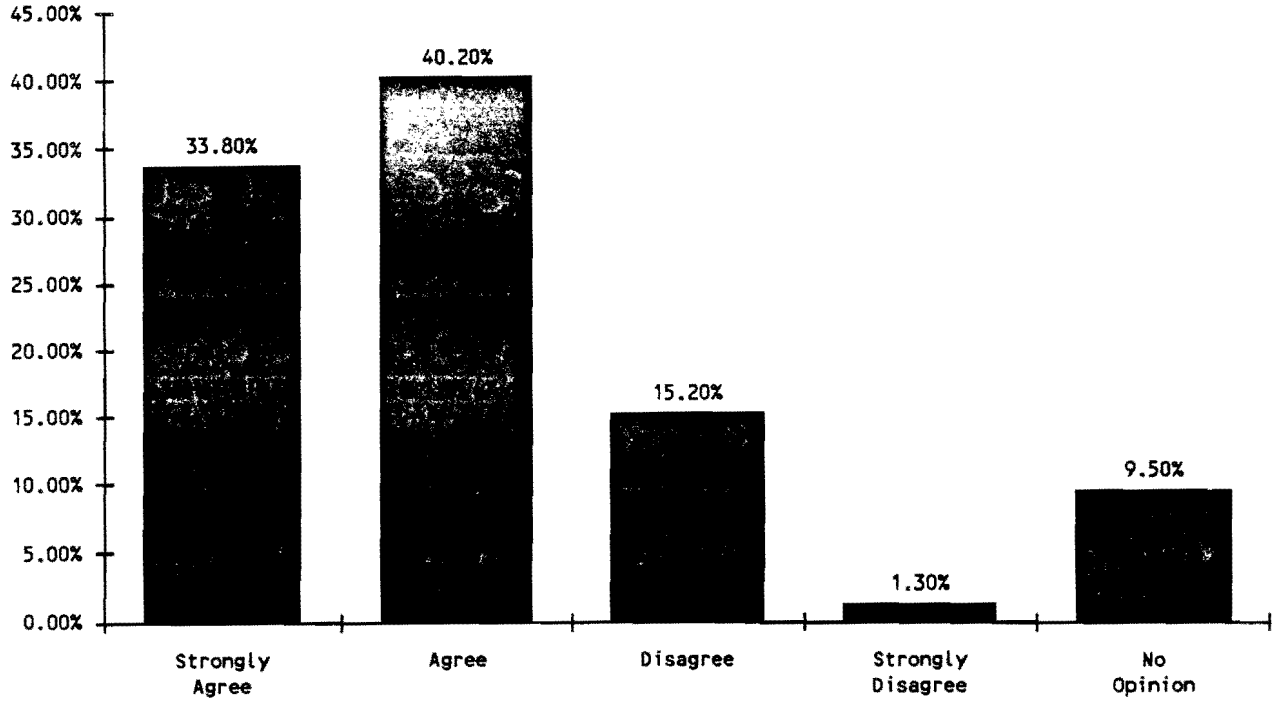
33. If you disagree or strongly disagree with the statement in question 32, identify which of the following contributed to your lack of understanding:

Choices	Responses	Percentage
a. The instructions were too lengthy.	17	50.0
b. The instructions were too complicated.	6	17.6
c. The instructions contained unexplained or inadequately explained terms or concepts.	7	20.6
d. a, b and c	0	0
e. a and b	2	5.9
f. a and c	0	0
g. b and c	0	0
h. Other (Please specify)	2	5.9



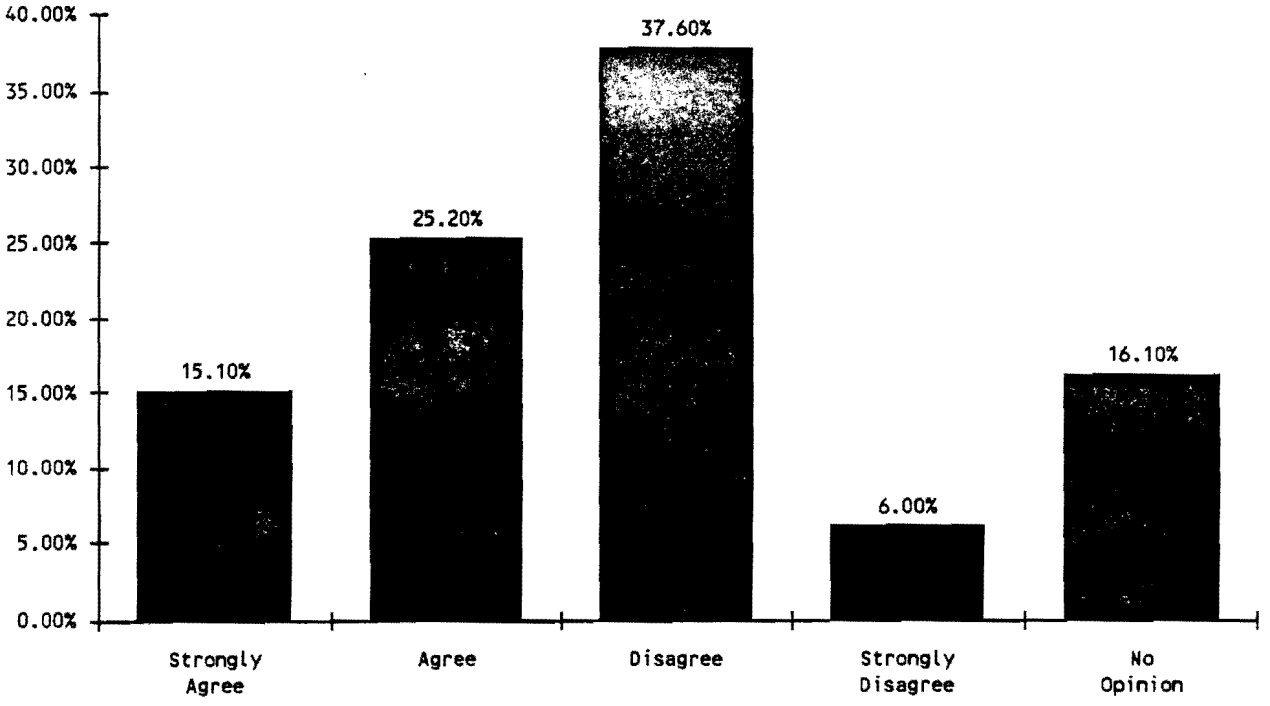
34. **"It would have been helpful for each juror to have a copy of the judge's instructions to follow while the judge delivers them."**

Choices	Responses	Percentage
a. Strongly Agree	100	33.8
b. Agree	119	40.2
c. Disagree	45	15.2
d. Strongly Disagree	4	1.3
e. No Opinion	28	9.5



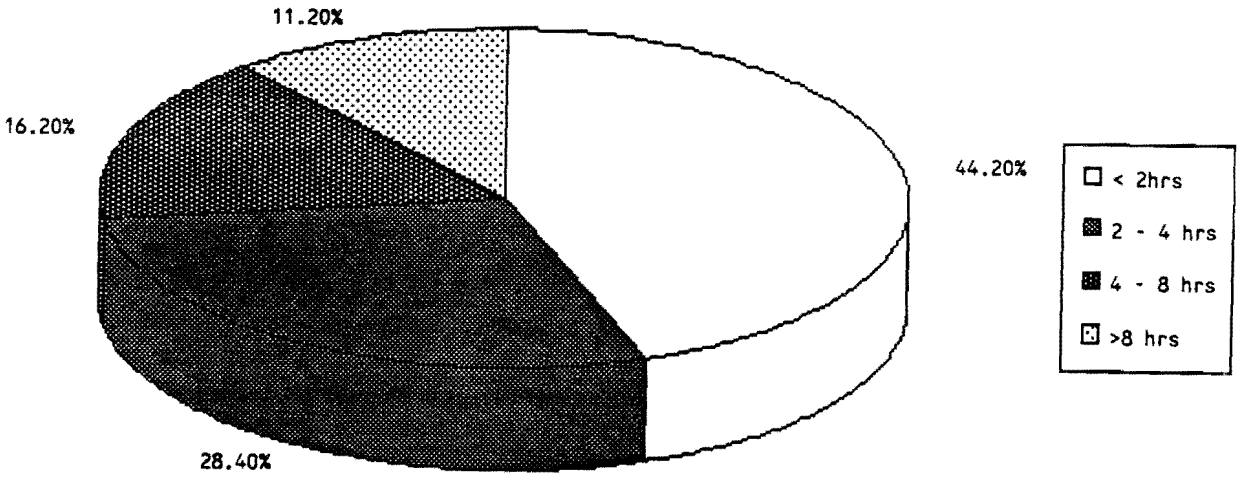
35. "It would have been helpful if the judge's final instructions were given before the evidence was presented in addition to being given afterwards."

Choices	Responses	Percentage
a. Strongly Agree	45	15.1
b. Agree	75	25.2
c. Disagree	112	37.6
d. Strongly Disagree	18	6.0
e. No Opinion	48	16.1



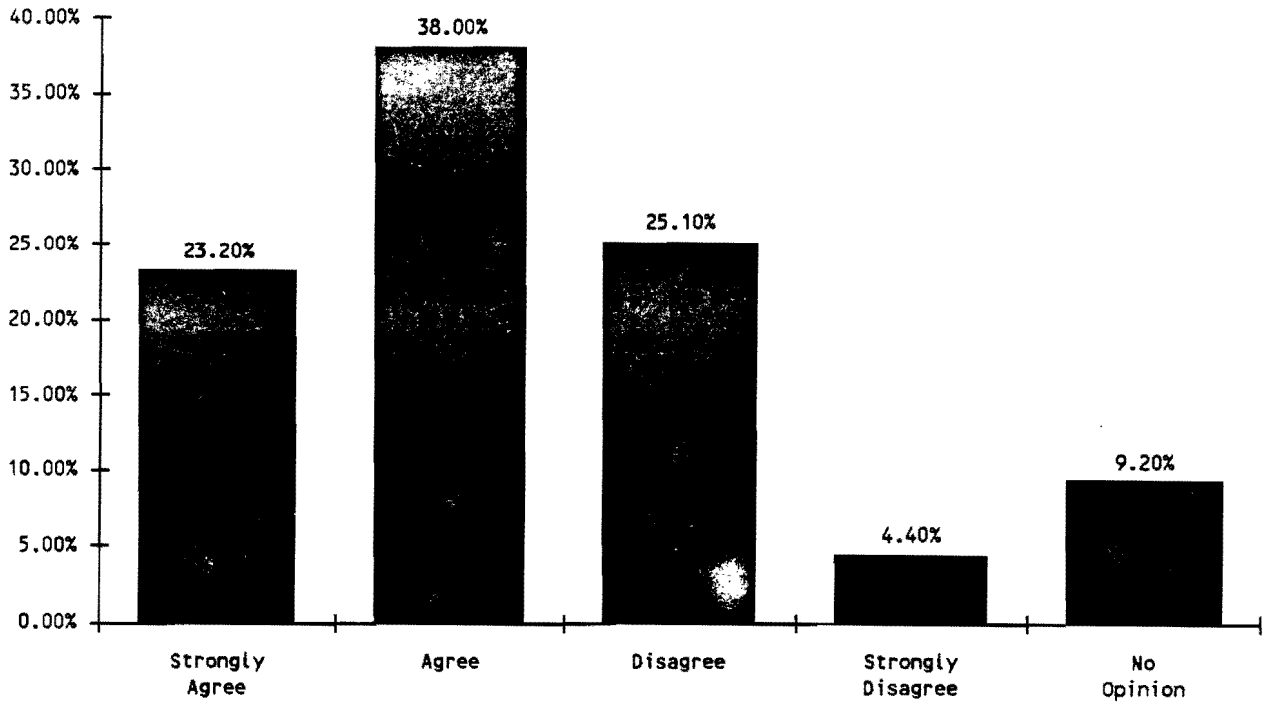
36. Approximately how long did the jury deliberate in your case?

Choices	Responses	Percentage
a. Under 2 hours	123	44.2
b. 2 to 4 hours	79	28.4
c. 4 to 8 hours	45	16.2
d. More than 8 hours (Please specify)	31	11.2



37. **"It would have been helpful during my deliberations if I had been permitted to take notes during trial."**

Choices	Responses	Percentage
a. Strongly Agree	63	23.2
b. Agree	103	38.0
c. Disagree	68	25.1
d. Strongly Disagree	12	4.4
e. No Opinion	25	9.2



APPENDIX F: Model Protective Order

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

PLAINTIFFS,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	
DEFENDANTS,	§	

PROTECTIVE ORDER

Upon motion of all the parties for a Protective Order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED THAT:

1. All Classified Information produced or exchanged in the course of this litigation shall be used solely for the purpose of preparation and trial of this litigation and for no other purpose whatsoever, and shall not be disclosed to any person except in accordance with the terms hereof.

2. "Classified Information," as used herein, means any information of any type, kind or character which is designated as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") by any of the supplying or receiving parties, whether it be a document, information contained in a document, information revealed during a deposition, information revealed in an interrogatory answer or otherwise. In designating information as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only"), a party will make such designation only as to that information that it in good

faith believes contains confidential information. Information or material which is available to the public, including catalogues, advertising materials, and the like shall not be classified.

3. "Qualified Persons," as used herein, means:

(a) Attorneys of record for the parties in this litigation and employees of such attorneys to whom it is necessary that the material be shown for purposes of this litigation;

(b) Actual or potential independent technical experts or consultants, who have been designated in writing by notice to all counsel prior to any disclosure of "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information to such person, and who have signed a document in the form of Exhibit "A" attached hereto (such signed document to be filed with the Clerk of this Court by the attorney retaining such person);

(c) One (1) "in-house" corporate officer or employee of a corporate party who shall be designated in writing by the corporate party prior to any disclosure of "Confidential" information to such person and who shall sign a document in the form of Exhibit "A" attached hereto (such signed document to be filed with the Clerk of this Court by the party designating such person); and

(d) If this Court so elects, any other person may be designated as a Qualified Person by order of this Court, after notice and hearing to all parties.

4. Documents produced in this action may be designated by any party or parties "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information

by marking each page of the document(s) so designated with a stamp stating "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only").

In lieu of marking the original of a document, if the original is not produced, the designating party may mark the copies that are produced or exchanged. Originals shall be preserved for inspection.

5. Information disclosed at (a) the deposition of a party or one of its present or former officers, directors, employees, agents or independent experts retained by counsel for purposes of this litigation, or (b) the deposition of a third party (which information pertains to a party) may be designated by any party as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information by indicating on the record at the deposition that the testimony is "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") and is subject to the provisions of this Order.

Any party may also designate information disclosed at such deposition as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") by notifying all of the parties in writing within thirty (30) days of receipt of the transcript, of the specific pages and lines of the transcript which should be treated as Confidential or For Counsel Only (or "Attorneys' Eyes Only") thereafter. Each party shall attach a copy of such written notice or notices to the face of the transcript and each copy thereof in his possession, custody or control. All deposition transcripts shall be treated as "For Counsel Only" (or "Attorneys' Eyes Only") for a period of thirty (30) days after receipt of the transcript.

To the extent possible, the Court Reporter shall segregate into separate transcripts information designated as Confidential or "For Counsel Only" (or "Attorneys' Eyes Only"), with blank, consecutively numbered pages being provided in a non-designated main transcript. The separate transcript containing "Confidential" and/or "For Counsel Only" (or "Attorneys' Eyes Only") shall have page numbers that correspond to the blank pages in the main transcript.

6. (a) "Confidential" information shall not be disclosed or made available by the receiving party to persons other than Qualified Persons. Information designated as "For Counsel Only" (or "Attorneys' Eyes Only") shall be restricted in circulation to Qualified Persons described in Paragraphs 3(a) and (b) above.

(b) Copies of "For Counsel Only" (or "Attorneys' Eyes Only") information provided to a receiving party shall be maintained in the offices of outside counsel for Plaintiff(s) and Defendant(s). Any documents produced in this litigation, regardless of classification, which are provided to Qualified Persons of Paragraph 3(b) above, shall be maintained only at the office of such Qualified Person and only working copies shall be made of any such documents. Copies of documents produced under this Protective Order may be made, or exhibits prepared, by independent copy services, printers or illustrators for the purpose of this litigation.

(c) Each party's outside counsel shall maintain a log of all copies of "For Counsel Only" (or "Attorneys' Eyes Only") documents which are delivered to any one or more Qualified Person of Paragraph 3 above.

7. Documents previously produced shall be retroactively designated by notice in writing of the designated class of each document by Bates number within thirty (30) days of the entry of this Order. Documents unintentionally produced without designation as Confidential may be retroactively designated in the same manner and shall be treated appropriately from the date written notice of the designation is provided to the receiving party.

Documents to be inspected shall be treated as "For Counsel Only" (or "Attorneys' Eyes Only") during inspection. At the time of copying for the receiving parties, such inspected documents shall be stamped prominently "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") by the producing party.

8. Nothing herein shall prevent disclosure beyond the terms of this Order if each party designating the information as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") consents to such disclosure or, if the Court, after notice to all affected parties, orders such disclosures. Nor shall anything herein prevent any counsel of record from utilizing "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information in the examination or cross-examination of any person who is indicated on the document as being an author, source or recipient of the "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information, irrespective of which party produced such information.

9. A party shall not be obligated to challenge the propriety of a designation as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") at the time made, and a failure to do so shall not preclude a subsequent challenge thereto. In the event

that any party to this litigation disagrees at any stage of these proceedings with the designation by the designating party of any information as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only"), or the designation of any person as a Qualified Person, the parties shall first try to resolve such dispute in good faith on an informal basis, such as by production of redacted copies. If the dispute cannot be resolved, the objecting party may invoke this Protective Order by objecting in writing to the party who has designated the document or information as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only"). The designating party shall be required to move the Court for an order preserving the designated status of such information within fourteen (14) days of receipt of the written objection, and failure to do so shall constitute a termination of the restricted status of such item.

The parties may, by stipulation, provide for exceptions to this Order and any party may seek an order of this Court modifying this Protective Order.

10. Nothing shall be designated as "For Counsel Only" (or "Attorneys' Eyes Only") information except information of the most sensitive nature, which if disclosed to persons of expertise in the area would reveal significant technical or business advantages of the producing or designating party, and which includes as a major portion subject matter which is believed to be unknown to the opposing party or parties, or any of the employees of the corporate parties. Nothing shall be regarded as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information if it is information that either:

(a) is in the public domain at the time of disclosure, as evidenced by a written document;

(b) becomes a part of the public domain through no fault of the other party, as evidenced by a written document;

(c) the receiving party can show by written document that the information was in its rightful and lawful possession at the time of disclosure; or

(d) the receiving party lawfully receives such information at a later date from a third party without restriction as to disclosure, provided such third party has the right to make the disclosure to the receiving party.

11. In the event a party wishes to use any "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information in any affidavits, briefs, memoranda of law, or other papers filed in Court in this litigation, such "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information used therein shall be filed under seal with the Court.

12. The Clerk of this Court is directed to maintain under seal all documents and transcripts of deposition testimony and answers to interrogatories, admissions and other pleadings filed under seal with the Court in this litigation which have been designated, in whole or in part, as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information by a party to this action.

13. Unless otherwise agreed to in writing by the parties or ordered by the Court, all proceedings involving or relating to documents or any other information shall be subject to the provisions of this Order.

14. Within one-hundred twenty (120) days after conclusion of this litigation and any appeal thereof, any document and all reproductions of any documents produced by a party, in the possession of any of the persons qualified under Paragraphs 3(a) through (d), shall be returned to the producing party, except as this Court may otherwise order or to the extent such information was used as evidence at the trial. As far as the provisions of any protective orders entered in this action restrict the communication and use of the documents produced thereunder, such orders shall continue to be binding after the conclusion of this litigation, except (a) that there shall be no restriction on documents that are used as exhibits in court unless such exhibits were filed under seal, and (b) that a party may seek the written permission of the producing party or order of the Court with respect to dissolution or modification of such protective orders.

15. This Order shall not bar any attorney herein in the course of rendering advice to his client with respect to this litigation from conveying to any party client his evaluation in a general way of "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information produced or exchanged herein; provided, however, that in rendering such advice and otherwise communicating with his client, the attorney shall not disclose the specific contents of any "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information produced by another party herein, which disclosure would be contrary to the terms of this Protective Order.

16. Any party designating any person as a Qualified Person shall have the duty to reasonably ensure that such person observes the terms of this Protective Order and shall be responsible upon breach of such duty for the failure of any such person to observe the terms of this Protective Order.

SIGNED this _____ day of _____, 1990.

_____

UNITED STATES DISTRICT JUDGE

AGREED AS TO FORM AND CONTENT:

_____

ATTORNEYS FOR PLAINTIFFS

_____

ATTORNEYS FOR DEFENDANTS

APPENDIX G: Model Videotape Order

APPENDIX G

Depositions recorded by non-stenographic means, including videotape, are authorized without the prior necessity of a motion and court order if taken under the following guidelines:

(1) The beginning of the videotape shall contain an announcement or other indication of the style of the case, the cause number, the name of the court where the case is pending, the physical location of the deposition, and an introduction of the witness, the attorneys, any parties or party representative who may be present, the court reporter, the video technician, and any other persons present at the deposition.

(2) The witness will be sworn on camera.

(3) The camera shall remain on the witness in standard fashion throughout the deposition. Close-ups and other similar techniques are forbidden unless agreed to by the parties or ordered by the court.

(4) The arrangement of the interrogation should be such that, in responding to the interrogating attorney, the witness will look as directly into the camera as possible.

(5) No smoking shall be allowed during the videotape, and there should be no unnecessary noise or movement.

(6) The party issuing the notice of the videotape deposition shall be responsible for the original of the videotape, and other parties shall have the option to obtain copies at their cost.

(7) A time-date generator or other suitable indexing method must be used throughout the course of recording the deposition.

(8) An announcement of the time on the videotape shall be made each time the videotape is begun and is stopped.

(9) The time of conclusion of the videotape must be announced on the videotape.

APPENDIX H: Juror Information Form

APPENDIX H

This form helps the court select a jury. Please answer all blanks in *print* and in *ink*. If the question does not apply to you, please write "NA" in it. The lawyers are entitled to information about potential jurors, but if you choose not to answer a question for private reasons, please draw a single line through it.

Name		Age	Birth Place		Religious Preference
City of Residence	Years There	Employer (ex if retired)		Type of Work	Years
Children's Ages & Sex				Grown Children's Type of Work	
Marital Status	Spouse's Name			Spouse's Birth Place	
Spouse's Employer		Type of Work			Years
List governments that you & relatives have worked for. List law enforcement but not the military.	Who?	Governmental Unit		Type of Work	
Have you served in the military?	Yes ☐ No ☐	Branch & Highest Rank			Years

School Level	School and City	Subject Studied	Degree
High School			
College			
Post College			

Describe Legal, Para-Legal, or Medical Training or Work:

Civil Suits	Have you sued or been sued?	Yes ☐ No ☐	Case Type
	Have you served on a jury? Verdict reached?	Yes ☐ No ☐ Yes ☐ No ☐	Case Type
	Have you been a witness in court?	Yes ☐ No ☐	Case Type
Criminal Actions	Have you been charged criminally, other than a traffic ticket?	Yes ☐ No ☐	Case Type
	Have you made a criminal complaint?	Yes ☐ No ☐	Case Type
	Have you served on a jury? Verdict reached?	Yes ☐ No ☐ Yes ☐ No ☐	Case Type
	Have you been a witness in court?	Yes ☐ No ☐	Case Type

List the magazines & newspapers you read.	
List the civic clubs, societies, unions, and political groups you and your spouse have joined.	
If there is a physical or other inability for you to serve as a juror, please describe it.	

APPENDIX I: Statement of the United States Attorney

APPENDIX I

U.S. Department of Justice

United States Attorney
Western District of Texas

727 E. Durango Boulevard, A-601
San Antonio, Texas 78206

(512) 229-6500
FTS 730-6500

September 12, 1991

Mr. Gerald H. Goldstein
GOLDSTEIN, GOLDSTEIN and HILLEY
29th Floor Tower Life Building
310 S. St. Mary's Street
San Antonio, Texas 78205-3199

Re: Advisory Committee for the Western District of Texas Under the Civil Justice Reform Act of 1990

Dear Mr. Goldstein:

We have been able to review the draft of the Criminal Docket Assessment Committee of September 11, 1991 which is proposed for inclusion in the Advisory Committee Report for the Western District of Texas under the Civil Justice Reform Act of 1990.

First, we reiterate that our position as reflected in the letter of the United States Attorney for this district to Ms. Judith Blakeway, dated May 8, 1991, has not changed.

Specifically, concerning the recommendations that could reduce the impact of the "ever increasing caseload upon our judicial resources," we file the following comments and objections:

(1) In response to the argument that "[b]oth the principles of federalism and the long-term health of the federal judicial system require returning the federal courts to their proper, limited role in dealing with crime," -- the increasing "federalization" of criminal law -- we note that the historic role of the federal government in prosecuting crime has been dramatically expanded as a result of national policy that this United States Attorney's Office is supporting. If this national policy is viewed as an expansion of the traditional limited role of the federal prosecutor, the response, in any event, will result in an increase in prosecutions. More importantly, however, the legislative and executive branches of the federal government, as a national priority, have chosen to increase the federal prosecutorial resources mainly as a response to the financial institution and the drug crises. While some may take issue with the prosecution of various drug offenders, the fact remains that the vast majority of the citizenry want and demand aggressive prosecutions. Further, while some may view certain prosecutable federal offenses as those traditionally prosecuted by the state, the fact of the matter is that national policy has dramatically

expanded the role of the federal prosecutor, e.g., Project Triggerlock is utilizing federal gun laws to take the career criminal off the streets.

(2) With respect to statutory mandatory minimums, it is our position that both the Congress and the Executive Branch have imposed numerous mandatory minimum sentences in drug related offenses as a reasonable response to a perceived national need to suppress drugs and drug trafficking. This district actively supports an aggressive posture on drug offenders, including the use of mandatory sentences.

(3) We vehemently object to the Committee's recommendation on the sentencing guidelines. It is our position that the sentencing guidelines is a congressional response to its belief that there were wide discrepancies for sentences imposed for similar offenses. After an exhaustive study, Congress chose to enact the guidelines. The United States Sentencing Commission has made a real effort fairly and reasonably calculating sentences, has modified the guidelines in response to perceived need, and, in addition, case law has further interpreted the guideline analysis. The sentencing guidelines are a congressional mandate done on a national level. Furthermore, it serves its purpose, to wit, sentences are fairly imposed on all defendants and the guess-work which heretofore plagued the sentencing process has been removed. Also, the guidelines, as they apply to drug offenders, make it a critical component of the sentencing process the quantity of drugs involved. A review of the sentences imposed on convicted traffickers in this district shows that lengthy jail terms are being imposed under the guidelines which again indicate that, at a national level, prosecution of these cases is appropriate.

(4) With regards to discovery practices, the report claims that "there is little incentive for the citizen accused to even consider settlement," but in reality, this statement is misleading. Most defense lawyers would concede that the pleading defendant receives not only acceptance of responsibility points, but also a sentence at the lower end of the guideline sentence calculation process. The statistical summaries seem to show that the same percentage of defendants are pleading versus proceeding to trial. See Exhibit 8.

(5) We disagree with the committee's position on witness lists and witness statements. It is our position that witness lists and witness statements should not be prematurely disclosed, and this is supported by both the Fed.R.Crim.P. and case law.

(6) With respect to plea bargaining, the United States Attorney's office continues to believe that a significant percentage of cases can and should be resolved by an appropriate plea disposition. Plea bargaining offers are left to the

discretion of the prosecutor and as such, this is not an appropriate area of discussion by the committee.

Finally, we have no objection to the recommendation that greater use be made of the Federal Magistrate Judges in criminal cases as proposed.

We thank you for the opportunity to review and express our views on the Criminal Docket Assessment report.

Very truly yours,

RONALD F. EDERER
United States Attorney

RFE/gck