CIVIL JUSTICE REFORM ACT
ADVISORY COMMITTEE REPORT

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CIVIL JUSTICE REFORM ACT OF 1990

ADVISORY GROUP REPORT

TABLE OF CONTENTS

REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990

I. Description of the Court

A. Structure

The Western District of Kentucky is comprised of 53 counties bordering Missouri, Illinois, Indiana, and Tennessee. There are four divisions: Bowling Green, Louisville, Owensboro, and Paducah.

The district currently consists of three and one-half active judges and two senior judges.[1] There is one existing judgeship vacancy. In addition, the district has three full-time and two part-time magistrate judges.[2] Three of the active judges, one senior judge, one full-time magistrate judge, and one part-time magistrate judge sit in the Louisville division. One senior judge sits in Paducah and the one-half active judge sits in the Owensboro division. All of the active judges, except Chief Judge Meredith, Judge Coffman and Senior Judge Allen, also hear cases in other divisions.

Louisville is located on a border with Indiana, is the largest city in the division, and is a significant commercial center. In addition, the population centers in each of the other divisions are located on or near borders with other states, contributing to a fairly large diversity caseload.

Two of the divisions include military installations which generate criminal caseloads. The Louisville division includes Fort Knox and the Paducah division

[1]Active judges are Chief Judge Ronald E. Meredith, Charles R. Simpson, III, John G. Heyburn II and Jennifer B. Coffman. The senior judges are Charles M. Allen and Edward H. Johnstone.

[2]The full-time magistrate judges are C. Cleveland Gambill, John Dixon, and W. David King. Magistrate Judge Gambill sits in Louisville and Ft. Knox, Judge Dixon sits in Bowling Green and Owensboro and Judge King sits in Paducah and Fort Campbell. The part-time magistrate judges are William W. Clark, who hears cases in Louisville, and Stewart B. Elliott, who hears cases in Owensboro.

includes Fort Campbell. There are five state penal institutions within the district, all of which contribute to the number of cases filed by prisoners.

II. Assessment of Conditions in the District

A. Court Resource Trends

When considering whether excessive cost and delay exists in the Western District of Kentucky there is a correlation that must be made between the condition of the docket and availability of court resources, both judicial and administrative. Therefore, the definition of the term "excessive" must be framed in this context.

Many of the statistical tables referred to in this report are for the statistical years 1991-1993. During this three-year period there has been an unfortunate fluctuation in the availability of judges to preside over the civil case process. There were numerous judgeship vacancy months, both actual and constructive, that existed during this reporting period. Chief Judge Thomas A. Ballantine became gravely ill in 1991, passed away in early 1992, and his position was vacant until September of 1992. Chief Judge Ronald E. Meredith has been ill since mid-1992. The district has been fortunate to have benefited from the assistance of several visiting judges on both the civil and criminal dockets. The following chart reflects vacant judgeship months for the statistical years 1991-1993, with an offset for visiting judgeship months included.

Vacant and Visiting Judgeship Months
SY 1991-1993

	Actual	Constructive*	Visiting Judge Months
1991	4	3	
1992	13	7	1.5
1993	5	10	.5

*Illnesses that were disabling

When considering the conditions of the civil and criminal dockets, supra, it is notable that the Indexed Average Lifespan of all civil cases began declining in 1993. This would indicate that the appointment of Judge Heyburn to the court's judgeship vacancy likely had an impact on case lifespan and pending cases over three years old. Also, this would appear to indicate that delay may, to a large degree, be predicated on the lack of a full allocation of judgeships. In addition, delays in the civil docket of the Western District of Kentucky, to a large extent, are probably not excessive in view of the judgeship vacancy months, complex cases[3], and criminal case priorities. The recommendations made in this report, however, are intended as constructive in view of the information collected regarding civil case processes in the court.

The Western District of Kentucky has recently received approval by the Judicial Conference to make the half-time judgeship a full-time judgeship. Congress, however, must authorize this allocation; and has yet to do so. In addition, because of the caseload distribution between divisions and travel required in this district, it would greatly benefit the court to have authorized an additional full-time magistrate judge.

[3]Significantly large and/or complex cases are also taxing on judicial resources. Within the past three years, the district has experienced several of these types of cases, which have consumed significant amounts of time. For example, two class action suits were initiated in the Western District and involved issues in the areas of truth in lending and eminent domain/land use associated with airport expansion. Class members totalled approximately 129,000 and 850, respectively.

The geographical and natural resource makeup of the district includes several areas heavily concentrated with coal. Consequently, the coal mining industry generates numerous, extremely complex cases. For example, several claimants attempted class action certification concerning contract disputes arising from alleged underpayments on numerous coal leases and royalty agreements dating back to the mid-1940s. An underground explosion resulting in the death of ten miners also produced several wrongful death and product liability actions. Finally, allegations of fraud, kickbacks, and mismanagement in the executive management of a large coal company also resulted in civil as well as criminal litigation.

Other examples of complex litigation in the Western District involved an action for price-fixing in the dairy industry as well as an environmental CERCLA case with more than 60 parties. The CERCLA action has already resulted in three reported opinions. Most of these actions are still pending.

Another positive factor in the Western District's performance is the pro se law clerk. The law clerk's efforts are instrumental in keeping this aspect of the docket manageable. In this district, more than one of every three civil cases are filed pro se.[4] The pro se law clerk assesses civil cases filed by non-lawyers at the time they are filed, in particular, prisoner petitions for relief, and often at later stages for interim or dispositive rulings. Because of the specialized assistance of the pro se law clerk, the court is able to reach disposition rates that are below national averages for disposition times. The one problem found was that this position is not graded as career. Several of the law clerk positions specifically designated to particular judges are categorized as "career" positions, with accompanying pay and benefits. In view of the performance of this position, it would appear to be in the best interest of the court to designate the pro se law clerk as career to ensure retention of professional people in this position.

The staffing levels of the Clerk's Office are inadequate. The Judicial Conference of the United States currently authorizes the Clerk of Court to hire only if the office is staffed at or below 72 percent of the work measurement formula. The Clerk's Office in the Western District of Kentucky is currently staffed at only 84 percent of formula, thereby inhibiting the performance of essential case management functions, i.e., monitoring, inventory assessment and statistics.

Recommendations

-That Congress authorize the creation of a full-time judgeship to replace the half-time position.

-That the Judicial Conference approve the addition of one full-time magistrate judge.

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[4]Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990, SY 1993 Statistical Supplement.

-That the Judicial Conference approve a career classification for pro se law clerks.

-That Congress appropriate funds necessary for appropriate Clerk's Office staffing levels.

B. Condition of the Docket

The Act requires the Advisory Group to make "a thorough assessment of the state of the court's civil and criminal dockets."[5]

1. Civil Cases

a. Civil Cases Generally

Throughout the United States, civil cases filed in federal district courts rose .7 percent in SY 1993.[6] The civil filings in the Western District of Kentucky increased 2.9 percent in the period ending June 30, 1993.[7] In the period between July 1, 1992, and June 30, 1993, 1,498 civil cases were commenced in the district, as compared to 1,458 for the same time period ending June 30, 1992.[8] The total number of civil filings increased during the 1993 period for the first time in five years.[9]

b. Nature of Cases in District; Particular Case Populations

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[5]28 U.S.C. § 472(c)(1). In making this assessment, the statute directs the Group to:

(1) determine the condition of the civil and criminal dockets;
(2) identify trends in case filings and in the demands being placed on the court's resources;
(3) identify the principal causes of cost and delay in civil litigation...; and
(4) examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts.

[6]Statistical data provided by Admin. Offrice of United States courts.

[7] Prepared based on statistics provided in Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990, SY 93 Statistics Supplement, September 1993 at 10 (hereinafter "Guidance") and statistical data provided by the Administrative Office of United States Courts.

[8]Guidance at 10.

[9]Total number of civil filings for the past five years:

1989	1990	1991	1992	1993
1,690	1,600	1,468	1,458	1,498

Table 1[10] provides an illustrative overview of case filings according to case type.

Table 1: Filings by Case Type, SY84-93

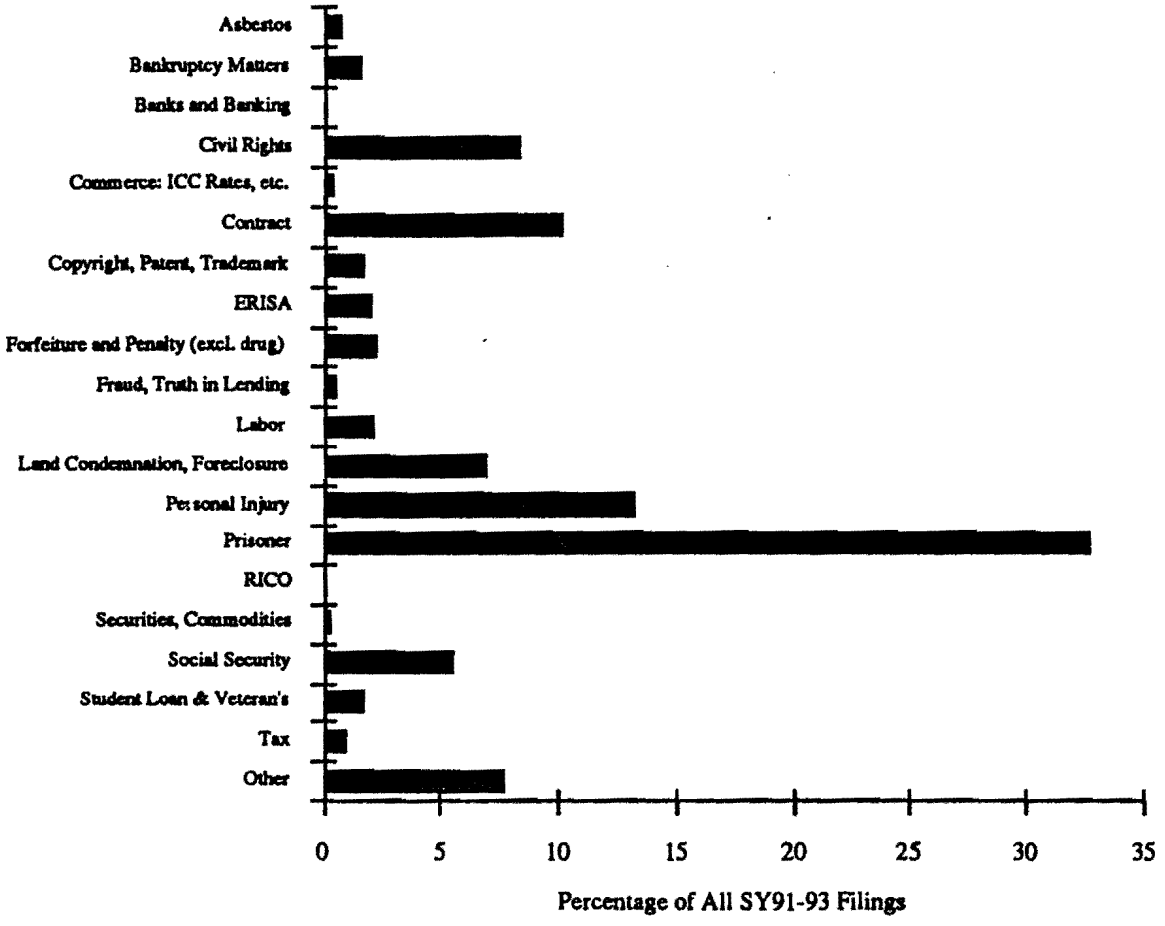
Western District of Kentucky	YEAR									
	84	85	86	87	88	89	90	91	92	93
Asbestos	11	3	30	13	42	14	10	23	12	0
Bankruptcy Matters	32	23	23	31	23	35	30	21	23	27
Banks and Banking	4	2	1	1	1	1	4	0	4	4
Civil Rights	135	130	116	119	118	83	106	120	123	129
Commerce: ICC Rates, etc.	60	51	54	61	42	50	2	3	6	10
Contract	284	288	275	216	227	216	180	161	147	142
Copyright, Patent, Trademark	26	22	15	16	44	32	22	23	23	33
ERISA	27	26	17	21	23	29	24	25	38	27
Forfeiture and Penalty (excl. drug)	22	31	14	31	16	24	49	40	28	34
Fraud, Truth in Lending	2	14	17	8	8	8	2	9	9	5
Labor	41	47	42	44	29	37	31	32	36	30
Land Condemnation, Foreclosure	73	53	49	96	88	53	76	88	110	109
Personal Injury	219	174	313	268	190	270	191	207	172	209
Prisoner	271	334	357	377	402	554	650	481	491	477
RICO	0	0	1	2	0	3	4	4	4	0
Securities, Commodities	6	10	5	7	6	7	7	7	5	2
Social Security	369	288	133	161	130	95	61	66	69	110
Student Loan and Veteran's	402	468	266	24	47	48	18	14	46	19
Tax	16	30	26	37	14	22	14	23	11	9
All Other	115	130	124	92	96	109	119	121	101	122
All Civil Cases	2115	2124	1878	1625	1546	1690	1600	1468	1458	1498

[10]Federal Judicial Center Supplement, SY 93.

The district has one large case population: cases filed by prisoners count for approximately 33 percent of the cases filed during the period SY 91-93.[11] Chart 1[12] clearly supports this assertion.

Chart 1: Distribution of Case Filings, SY91-93

Western District of Kentucky



[11] *Id.*
[12] *Id.*

Prisoners filed 477 cases in the period running from July 1, 1992, through June 30, 1993.[13] By comparison, Bankruptcy (27), Banks and Banking (4), Commerce: ICC Rates, etc. (10), Forfeiture and Penalty (excl. drug) (34), Fraud, Truth in Lending (5), Land Condemnation, Foreclosure (109), RICO (0), Securities, Commodities (2), Student Loan and Veteran's (19), and Tax (9) cases account for another 219 cases.[14] The subject of weighted filings and their impact on the docket will be addressed later in this report.

c. Civil Cases by Divisions

Civil case filings, as one would expect, are concentrated in Louisville. Of the 1,498 civil cases filed during SY 93, 786 were filed in Louisville, 329 were filed in Paducah, 198 were filed in Bowling Green, and 185 were filed in Owensboro.[15] The division totals for SY 92 and SY 93 are reflected in the following chart (next page):

[13]Statistical profile prepared for Western District of Kentucky by the Administrative Office of the United States District Courts.

[14]Guidance at 10, Table 1.

[15]Statistical profile prepared for Western District of Kentucky by the Administrative Office of the Unites States Courts.

Civil Cases Filed By Division

Statistical Years[16] 1992 and 1993

Division	1992	1993	Net Change	% of Change
Louisville	798	786	-12	-1.5
Paducah	308	329	21	6.8
Bowling Green	171	198	27	15.8
Owensboro	178	185	7	3.9
TOTAL	1,455	1,498	43	2.955[17]

Significant differences exist among the divisions. The following chart, next page, illustrates the distribution of cases filed in each of the divisions according to the type of case for calendar year 1992.

[16]Statistical years run from July 1 through June 30. This measurement period was recently changed by the Administrative Office to commence October 1 and end September 30. However, the instant chart calculations were made for the July 1-June 30 period.

[17]These calculations are based on the statistical profile prepared for Western District of Kentucky by the Administrative Office of the United States District Courts. This data differs from that provided in the Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990, SY 93 Statistics Supplement, September 1993 insofar as the Administrative Office statistics show that 1,455 civil cases were filed in SY 92 and the Guidance statistics indicate that 1,458 cases were filed in SY 92. Consequently, this divisional breakdown differs slightly from the numbers previously provided in this Report.

Distribution of Cases filed, by Division

During Calendar Year 1992

By Percentage of Docket

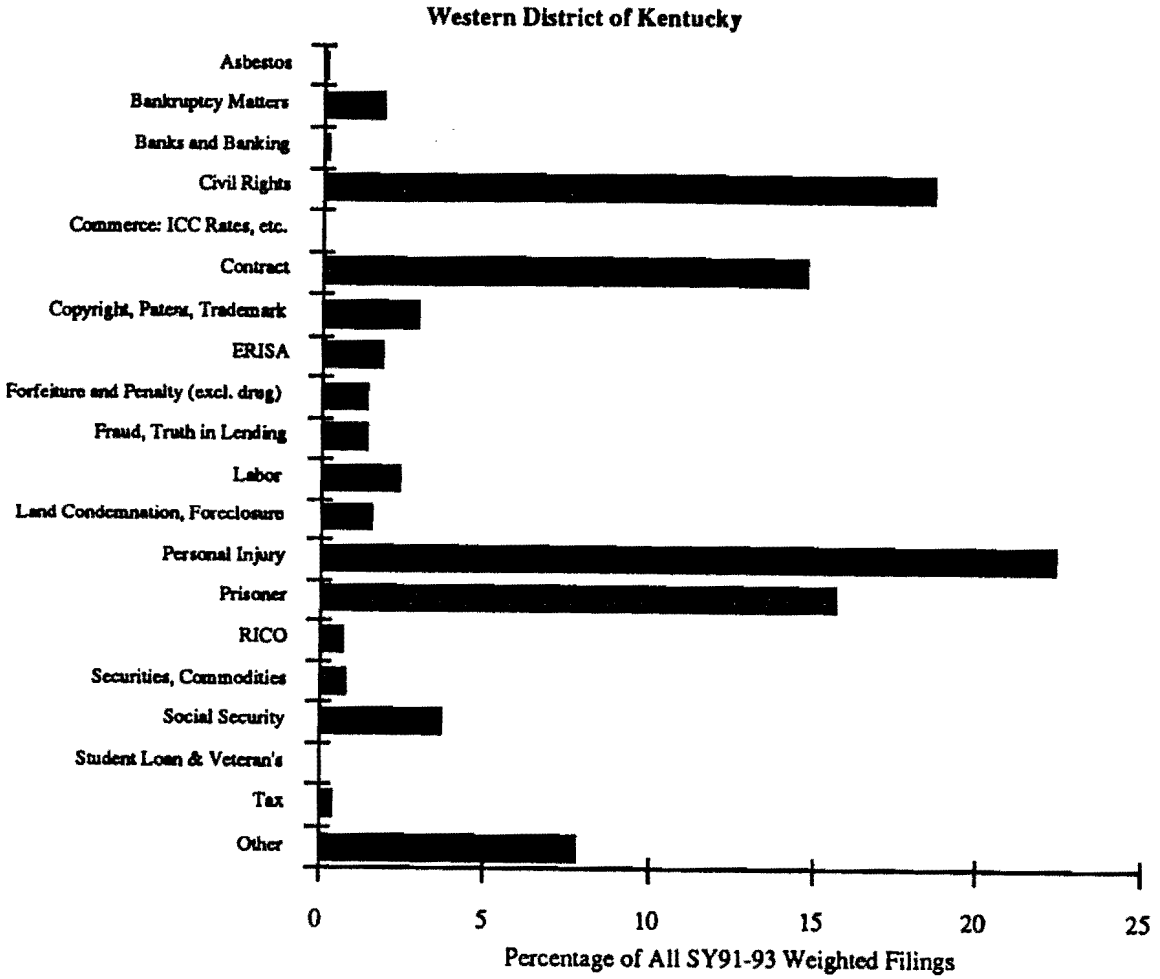
Type of Case	Bowling Green	Louisville	Owensboro	Paducah
Asbestos	8	42	8	42
Bankruptcy	0	74	16	10
Banking	0	67	0	33
Civil Rights	14	63	11	12
Commerce/ICC	17	50	17	16
Contract	16	49	18	17
Copyright, Patent Trademark	18	74	4	4
ERISA	13	68	8	11
Forfeiture, Penalty & Tax	15	65	10	10
Fraud, Truth n Lend	0	100	0	0
Labor	0	68	26	6
Land Condemn & Foreclosure	19	35	21	25
Personal Injury	11	44	15	30
Prisoner	7	61	6	26
RICO	0	50	25	25
Securities, Commodities	0	67	33	0
Social Security	28	46	10	16
Student Loan & Vets	0	73	16	11
All Other	8	61	17	14
All Cases	11	54	13	22

d. Weighted Filings

"Weighted filings" refers to the number of actions per judge adjusted for case difficulty. It should also be noted that the contributions of the senior judges to the civil caseload are not reflected in the statistics on weighted filings. These statistics are calculated based on the number of active judges authorized for the district. One senior judge in this district, however, hears only civil cases.

Chart 3 employs the current case weights (revised in August 1993) to show the approximate distribution of demands on judge time among the case types accounting for the past three years' filings in this district.

Chart 3: Distribution of Weighted Civil Case Filings, SY91-93



Personal injury and civil rights cases account for the two largest percentages of weighted filings. Personal injury actions comprise 23 percent of all weighted filings and civil rights cases account for 19 percent.

2. Criminal Cases

During the period ending in June 1993, criminal cases filed nationwide declined 3.3 percent.[18] The Western District saw a decrease of just over 17 percent in criminal filings commenced in the twelve month period ending June 30, 1993.[19] A better indication of the burden that a criminal caseload presents to a court rather than the number of criminal cases is the number of criminal defendants.[20] Using this measure, the Western District also saw a decrease in 1993. During SY 1993, criminal cases involving 500 defendants were commenced, down from 629 defendants in SY 1992.[21] Approximately 11 percent of all defendants were drug defendants.[22] The following chart, next page, demonstrates the activity of criminal filings according to the number of defendants involved for the district covering SY 84-93.

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[18]Federal Judicial Center Supplement, SY 93.

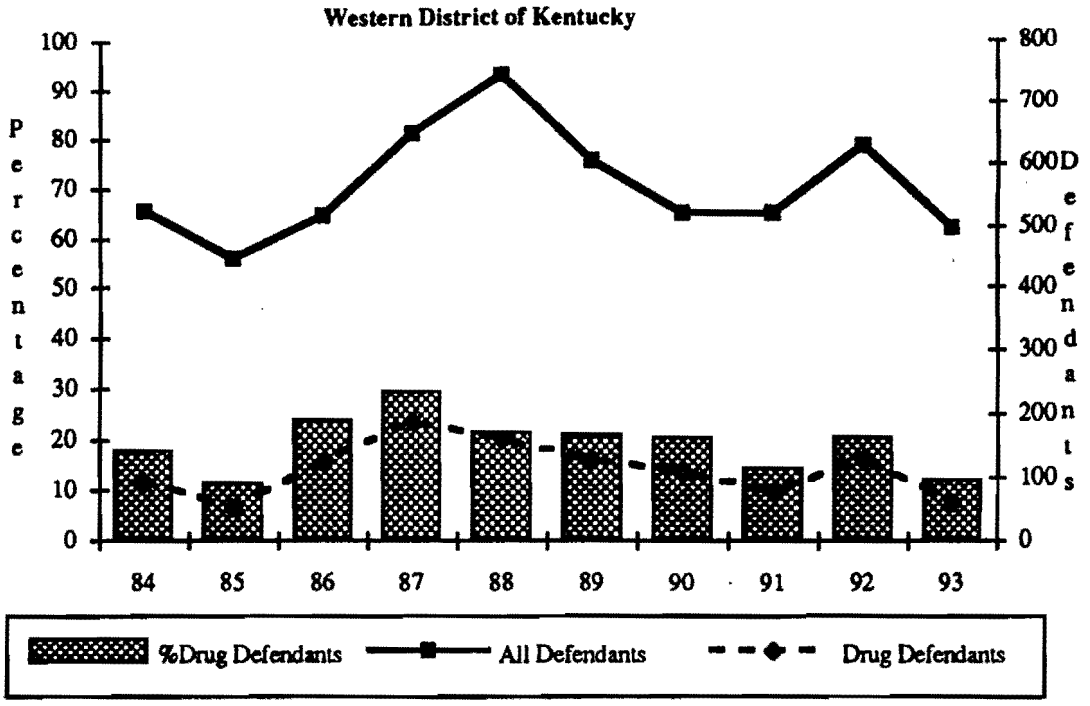
[19]Prepared based on statistical profile prepared for Western District of Kentucky by the Administrative Office of the United States Courts.

[20]Guidance at 13 ("We have counted criminal defendants rather than cases because early results from the current FJC district court time study indicate that burden of a criminal case is proportional to the number of defendants.")

[21]*Id.*

[22]*Id.*

Chart 9: Criminal Defendant Filings with Number and Percentage Accounted for by Drug Defendants, SY84-93



In addition, all of the magistrate judges spend a substantial amount of time on criminal matters. For example, full-time magistrate judges covering the two army bases in the district spend at least one day per week on criminal matters.

3. Trials

During calendar year 1992, 1,570 civil cases were terminated in the Western District.[23] As of October 31, 1993, the district has terminated 1,419 civil cases.[24]

A measure of the relative burden of trials on the court is both the number and length of civil trials. Trial activity in the Western District of Kentucky for Calendar Year 1992 and Calendar Year 1993 (through October), is illustrated in the following chart.[25]

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[23]Statistical data provided by clerk's office

[24]*Id.*

[25]Prepared from Judges' monthly reports for trials and other court activity (JS10). It should be noted that trial time, as reported on the JS10 includes proceedings such as hearings on temporary restraining orders and sentencing. It should also be noted that the trial time reflected includes the trial time of visiting judges.

1992

Civil Trials:	43
Number of trial days:	100
Trials lasting:	
1 day:	20
2 days	6
3 days	7
4 days	3
5 days	4
6-7 days	3
Criminal Trials:	89
Number of Trial Days:	174
Trials lasting:	
1 day:	54
2 days:	15
3 days:	6
4 days:	7
5 days:	3
6-10 days:	2
11-15 days:	2

1993 (through October)

Civil Trials:	48
Number of Trial Days:	95
Trials lasting:	
1 day:	23
2 days:	10
3 days:	10
4 days	3
6-10 days:	2
Criminal Trials:	70
Number of trial days:	121
Trials lasting:	
1 day:	49
2 days	11
3 days:	3
4 days:	4
5 days:	1
6-10 days:	1
11-15 days:	1

Thus far in 1993, the judges have spent 216 days in trial. Civil trials account for 95 of those days; approximately 44 percent of all trial time. Conversely, criminal trials account for 121 of total trial days; approximately 56 percent of all trial time. In calendar year 1992, civil trials took approximately 36 percent of all trial time and criminal trials accounted for the remaining 64 percent.

4. Length of Time to Disposition

In SY 93, the median time from issue to trial in civil cases in the Western District was 24 months.[26] Nationally, however, the median for all trials was 19 months. The median within the Sixth Circuit for all trials was 19 months.

The most recent judicial workload profile indicates that the time from issue to trial has fluctuated over the past five years.[27] For the period ending June 30, 1993, the Western District was eighth in the circuit. Only four other circuits have median times from issue to trial lower than that of the Sixth Circuit.

Data for a single year (or even several years) cannot, however, give a reliable indication of the "pace" of case dispositions, and may actually be misleading. In order to give a more accurate picture of the pace of the court, the Administrative Office has created a measure called the "Indexed Average Lifespan," which compares the characteristic lifespan of the court's civil cases to that of all district courts over the past decade.[28] The Indexed Average Lifespan for the Western District is indexed at 13 months and the national average for Indexed Average Lifespan is indexed at 12 months. In the Western District, the indexed

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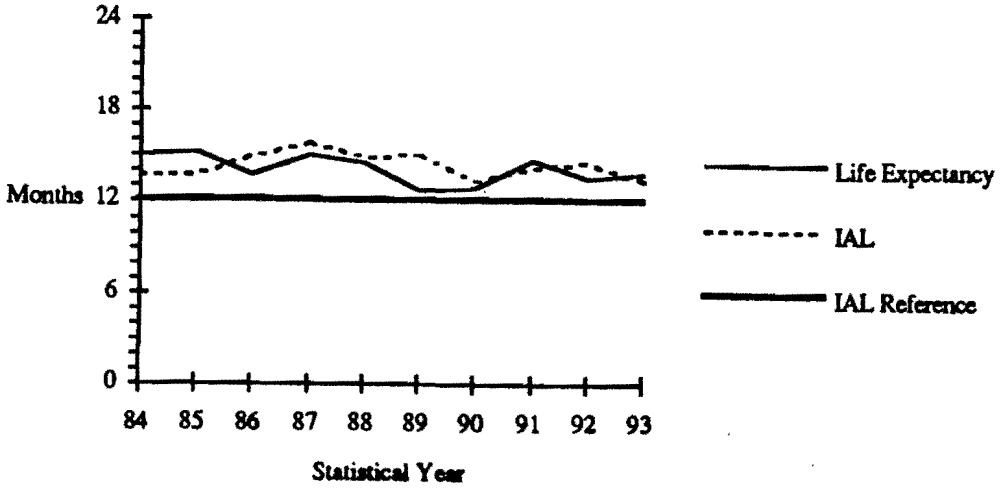
[26]Statistical profile prepared for Western District of Kentucky by the Administrative Office of the United States Courts.

[27]The figures are:
1992: 18 months
1991: 25 months
1990: 19 months
1989: 19 months
1988: 17 months

[28]Guidance at 12-13.

average lifespan for all cases in SY 93 was down from 15 in SY 92, and equal to a ten year low in SY 90. During every year of the past decade, the indexed average lifespan of the cases in the district has been above 12.[29] The following chart illustrates IAL activity for the district.

Chart 5: Life Expectancy and Indexed Average Lifespan, All Civil Cases SY84-93
Western District of Kentucky



When only "Type II"[30] cases are considered, however, the indexed average lifespan is around 15 for SY 93.[31] This number is also down from SY 92. In SY 92 the Indexed Average Lifespan for Type II cases was approximately 18 months. The SY 93 figure is the lowest it has been since SY 88. Chart 6, following, demonstrates this trend:

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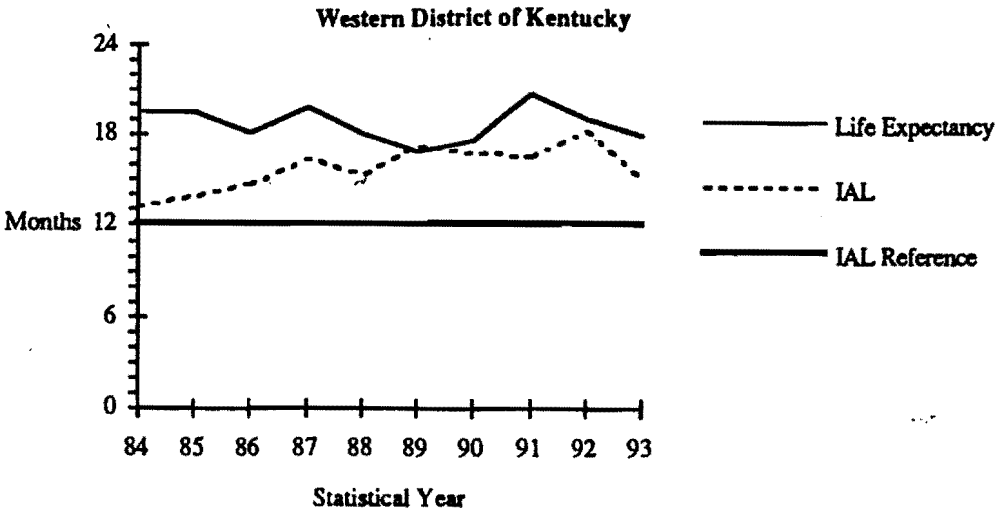
[29] *Id.* at 13.

[30] The FJC divides cases into two types. Type I cases are distinctive because within each case type the vast majority of the cases are handled the same way; for example, most Social Security cases are disposed of by summary judgment. Type II cases, in contrast, are disposed of by a greater variety of methods and follow more varied paths to disposition; for example, one contract action may settle, another go to trial, another end in summary judgment, and so on." Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990, February 1991.

[31] Guidance at 13.

Chart 6: Life Expectancy and Indexed Average Lifespan, Type II Civil Cases SY84-93



Another measure of some usefulness is the percentage of the court's docket that is over three years old. In SY 93, 10.1 percent of the court's cases were three years old or older. This is the lowest percentage of three-year-old cases from the past five years.[32]

5. Motions, and Bench Trials

The Act requires all judicial officers to complete forms listing all of their submitted motions and bench trials over 6 months old. The judges in the Western District reported the following figures for the periods ending September 30, 1991, March 31, 1992, September 30, 1992, March 31, 1993 and September 30, 1993.[33]

[32]Federal Judicial Center Supplement, SY 93.
[33]Statistics provided by judges' chambers.

Motions, and Bench Trials

for Semi-Annual Periods

	9-30-91	3-31-92	9-30-92	3-31-93	9-30-93
Bench Trials Submitted Over 6 months	4	2	2	2	4
Motions Pending Over 6 Months	56	78	66	127	60

C. Attorney and Litigant Perceptions About Pretrial Practices in the Western District

1. Attorneys' Survey

During June 1992, counsel in 100 Western District civil cases which had been closed during the previous two years, apportioned among plaintiff and defendant counsel, the division offices, and subject categories, received a survey from the Advisory Group seeking responses about pretrial practices in the Western District of Kentucky. The results are included in this report as Appendix A.

The average respondent has been practicing law for 18 years, with 70 percent of the law practice in civil cases. Most respondents are in private practice, with an average of 17 other attorneys. Nearly half of the respondents' civil practice consists of representing plaintiffs. Sixty percent of the respondents have not encountered unreasonable delays in the Western District. For the 40 percent who had encountered such delays, the tactics of counsel and judicial inefficiencies contributed to most respondents' perceptions of the delays. Similarly, two thirds of the respondents have not found their Western District litigation to be unnecessarily costly. For the one third who had identified such costs, more than half attributed the costs to the same two factors - counsel's conduct and judicial inefficiencies.

Counsel's conduct primarily and specifically consisted of excessive numbers of depositions and deposition questions, overbroad document requests, raising frivolous objections, and failure to attempt in good faith to resolve issues without court intervention.

When asked about the case management practices currently used by the court, slightly less than one third stated that ineffective case management by judges contributed to delays or costs. More than 40 percent of that group identified the following as having a moderate or substantial effect on their assessment of excessive cost or delay.

* too few status conferences;
* too few pretrial motion conferences;
* too few deadlines;
* failure to resolve discovery and other motions promptly;
* failure to initiate settlement discussions;
* failure to tailor discovery to the needs of the case;
* inadequate judicial preparation for conferences or proceedings;
* failure by the judge to assign reasonably prompt trial dates;
* failure of the judge to meet assigned trial dates.

When asked about case management solutions implemented in other districts or under active consideration in this or other districts, more than 40 percent of the respondents believed that the following proposals would have a substantial or moderate effect in expediting civil litigation or reducing its cost:

* shorter time limits for completing various stages of litigation;
* requiring counsel to attempt to resolve issues before court intervention;

* permitting pre-motion conferences with the court on any motion at the request of any party; permitting the filing of procedural, non-dispositive motions by letter rather than by formal motions and briefs;
* providing a 30 page limitation for memoranda of law, except for cause;
* requiring mandatory arbitration of all disputes in which the amount in controversy is less than $100,000;
* providing court-annexed mediation upon mutual consent of parties for some or all issues in dispute;
* making available attorneys who are experts in the subject matter in dispute to evaluate claims and defenses and to assist parties in settlement negotiations;
* requiring attendance of parties and/or their insurers at court settlement conferences;
* increasing availability of telephone conferences with the court;
* requiring automatic disclosure of information shortly after joinder of the issues on important witness identities, general description of documents relied upon to prepare pleadings or likely to be used in support of allegations, and existence and contents of insurance agreements;
* requiring automatic disclosure prior to final pretrial conference of trial experts, their qualifications, opinions and the basis therefor;
* cost shifting for broad discovery requests where the burden of responding is disproportionate to the amounts or issues in dispute;
* defining the scope of permissible discovery by balancing the burden of expenses of the discovery against its likely benefit;
* assessing the costs of discovery motions on the losing parties;

* requiring discovery on certain issues or stages of the case to be completed before permitting discovery respecting other issues or stages;
* limiting the number and length of depositions presumptively permitted.

The following proposals received less than 40 percent support for a substantial or moderate effect in expediting civil litigation or reducing its cost:

* requiring Rule 11 sanctions motions to be separately filed and not appended to another motion;
* providing less time for completing discovery;
* limiting types of interrogatories.

Slightly more than one half of the respondents believed that the cost and time to litigate a civil action has improved or remained unchanged since 1989. Five months was the average response to the question about how long it has taken since 1989 from the time their civil cases were ready for trial until trial actually commenced.

2. Litigants' Survey

During Fall, 1992, the parties in the same cases in which their counsel received surveys also received surveys. The results of the survey are included in this report as Appendix B.

Of the respondents, slightly more than one half of the respondents had been plaintiffs, and slightly less than one half had a contingent fee arrangement with their counsel. Almost one half of the cases had been settled, and most of the rest had been tried or disposed of by summary judgment. One half of the respondents stated that the case had taken more than 24 months from filing to resolution, and more than one half stated that the case should have taken one to six months to resolve. More than two thirds believed that their case had taken "much too long" to resolve, with much of the blame being given to opposing counsel or parties. No one aspect

of the proceeding was identified as taking too much time, but almost half blamed the "system" for delays. The responses were scattered as to what should be done to speed the process.

More than one half stated that the monetary costs of the case were much or somewhat too high, especially discovery costs, attorney's fees and their own travel expenses and time lost from other things. Again, the "system" was most frequently identified as the cause of the high costs, with most naming speedier resolution as the best way to reduce expense. More than one half would have accepted mediation or binding arbitration as an alternative method of resolving the dispute.

D. Description of Current Pretrial Practices in the Western District

Four judges and the full-time magistrate judge stationed in Louisville completed a questionnaire about civil case processing and differential case management techniques. There is some variation in pretrial practices among the chambers in the Western District. All of the judges responding to a questionnaire from the Advisory Group regularly supervise pretrial activities personally instead of assigning cases to pretrial supervision by magistrate judges. However, all of the judges do assign some types of cases to the magistrate judges.

1. Assignment of Cases

Due to the recent appointment of Judge Coffman to fill the one-half judgeship in this district as well as Judge Johnstone's announcement of senior status, case assignments are as follows:

Bowling Green	
Heyburn	100%
Louisville	
Meredith[34]	27%
Simpson	38%
Heyburn	7%
Allen[35]	15%
Johnstone[36]	13%
Owensboro	
Simpson	10%
Coffman	90%
Paducah	
Heyburn	35%
Johnstone[37]	65%

2. Monitoring of Process, Filings

All of the judges utilize one person, usually the courtroom deputy, to monitor service of process. All permit extensions of time as long as the trial date is not affected or there is good cause shown by the opposing party. The Joint Local Rules also permit the parties to agree to one extension without Court intervention.

3. Initial Scheduling Orders and Conferences

All of the respondents use a scheduling order, with each using a different standard order according to his preferences. By Joint Local Rule 22, certain types of cases are exempt from Rule 16 conferences. The format of the initial conference varies. Judge Johnstone uses it to narrow issues, explore anticipated problems, determine the time needed to complete discovery and when the case will be ready for trial. Judge Allen states his understanding of the nature of the case and the specific issues, determines the type of discovery which will be necessary and how

[36]Judge Meredith is allowed a 75% docket as Chief Judge.
[35]Senior Judge
[36]Senior Judge
[37]Senior Judge

long it is likely to take, and sets dates for filing summary judgment motions and for trial. Judge Simpson asks the attorneys to explain the case, discusses anticipated discovery problems, establishes discovery deadlines agreed to by the parties, explores both settlement and consent to trial by the magistrate judge, and explains when a final pretrial conference will be scheduled.

The judges split on whether the conference is effective. Judge Johnstone stated that it gives him a better understanding of the case and the docket. Judge Simpson said that his requirement of counsel filing a conference statement and litigation plan forces the attorneys to make an early evaluation of the case and to discuss settlement. Judge Heyburn uses the conference to limit issues and settle cases. Magistrate Judge Gambill assesses the progress of the case, anticipate discovery disputes, and inject the possibility of settlement. Judge Allen believes that the same scheduling results of a conference could be achieved by an order directing the parties to meet and submit their agreement on deadlines.

Most of the judges think that Rule 16 conferences are an effective case management tool, and that certain types of cases (*e.g.*, social security, *pro se* prisoner, habeas corpus) should continue to be exempt from the requirement of a Rule 16 conference. All stated that a judge should not always hold a Rule 16 conference. Case management orders are an effective case management device, but the judges split on whether they are more effective in certain types of cases.

Judge Johnstone and Judge Heyburn do not use the magistrate judge for the Rule 16 conferences, unless the case has been referred to the magistrate judge for all pretrial matters. Judge Allen has the magistrate judge conduct Rule 16 conferences, and conducts the final pretrial conference himself. When a magistrate judge conducts a Rule 16 conference for Judge Simpson, he follows Judge Simpson's approach to the conference described above, plus he rules on any non-dispositive pretrial matters which are pending at the time. Magistrate Judge

Gambill stated that Chief Judge Meredith routinely refers all civil cases to him for scheduling conferences.

4. Final Pretrial Conferences

Final pretrial conferences are usually held either at the discretion of the court or at the request of counsel, or when the deadline for filing dispositive motions has passed. The judges send pretrial orders to counsel. At the conference, most of the judges take an active role in exploring settlement possibilities. Judge Simpson rarely bifurcates trials, unless liability is a very close issue. Judge Johnstone bifurcates only after discussion with counsel. Judge Allen bifurcates when the proof does not involve significant overlap. Magistrate Judge Gambill routinely bifurcates only insurance coverage and bad faith claims.

5. Setting Trial Dates

All of the judges use a date certain (at the pretrial conference or after the deadline for submitting summary judgment motions) for setting trials, and most stack multiple cases for the same date. Trials are scheduled at a conference with counsel present to use their input.

When a case is ready for trial, Judge Simpson and Judge Johnstone stated that it takes three to six months to reach the case for trial. All social security and most prisoner rights cases are referred to the magistrate judge for handling non-dispositive matters and fact finding. The judges encourage counsel to consent to trial before a magistrate judge, as early as possible or at a Rule 16 scheduling conference. The judges believed that it would be useful to assign all cases brought by a particular pro se plaintiff to the same judge.

6. Discovery Practice

All of the respondents set cut-off dates for discovery. Discovery conferences under Rule 26(f) are conducted if necessary, or in conjunction with a Rule 16 conference. Judges Johnstone, Simpson and Heyburn routinely refer discovery

disputes to a magistrate judge, who has authority to handle hearings. Some discovery disputes and other pretrial matters are also referred to the magistrate judge.

Most of the judges stated that the court's handling of discovery disputes should not differ based on the category of case. The judges observed that limitations should be placed on discovery and attorney fees. Expediting civil cases can be effected by scheduling deadlines as soon as the issues are joined, and imposing sanctions for unnecessary discovery disputes.

7. Motion Practice

Most motion practice is completed without oral arguments. The filing of motions, responses, and briefs are monitored by the courtroom deputy clerk. Attorneys' proposed orders are used in routine matters, but not in dispositive situations. One judge expressed the view that wholesale submission of proposed orders wastes time and resources. A motion day practice is disfavored in favor of examining the case record and/or holding pretrial conferences. Oral rulings on motions are often made at pretrial conferences. Internal policies for handling motions ready for ruling are to: 1) quickly rule on routine motions; and 2) for those requiring research, to give priority based on the date of the motion's submission or to give urgent matters and cases imminent for trial. Opinions are published only when they may clarify or guide a legal issue.

E. Conclusions

The Advisory Group concludes that civil litigation in the Western District of Kentucky is generally well-managed. Neither a majority of attorneys surveyed nor judicial officers interviewed or otherwise consulted during our assessment mentioned systemic problems with the flow of cases through the court. The judges, however, believe that the criminal docket displaces and significantly delays the civil

docket because it takes precedence. They specifically raised the impact of the Sentencing Guidelines as an impediment to more fully addressing the civil caseload.

The court is above the national median on time to disposition for most cases, however, trends indicate that progress is being made to reduce disposition times. Judicial illnesses and vacancies have contributed significantly to this statistic. Except for prisoner petitions, we have identified no specific area of cases in which filings are growing appreciably. Nevertheless, the Advisory Group has identified two areas in which the state of the docket suggests that delay or cost-reduction measures are appropriate. The time to trial is longer in the Western District than in many districts, a fact that may be associated with a general perception that pretrial deadlines and trial settings are not firm. In addition, review of the docket confirmed a backlog of pending motions in several chambers. However, recent statistics indicate that this number is in decline. Moreover, regardless of the overall state of the docket, it is clear to the Advisory Group that some unnecessary cost and delay exist in civil litigation in the Western District. We now turn to our conclusions concerning causes of cost and delay in this district and our recommendations for improvement.

III. Identification of Causes of Cost and Delay; Recommendations

The Advisory Group has identified four areas that contribute to some unnecessary cost and delay in the Western District of Kentucky: (1) a reluctance to adhere to pretrial deadlines; (2) delays associated with pretrial motions; (3) inefficiencies in discovery practice; and (4) underuse of alternatives to litigation.

A. Pretrial Management and Practice

1. Assessing Delay in Pretrial Practice

The Civil Justice Reform Act requires consideration of various pretrial management strategies including early judicial involvement in cases, the setting of

an early, firm trial date, and the use of differing "tracks" for cases based on an assessment of their complexity. The Advisory Group evaluated the current practices of the court in light of these suggestions.

Despite differences in pretrial management strategies among the judges, we conclude that assuming increased early and ongoing involvement by judges in the pretrial period would result in cost savings or reduce delay. This promise is based on our assessment of the need for a case management plan that will be filed before the scheduling conference.

We are unconvinced that a formal system of tracks would significantly aid efficiency. The district already exempts a number of categories of routine cases from the requirements of Fed. R. Civ. P. 16(b) (see Joint Local Rule 22) and has an efficient system for handling pro se and prisoner cases through use of a pro se law clerk. In addition, the judges all use scheduling orders which force the attorneys to think about their cases and evaluate them before the scheduling conference. Judge Simpson, for example, requires the attorneys to meet prior to the scheduling conference and create a pretrial agenda, of sorts. We believe that expanding the use of his order or a comparable order would produce a more realistic and individualized pretrial schedule than requiring a case to be placed on a "track" early in its life.

There are other ways in which pretrial practices in the district can be improved. First, attorneys surveyed by the Advisory Group indicated that pretrial deadlines are not always strictly enforced. This may be due in part to the practice of issuing some scheduling orders without consultation with the attorneys, with the result that the deadlines are not realistic. The Advisory Group recommends, therefore, that a Local Rule be adopted to require preparation by the attorneys of a realistic schedule early in the case, and that a Local Rule against routine

enlargements of pretrial deadlines (thereby amending Joint Local Rule 6(a)(1)) be adopted and enforced.

Second, as suggested by the Act,[38] the Advisory Group has concluded that setting early, firm trial dates would reduce cost and delay in the pretrial process in this district. Currently, the judges' procedures for setting trial dates vary considerably, with one judge setting the date at the first pretrial conference, and others waiting until discovery is substantially complete. Lack of consistency in setting trial dates, coupled with a relaxed attitude on the part of some counsel with respect to pretrial deadlines, contributes to the relatively long wait for trials in the district.

2. Recommendations

a. Proposed New Joint Local Rule 4(f): Trial Settings. The Advisory Group recommends that the court adopt a joint Local Rule requiring that trials normally be commenced within eighteen months of the filing of the complaint.

> All trials shall commence eighteen months after the filing of the complaint, unless the court determines that, because of the complexity of the case, or the demands of the court's docket, the trial court cannot reasonably be held within such time.

The Advisory Group believes that setting an early and firm trial date is the best way to focus the attention of attorneys and the court on a case. Early, firm trial settings will encourage cooperation in discovery and adherence to deadlines established in the case management plan contemplated by the following recommendation. We recognize, however, that early and firm trial dates should be implemented only in conjunction with those other measures, *e.g.*, adherence to case management plan deadlines and prompt rulings on motions. We also recognize that in specific cases the presumptive deadline could produce injustice and increase costs.

[38] See 28 U.S.C. § 473(a)(2)(B).

b. Proposed Local Rule: Case Management Plan: Scheduling Orders. The Advisory Group makes the following recommendation as an amendment to Joint Local Rule 22 for the pretrial administration of all cases that are not exempted by current Joint Local Rule 22 from Fed. R. Civ. P. 16(b).

i. Following the appearance of counsel for all defendants, and in any event no later than sixty days after the filing of the complaint, the court shall issue an order requiring counsel for all parties (or parties appearing pro se) to confer, prepare and file a case management plan within a reasonable time of the entry of the order. The matters to be covered by the plan shall be prescribed by a new Joint Local Rule 22. The plan should normally be premised on a trial setting of at most eighteen months after the filing of the complaint. If counsel agree that the case cannot reasonably be ready for trial within eighteen months, the plan should state in detail the basis for that conclusion. The plan should also incorporate the scheduling and other agreements of the parties as well as advise the court of any substantial disagreements among the parties on the matters covered by the conference.

ii. After the case management plan is filed, the court should set a scheduling conference and issue a scheduling order within 120 days of the filing of the complaint as prescribed by Federal Rule of Procedure 16(b).

iii. If the case management plan is inadequate or reflects material disagreements among counsel the court should either:

(a) Proceed with the scheduling conference on the noticed date, to be followed by an entry reflecting the matters ordered and agreed to at the conference and setting a firm trial date; or

(b) Issue an order without further hearing adopting the acceptable portions of the plan, omitting unacceptable portions, supplying omitted matters, resolving disputed matters, vacating the pretrial conference setting, and setting a

firm trial date. The court may choose to conduct a telephone conference with counsel prior to entering such an order.

iv. As an inducement to the parties to consent to a magistrate judge where the magistrate's duties permit the handling of more cases, orders setting trial dates may offer an alternative, earlier trial date in the event the parties consent to refer the case to the magistrate judge.

v. Items to be covered in the conference include:

(1) voluntary disclosure of discovery information without the necessity of formal discovery requests;[39]

(2) staged discovery and/or issues appropriate to facilitate early resolution;[40]

(3) contentions;

(4) possible stipulations and discovery deadlines;

(5) whether the parties will consent to a referral of the case to a magistrate judge with approval of the court;

(6) a schedule for the filing of dispositive motions;[41]

(7) time limits on the joinder of additional parties and for amendments to pleadings;

(8) Whether one or more interim pretrial conferences would be beneficial;

(9) a recommended trial date; and

(10) Alternative Dispute Resolution.

Lawyers should have a continuing obligation to amend the case management plan, with court approval, in connection with any subsequent scheduling conferences or as otherwise appropriate. In cases in which pretrial case management is assigned to a

[39]See 28 U.S.C. § 473(a)(4).
[40]See 28 U.S.C. § 473(a)(3)(C)(ii).
[41]See 28 U.S.C. §§ 473(a)(2)(D); (a)(3)(D).

magistrate judge, the agenda for subsequent pretrial conferences also should include the question of whether the parties believe involvement by the district judge would materially advance the case.

c. Revised Joint Local Rule 22. To implement the above recommendations, the Advisory Group recommends amendment of Joint Local Rule 22, as follows:

In any civil case, other than habeas corpus, pro se prisoner civil rights, social security, and United States initiated foreclosure or collection, the assigned or presiding Judge shall direct the Clerk to issue notice of the requirement for a case management plan. The notice shall be given to plaintiff's counsel at the time the complaint is filed, and the notice shall issue to defendants along with a copy of the complaint and summons.

d. Case Management Plan

(1) The order setting the last date for filing a case management plan shall require counsel for all parties to confer and prepare a case management plan and to file such plan by a date specified in the order. Failure to file such plan shall be cause for sanctions.

(2) Upon the filing of an acceptable case management plan in compliance with the order and this rule, the court may set a scheduling conference.

(3) If the parties do not file a case management plan, or file a plan that fails materially to comply with the order and this rule, or file a plan that reflects material disagreements among the parties, the court may:

(A) Conduct the scheduling conference requiring that all parties attend with their counsel and, following such conference, enter an order reflecting the matters ordered and agreed to at the conference and setting a firm trial date; or

(B) Issue an order without further hearing adopting the acceptable portions of the plan, omitting unacceptable portions, supplying omitted matters, resolving disputed matters, vacating the pretrial conference setting and setting a firm trial date. The court may conduct a telephone conference with counsel prior to entering such an order.

(4) To the extent permitted by statute and rule, orders entered upon subparagraphs (3)(A) and (3)(B) may offer an alternative trial date in the event the parties thereafter consent to referral of the case to a magistrate judge.

e. Contents of case management plan.

(1) The objective of the case management plan is to promote the ends of justice by providing for the timely and efficient resolution of the case by trial, settlement or pretrial adjudication. In preparing the plan, counsel shall confer in good faith concerning the matters set forth below and any other matters tending to accomplish the objective of this rule. The plan shall incorporate matters covered by the conference on which the parties have agreed as well as advise the court of any substantial disagreements on such matters.

(2) The conference and case management plan shall address the following matters:

(A) Trial date. The plan should be premised on a trial setting of at most eighteen months after the filing of the complaint and should recommend a trial date. If counsel agree that the case cannot reasonably be ready for trial within eighteen months, the plan shall state in detail the basis for that conclusion. The plan shall also state the estimated time required for trial.

(B) Contentions. The plan shall set forth the contentions of the parties, including a brief description of the parties' claims and defenses.

(C) Discovery schedule. The plan shall provide for the timely and efficient completion of discovery taking into account the desirability of phased discovery where discovery in stages might materially advance the expeditious and efficient resolution of the case. The plan should also provide a schedule for the taking of the depositions of expert witnesses, together with a designation whether the deposition is for discovery purposes only or is to be offered in evidence at trial.

(D) Witnesses and exhibits. The plan shall incorporate a schedule for the preliminary and final disclosure of witnesses and exhibits.

(E) Accelerated discovery. The parties shall discuss and seek agreement on the prompt disclosure of relevant documents, things and written information without prior service of requests pursuant to Fed. R. Civ. P. 33 and 34.

(F) Limits on depositions. The parties shall discuss whether limits on the number or length of depositions should be imposed.

(G) Motions. The plan will identify any motions which the parties have filed or intend to file. The parties shall discuss whether any case-dispositive or other motions should be scheduled in relation to discovery or other trial preparation so as to promote the efficient resolution of the case and, if so, the plan shall provide a schedule for the filing and briefing of such motions.

(H) Stipulations. The parties shall discuss possible stipulations and, where stipulations would promote the efficient resolution of the case, the plan shall provide a schedule for the filing of stipulations.

(I) Bifurcation. The parties shall discuss whether a separation of claims, defenses or issues would be desirable; and if so, whether discovery should be limited to the claims, defenses or issues to be tried first.

(J) Alternative dispute resolution. The parties shall discuss which of the following alternative dispute resolution methods is most appropriate for resolving the case: mediation or neutral evaluation. Unless the parties submit an agreed statement to the court seeking an exception to the use of one of these methods, it is presumed that the parties will agree on one of these methods.

(K) Settlement. The parties shall discuss the possibility of settlement both presently and at future stages of the case. The plan may provide a schedule for the exchange of settlement demands and offers, and may schedule particular discovery or motions in order to facilitate settlement.

(L) Referral to a magistrate judge. The parties shall discuss whether they consent to the referral of the case to a magistrate judge for trial.

(M) Amendments to the pleadings; joinder of additional parties. The parties shall discuss whether amendments to the pleadings, third party complaints or impleading petitions, or other joinder of additional parties are contemplated. The plan shall impose time limits on the joinder of additional parties and for amendments to the pleadings.

(N) Other matters. The parties shall discuss (1) whether there is any question regarding jurisdiction over the person or of the subject matter of the action (2) whether all parties have been correctly designated and properly served, (3) whether there is any question of appointment of a guardian *ad litem*, next friend, administrator, executor, receiver or trustee, (4) whether trial by jury has been timely demanded, and (5) whether related actions are pending or contemplated in any court.

(O) Interim pretrial conferences. The parties shall discuss whether interim pretrial conferences prior to the final pretrial conference should be scheduled.

f. Additional pretrial conferences. Additional pretrial conferences shall be held as ordered by the court. Prior to each such pretrial conference, counsel for all parties will confer, in person or by telephone, to prepare for the conference. Such conference shall include a review of the case management plan and shall address whether the plan should be supplemented or amended. In cases in which pretrial case management is assigned to a magistrate judge, counsel shall also discuss whether direct involvement by the district judge prior to trial might materially advance the case. The discussions of counsel shall be summarized by one of counsel who shall prepare an agenda for the scheduling conference which shall reflect the agreements reached among or between counsel, including any proposed supplements or amendments to the case management plan. It shall be the responsibility of all counsel that an agenda be presented to the court at the scheduling conference. Failure to present an agenda and failure to confer as required may be grounds for the imposition of sanctions.

g. Contents of final pretrial order. In addition to such other provisions as the court may direct, the final pretrial order may direct each party to file and serve the following:

(1) A trial brief, the nature and extent of which shall be directed by the Judge. Copies of all foreign statutes involved, with reference to their source, shall also be submitted.

(2) In nonjury cases, proposed findings of fact and conclusions of law, including citations for each conclusion of law if available.

(3) In jury cases, requested charges to the jury covering issues to be litigated. Each charge should cite appropriate authority.

(4) A stipulation of facts relating to jurisdiction and the merits of the issues.

h. Deadline. Deadlines established in any order or pretrial entry under this rule shall not be altered except by agreement of the parties and the court, or for good cause shown.

B. Pretrial Motions

1. Assessing Delay in Ruling on Pretrial Motions.

The Advisory Group concludes that there is a problem with delay in court rulings on pretrial motions in the Western District. This conclusion is supported by each of the sources of information available: (1) The interviews with many of the Western District judges conducted by members of the Advisory Group; (2) the results of the attorney survey conducted by the Advisory Group; (3) statistics in Section II of this Report, *infra*[42]; (4) conversations with attorneys practicing in the Western District; and (5) personal experiences of members of the Advisory Group. Many believe that delay in resolving pretrial motions is the most serious problem of cost and delay in the district.

To keep cases moving at reasonable speed and avoid the difficulties noted below, motions should ordinarily be ruled upon within 30 days after completion of briefing. More complex motions (*e.g.*, summary judgment motions involving extensive facts and/or several difficult legal issues) should ordinarily be ruled upon within 60 days after completion of briefing.

2. Increased Cost and Delay in Case Disposition Caused by Delayed Rulings on Motions

Delay in rulings on pretrial motions may prompt attorneys, often at the urging of clients, to postpone other work in the case, *e.g.*, conducting discovery, seriously evaluating case for settlement purposes, in an effort to decrease litigation

[42]See this Report at 19 (which lists pending motions at lease six months old.)

costs. This is particularly likely to occur when motions are addressed to whether the court is the proper forum, *e.g.*, venue, personal and subject matter jurisdiction.

Delay in rulings on pretrial motions also may, and frequently does, increase costs to the litigants, *e.g.*, discovery is done that turns out to have been unnecessary when a motion to dismiss is belatedly granted. The problem of increased costs to the litigants is particularly exacerbated when a ruling that disposes of a case, or a significant portion of a case, has been delayed past the point that trial preparation has already begun because of an imminent trial setting.

An additional point, implicit in the preceding discussion, should also be noted. When delay in ruling on a pretrial motion cannot be avoided, a conflict often results between the goals of (1) reducing delay in the ultimate disposition of the case, and (2) avoiding unnecessary costs to litigants. Continuing other work in the case pending a ruling causes unnecessary costs to be incurred if the motion is eventually granted. On the other hand, postponing that other work pending a ruling on the motion may cause delay in the ultimate disposition of the case if the motion is eventually denied.

Finally, there are adverse effects that should not be ignored even when cases are eventually settled in the face of long-pending and potentially dispositive, but unresolved, motions. First, both litigants will likely have incurred unnecessary attorneys' fees and other costs and expenses while the motion was pending.[43] Second, the quality of justice suffers where settlements must reflect substantive uncertainties and future litigation costs that could be clarified by a ruling on the motion. Third, respect for the judicial system may suffer. It is difficult for attorneys to explain to clients why courts do not decide important issues where a

[43]Client time and attention that has to be devoted to a pending case is a large and very real, but frequently overlooked, cost of litigation.

ruling would save them large costs in settlements and litigation expenses, or at least allow a more realistic evaluation of their position.

3. Causes of Delay in Ruling on Motions

The Advisory Group has identified two potential causes for delay in deciding pretrial motions:

a. Workload and staffing. Each active judge employs two law clerks except the Chief Judge, who is entitled to three clerks. Senior judges normally have only one law clerk, although both senior judges in this district have two. Each magistrate judge employs one law clerk. In extraordinary circumstances, such as appointment to a judicial commission or special projects, a judge may be able to obtain authority to hire an extra law clerk on a temporary basis.

One of the law clerk's main functions is to assist the judge in disposing of motions. Law clerks are particularly instrumental in processing the more complex motions that require substantial research and careful review of the record. Therefore, an additional law clerk for each judge and magistrate judge would benefit the court. With only one clerk, the magistrate judges are hampered in dealing with a difficult or complicated matter which requires extended concentration on one file while also managing more urgent matters that arise.

The Advisory Group concluded that additional staff would be useful in reducing the delays associated with motion practice in the Western District. We are reluctant, however, to make a recommendation with respect to the form that additional staff should take.

b. Frivolous, trivial, inartfully drafted or unnecessary motions. Many motions should not be filed at all. These include, among other examples, discovery motions that reflect unreasonable positions, motions for summary judgment in cases in which material issues of fact plainly exist, and motions that would have been reasonably compromised had the parties undertaken good faith discussions prior to

filing the motion. All such motions unnecessarily contribute to the court's workload. In addition, the pendency of a meritless motion can delay and interfere with other trial preparation, *e.g.*, reinforcing unreasonable positions taken by counsel on similar issues. Meritless but unresolved motions can also affect settlement value.

In addition, lawyers contribute to motion delays by the form of their motions and accompanying papers. Memoranda should always be clear and concise and should adhere to reasonable page limitations, whether or not they are within the 40-page limit imposed by Joint Local Rule 6(c). Requests to exceed the limit should be made only when absolutely necessary. Proposed orders should be correct and substantively complete.

4. Recommendations

The Advisory Group recommends the following measures to address the issue of delay in rulings on pretrial motions:

a. Staffing. The Advisory Group recommends that the Judicial Conference and the Judicial Council of the Sixth Circuit make available to the district court additional staff specifically to aid the court in deciding motions.

b. Summary Judgment Motions.

(1) Case management plans and scheduling orders should set summary judgment motions to be filed and briefed as soon as reasonably feasible in the circumstances of the particular case. For example, where the summary judgment motion will present a dispositive issue of law that is apparent from the outset of the case, the motion should be scheduled early, before the expenditure of substantial time and money on discovery. If a limited amount of discovery is required to present the motion properly, the plan and order may provide for the prompt completion of that "first phase" discovery and the subsequent filing of the motion. As an outer limit in complex cases, scheduling orders should set summary judgment motions to be filed and

completely briefed no less than 90 days before any scheduled trial date. As an outer limit in other cases, scheduling orders should set summary judgment motions to be filed and completely briefed no less than 60 days before any scheduled trial date. Motions to extend earlier deadlines in scheduling orders should be granted only for good cause shown. Motions to extend the outer limit deadlines should be granted only for extraordinary cause.

(2) In ruling on motions, the Court should give first priority to summary judgment motions in cases scheduled for trial within 60 days.

(3) If a summary judgment motion has not been resolved in a case scheduled for trial within 30 days, the motion should be decided by that scheduled trial date and the trial should be rescheduled to a date at least 30 days from the date of the decision on that motion and no more than 90 days after the previously scheduled trial date, unless the parties stipulate to an earlier date.

c. Other Dispositive Motions. The same principles and guidelines that govern summary judgment motions and decisions should apply with respect to all other dispositive motions.

d. Motions Addressing Jurisdiction and Venue. In ruling on motions, the Court should give second priority to motions addressed to whether the court is the proper forum, *e.g.*, venue, personal and subject matter jurisdiction, transfer to another district, remand of removed cases.

e. Notification of Anticipated Settlement. The parties should immediately notify the Court of any reasonably anticipated settlement of a case where there is any pending motion. A Local Rule imposing this requirement should be adopted. Absent such a notification by the parties, the Court should not delay ruling on a pending motion in the hope of settlement or to try to induce the parties to settle.

f. Meet and Confer Requirement; Proposed Joint Local Rule. The Advisory Group endorses a new Joint Local Rule 6(a)(4). Experience under the described procedure should be accumulated in order to permit evaluation of the results and the advisability of a broader or narrower rule.

6(a)(4) Informal Conference to Discuss Certain Motions

The court may deny any motion for the award of attorney's fees, motion for sanctions, or motion for attorney's disqualification (except those motions brought by a person appearing pro se) unless counsel for the moving party files with the court, at the time of filing the motion, a separate statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorney(s) on the matter(s) set forth in the motion. This statement shall recite, in addition, the date, time, and place of such conference and the names of all parties participating therein. If counsel for any party advises the court in writing that opposing counsel has refused or delayed meeting and discussing the matters covered in this Rule, the court may take such action as is appropriate to avoid unreasonable delay.

C. Discovery Practice

1. Assessing Cost and Delay in Discovery Practice

The Act requires the Advisory Group to consider whether additional controls on discovery are necessary to prevent discovery abuses or excessive delays. Based upon responses from attorneys and judicial officers interviewed by the Advisory Group, the district does not experience plainly excessive discovery or other serious discovery abuses except in rare instances. However, a substantial number of attorneys believe that a substantial or moderate cause of delay is the failure of counsel to attempt in good faith to resolve issues without court intervention. The Advisory Group proposes the following replacement to Joint Local Rule 6(a)(2).

6(a)(2) Attorneys filing discovery motions must file a separate statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorney(s) on the matter(s) set forth in the motion. The statement must recite, in addition, the date, time, and place of such conference and the names of all parties participating therein. If counsel for any party advises the court in writing that opposing counsel has refused or delayed meeting and discussing the problems covered in this Rule, the court may take such action as is appropriate to avoid unreasonable delay.[44] Problems expressed to the Advisory Group were confined to case-specific instances and did not show a pattern or trend of serious abuse.

Attorneys responding to our survey expressed concern over the judges' inability to resolve discovery disputes promptly and to tailor discovery to the needs of the case. Forty-six percent of the respondents believe that the judges were somewhat permissive in setting deadlines, and 33 percent blamed delays on the reluctance of the court to enforce deadlines.

While we do not face severe problems in this district with discovery practices, the Advisory Group believes that there are measures that could be adopted to facilitate discovery. First, the requirement that attorneys construct a case management plan in compliance with amended Joint Local Rule 22, described above, will encourage attorneys to use staged discovery where appropriate, to cooperate in devising an efficient discovery schedule within the discipline of an early, firm trial date, and to discuss possible limitations on the number of depositions.[45]

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[44]See 28 U.S.C. § 473(a)(5).

[45]See 28 U.S.C. § 473(a)(3)(C)(i). The Local Rules already limit the number of interrogatories and requests for admissions that may be served without leave of court. See Joint Local Rule 8(c).

The Act suggests the consideration of procedures to encourage the voluntary exchange of discovery information.[46] In this connection, the Advisory Group considered the effect and utility of proposed amendments to Rule 26(a) of the Federal Rules of Civil Procedure that would require mandatory disclosures of certain standardized information early in the life of the case.[47]

Because the Advisory Group has serious reservations about several of the provisions for mandatory disclosure in the proposed Federal Rule, we decline to recommend routine mandatory disclosure by Local Rule for the following reasons:

1. Required Local Rule disclosures may conflict with or duplicate those called for by the proposed amendments to the Federal Rules.

2. If local disclosure requirements proliferate, they may differ in many respects. Necessary research into local requirements would add expense and further "balkanize" federal practice.

3. Depending upon the timing of required disclosures, the requirements may be viewed as pro-defendant if they require early production of information possessed only by the plaintiff, who by virtue of the requirements of Fed. R. Civ.

[46]28 U.S.C. § 473(a)(4).

[47]Subsection (a)(1) would require (i) a plaintiff within 30 days of service of any party's answer to the complaint, or (ii) a defendant within 30 days after service of its answer, or (iii) any other party within 30 days of receipt of a written demand for accelerated disclosure accompanied by the demanding party's disclosures, to provide:

(a) names, addresses and telephone numbers of "each individual likely to have information that bears significantly on any claim or defense . . .";

(b) a copy or a description by category and location of all documents in the possession, custody or control of the party "likely to bear significantly on any claim or defense";

(c) a computation of each category of claimed damages; and

(d) insurance agreements.

Subsection (a)(2) would require, on the same schedule, the production of the written reports of expert witnesses, exhibits to be used as a summary or support for expert opinion, the qualifications of the witness, and a list of other cases in which the witness has testified over the previous five years.

Subsection (a)(3) would require the parties to produce, at least 30 days before trial, names, addresses and telephone numbers of witnesses (apparently without distinction between case-in-chief and rebuttal), a designation of witnesses whose testimony will be presented by deposition, and an identification of exhibits.

P. 11 must inquire into the facts supporting the allegations of the complaint before bringing suit. The proposed Federal Rule attempts to balance these concerns by keying plaintiffs' disclosure requirements to the filing of any answer to the complaint, and defendants' disclosure requirements to the filing of its answer. Whether or not this arrangement will be workable and perceived as fair has not yet been tested through experience;

4. Rule-mandated disclosures will inevitably lack the flexibility which comes from case-by-case consideration of the desirability and scope of cooperative disclosures; and

5. Mandatory disclosures of information are time-consuming and may add to the expense of litigation in some instances. The Advisory Group believes they should be implemented only where there is a demonstrated need for them.

Thus, while we considered recommending mandatory disclosures of the type included in the proposed Rule 26(a), we concluded that the better course would be to include cooperative, accelerated disclosures as an item to be considered in the preparation of the case management plan. If there is substantial disagreement among the parties concerning the desirability or scope of such disclosures, the court may resolve those differences in the process of its review of the case management plan and order appropriate disclosures. Because the procedure would be a flexible one based upon the demands of the particular case, it would encourage the early, cooperative exchange of information essential to an informed evaluation of settlement possibilities, but would not be required where the nature of the case being litigated did not justify it.

2. Recommendations

a. The Advisory Group recommends that the court adopt a Local Rule to facilitate discovery in civil cases concerning certain aspects of the conduct of depositions, the timing of disclosure of expert witnesses, and procedures governing

a claim of privilege. The Advisory Group recommends that a Local Rule along the lines of the Standing Orders of the United States District Court, Eastern District of New York, on Effective Discovery in Civil Cases, included in Appendix C to this report, be considered by the Joint Local Rules Committee.

b. The Advisory Group recommends that the court publicize, perhaps through a Joint Local Rule, the willingness of the magistrate judges to hear and resolve discovery disputes telephonically.

c. The Advisory Group recommends adoption of amended Joint Local Rule 22, discussed above.

D. Alternative Dispute Resolution

1. Assessing Use of Alternative Dispute Resolution

The Act requires the Advisory Group to consider the use of Alternative Dispute Resolution (ADR) as a means to reduce costs and delays in the resolution of civil cases.[48] The Advisory Group considered the statistical materials analyzed in Part I, case filing trends noted there, the current practices of the bench and bar in the district,[49] and many published articles on ADR and settlement techniques.

Judicial officers in the Western District actively explore and encourage settlement in pretrial conferences. To encourage settlement discussions among the litigants, amended Joint Local Rule 22 requires counsel to be prepared to discuss at the initial pretrial conference "whether there is a probability of disposing of the case through settlement, pretrial adjudication, involuntary dismissal, mediation or alternative dispute resolution methods." Our proposed revised Joint Local Rule 22 continues this requirement. Judicial officers presently encourage settlement through many techniques.

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[48]See 28 U.S.C. §§ 473(a)(3)(A); 473(a)(6); and 473(b)(4).

[49]Judicial officers were asked about their views of ADR in interviews. Attorneys were also surveyed.

Other than generally encouraging settlement, however, the court does not frequently use ADR methods. Nevertheless, the court has expressed great interest in utilizing alternative Dispute Resolution. Early neutral evaluations and mediation have little track record in the district. No formal rules, practices or procedures are currently available for the initiation or utilization of any ADR method. If any method is used, it is by the consent of the parties on an ad hoc basis and without established guidelines.

2. Causes of Resistance to ADR

ADR may be infrequently used in this district because, attorneys and litigants do not believe such methods result in significant savings of cost or time. Attorneys may also not be as familiar or comfortable with ADR techniques as with the procedural regularity of the courtroom. Some cases, particularly those involving important public law issues, may not be appropriate for resolution through ADR. The effectiveness of ADR techniques in this district will depend upon the willingness and motivation of the attorneys and litigants to participate. So long as attorneys are uncomfortable with ADR methods, or believe such methods will not result in significant savings of cost or time, they will remain little used.

3. Recommendations

The Advisory Group recommends that participation in ADR be required, unless counsel for the parties show good cause for not using one of the ADR methods. However, the Advisory Group believes that established guidelines for the implementation and use of ADR programs would facilitate the incorporation of ADR techniques into the settlement process already pursued as a matter of course by the judges and magistrate judges.

a. Action by the Court.

(1) Settlement. The court should continue actively to encourage settlement. Efforts should include discussion of settlement possibilities at every

pretrial conference, solicitation of settlement offers from the parties, and other techniques.

(2) ADR Methods. The court should promulgate a Local Rule to establish guidelines for the initiation and implementation of ADR methods. The Advisory Group believes that ADR would thus be fostered in the district by establishing a framework for its use and by clearly defining some of the more significant ADR methods.

(3) Publicity. The court should include a description of ADR mechanisms and a discussion of their potential benefits in a brochure, similar to that used in the Northern District of California and elsewhere, designed to educate litigants as well as attorneys regarding ADR. A copy of the excellent Northern District of California publication is included in the Appendix D.

(4) ADR Administrator. The duties of an ADR Administrator should be given to a current employee in the Clerk's Office or other available resource. The ADR Administrator will establish and maintain the ADR programs and processes for the Court.

b. Action by Attorneys and Litigants. Attorneys should familiarize themselves and their clients with alternative means of dispute resolution and should encourage settlement and use of ADR methods in appropriate cases. Attorneys should not rely solely on the court to initiate settlement discussions or propose alternative means to enhance the possibility of settlement. Rather, attorneys should take the initiative to encourage early resolution of the litigation and to seek court involvement as appropriate in these efforts.

c. Proposed Local Rule on ADR. Joint Local Rule 23 should be amended to provide procedures for implementing the more frequently used alternative dispute resolution methods. Our proposed text is as follows:

Amended Joint Local Rule 23: Alternative Methods of Dispute Resolution. The court, in its discretion with the consent of the parties, may set any appropriate civil case for nonbinding alternative dispute resolution. The parties may agree to be bound by the result of any such proceeding. Such proceedings may include any of the following procedures, any variations thereof, or any other method agreed upon by the parties and approved by the court.

(i) Mediation.

(a) The court may, upon its own motion with the consent of the parties, refer the case to mediation at any time after and the initial pretrial conference and following adequate discovery and set deadlines for resolution.

(b) The ADR Administrator is responsible for establishing and maintaining an adequate list of a qualified mediators from which the court or parties may choose. The Administrator shall advise the Court of mediation standards. The mediator shall be knowledgeable about the subject matter of the dispute, but have no specific knowledge about the case. The mediator shall be compensated as agreed by the parties with the mediator, subject to the approval of the court.

(c) The ADR Administrator, with the consent and cooperation of the parties and counsel, will plan and arrange for the mediation process within ten days after referral of the case to mediation, as described in (1), above. The Administrator will inform the Court about the progress of the mediation schedule.

(d) Because mediation proceedings are regarded as settlement proceedings, any communications related to the subject matter of the dispute made during the mediation by any participant, mediator(s), or any other person present shall be a confidential communication. No admission, representation, statement, or other confidential communication made in

establishing or conducting the proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery. The mediator(s) are not subject to subpoena and share judicial protection and immunity.

(e) Mediations shall be conducted according to national and local guidelines and principles which are established and recognized as just, proper and ethical.

(f) All costs of mediation shall be borne by the parties.

(g) Following a good faith attempt at mediation, the ADR Administrator shall report to the Court the positions of the parties.

(ii) Early Neutral Evaluation.

(a) Following the initial pretrial conference, the Court may require counsel for the parties to meet with a neutral and impartial attorney, knowledgeable in the law of the particular case, in order to identify certain issues, create a discovery schedule, or other useful purpose. Discovery disputes may be referred to the neutral evaluator before a motion is made to the Court.

(b) The neutral evaluator, though not acting as a mediator, may assist the parties in minor disagreements and communications. The neutral evaluator's judgement and advice to the parties shall be confidential, and all communications are to be regarded as in the nature of settlement and are privileged. The neutral evaluator is not subject to subpoena while serving at the discretion of the Court.

(c) The ADR Administrator shall establish and maintain a list of respected and competent volunteer attorneys from which the Court and parties may agree to serve as a neutral evaluator. Work as a neutral evaluator satisfies pro bono professional conduct standards.

(d) The Administrator will report to the Court any agreements or mutual positions of the parties or counsel. The matter may be referred to a Magistrate Judge or to mediation upon consent of the parties any time during the early neutral evaluation process.

IV. Conclusion

The Advisory Group's mission is to recommend procedures which will assist the Western District in facilitating processes which will reduce both delay and cost in the civil docket. Accordingly, recommendations toward this end have been made to the Court.

These recommendations specifically cover the areas of case management and alternative dispute resolution. The fundamental guiding principle has been the desire to do justice. These recommendations are made in the belief and hope that they will make the civil judicial system in the Western District more accessible and affordable to all citizens. Further, the Advisory Group recommends that the Court implement its own plan to achieve the goals of the Act.

APPENDIX A

CIVIL JUSTICE REFORM ACT SURVEY RESULTS

Question 1 *For how many years have you been practicing law?*

AVERAGE RESPONSE 18 Years

Question 2 *What percentage (estimated) of your practice (of time spent) is devoted to civil litigation?*

AVERAGE RESPONSE 70 Percent

Question 3 *During the past three years, what percentage (estimated) of your civil practice was in the W.d. Ky.?*

AVERAGE RESPONSE 29 Percent

Question 4 *During the past three years, what percentage (estimated) of your civil practice was in the E.D. Ky.?*

AVERAGE RESPONSE 5 Percent

Question 5 *How would you best describe your practice?*

RESPONSE	PERCENTAGE OF TOTAL
Private law firm	92.1%
Federal government	2.0%
State Government	3.9%
Local Government	0.0%
Corporate counsel	0.0%
Independent non-profit organization	2.0%
Other	0.0%

Question 6 *How many practicing lawyers are there in your firm or organization?*

AVERAGE RESPONSE 18 Lawyers

Question 7 *What percentage (estimated) of your civil litigation practice consists of representing plaintiffs?*

AVERAGE RESPONSE 47 Percent

THE FOLLOWING QUESTIONS PERTAIN TO CIVIL LITIGATION EXPERIENCE IN THE WESTERN DISTRICT OF KENTUCKY DURING THE PAST THREE YEARS.

Question 8 *Have you encountered unreasonable delays?*

RESPONSE	PERCENTAGE OF TOTAL
YES	39.2%
NO	60.8%

If yes, how much have each of the following contributed to these delays?

	No contribution	*Slight contribution*	*Moderate contribution*	*substantial contribution*
Tactics of counsel	13.6%	27.3%	36.4%	22.7%
Conduct of clients	59.1%	22.7%	18.2%	0.0%
Conduct of insurers	40.9%	45.5%	9.1%	4.5%
Personal or office practice inefficiencies	38.1%	38.1%	19.0%	4.8%
Judicial inefficiencies	27.3%	0.0%	45.4%	27.3%

Question 9 *Have you found such litigation to be unnecessarily costly?*

RESPONSE	PERCENTAGE OF TOTAL
YES	33.3%
NO	66.7%

If yes, how much have each of the following contributed to these delays?

	No contribution	*Slight contribution*	*Moderate contribution*	*substantial contribution*
Conduct of counsel	5.3%	15.8%	47.4%	31.5%
Conduct of clients	27.8%	33.3%	38.9%	0.0%
Conduct of insurers	43.8%	25.0%	18.7%	12.5%
Personal or office practice inefficiencies	43.8%	31.2%	25.0%	0.0%
Judicial inefficiencies	35.3%	11.8%	52.9%	0.0%

Question 10 *To what extent have tactics of counsel contributed to unreasonable delay or unnecessary cost?*

RESPONSE	PERCENTAGE OF TOTAL
NONE	28.6%
SLIGHT	32.6%
MODERATE	24.5%
SUBSTANTIAL	14.3%

If you selected moderate or substantial, please indicate the extent to which each of the following tactics of counsel contributed to your assessment.

	Substantial cause	*Moderate cause*	*Slight cause*	*Not a cause*
Unnecessary use of interrogatories	10.5%	26.3%	21.1%	42.1%
Too many interrogatories	15.8%	31.55%	21.1%	31.55%
Too many depositions	20.0%	45.0%	15.0%	20.0%
Too many deposition questions	15.8%	36.8%	21.1%	26.3%
Overbroad document requests	26.3%	26.3%	21.1%	26.3%
Unavailability of witness or counsel	6.3%	25.0%	18.7%	50.0%
Raising frivolous objections	15.8%	42.1%	10.5%	31.6%
Failure to attempt in good faith to resolve issues without court intervention	26.3%	31.5%	21.1%	21.1%
Unwarranted sanction motions	11.1%	5.6%	27.8%	55.5%
Lack of professional courtesy	0.0%	26.3%	42.1%	31.6%

Question 11 *To what extent has ineffective case management by magistrate judges contributed to unnecessary delays or unreasonable costs?*

RESPONSE	PERCENTAGE OF TOTAL
NONE	28.6%
SLIGHT	32.6%
MODERATE	24.5%
SUBSTANTIAL	14.3%

If you selected moderate or substantial, please select the appropriate response for the following court activities:

	STATUS CONFERENCES	PRE-MOTION CONFERENCES	DEADLINES	EXTENSION OF DEADLINES
Far to many	0.0%	0.0%	0.0%	0.0%
Somewhat too many	10.0%	0.0%	0.0%	44.4%
Reasonable number	40.0%	50.0%	88.9%	55.6%
Somewhat too few	30.0%	30.0%	11.1%	0.0%
Far too few	20.0%	20.0%	0.0%	0.0%

Please indicate the extent to which each of the following possible instances of ineffective case management by judges contributed to your assessment:

	Substantial effect	Moderate effect	Slight effect	No effect at all	No opinion
Delays in entering scheduling orders	0.0%	30.0%	20.0%	40.0%	10.0%
Excessive time periods provided for in scheduling orders	0.0%	10.0%	30.0%	50.0%	10.0%
Failure to resolve discovery disputes promptly	40.0%	40.0%	0.0%	10.0%	10.0%
Failure to resolve other motions promptly	63.6%	18.2%	0.0%	9.1%	9.1%
Scheduling too many motions on different cases concurrently	0.0%	0.0%	40.0%	50.0%	10.0%
Failure to tailor discovery to needs of the case	20.0%	10.0%	20.0%	40.0%	10.0%
Failure by judge to initiate settlement discussions	10.0%	20.0%	10.0%	60.0%	0.0%
Inadequate supervision of settlement discussions	10.0%	20.0%	10.0%	60.0%	0.0%
Inadequate judicial preparation for conferences or proceedings	10.0%	30.0%	10.0%	50.0%	0.0%
Failure by judge to assign reasonably prompt trial dates	30.0%	0.0%	20.0%	50.0%	0.0%
Failure of judge to meet assigned trial dates	20.0%	10.0%	30.0%	40.0%	0.0%
Failure by judge to give sufficient advance notice of trial	0.0%	0.0%	20.0%	80.0%	0.0%

Question 12 *To what extent has ineffective case management by judges judges contributed to unnecessary delays or unreasonable costs?*

RESPONSE	PERCENTAGE OF TOTAL
NONE	55.3%
SLIGHT	17.0%
MODERATE	19.2%
SUBSTANTIAL	8.5%

	STATUS CONFERENCES	*PRE-MOTION CONFERENCES*	*DEADLINES*	*EXTENSION OF DEADLINES*
Far to many	0.0%	0.0%	6.7%	0.0%
Somewhat too many	6.7%	0.0%	0.0%	33.3%
Reasonable number	46.7%	40.0%	46.65%	66.7%
Somewhat too few	26.6%	33.3%	46.65%	0.0%
Far too few	20.0%	26.7%	0.0%	0.0%

Please indicate the extent to which each of the following possible instances of ineffective case management by judges contributed to your assessment?

	Substantial effect	*Moderate effect*	*Slight effect*	*Not a cause*
Delays in entering scheduling orders	6.3%	12.5%	50.0%	31.2%
Excessive time periods provided for in scheduling orders	0.0%	12.5%	37.5%	50.0%
Failure to resolve discovery disputes promptly	18.8%	50.0%	31.2%	0.0%
Failure to resolve other motions promptly	81.2%	6.3%	12.5	0.0%
Scheduling too many motions on different cases concurrently	5.9%	17.6%	11.8%	64.7%
Failure to tailor discovery to needs of the case	6.3%	43.7%	0.0%	50.0%
Failure by judge to initiate settlement discussions	12.5%	31.2%	6.3%	50.0%
Inadequate supervision of settlement discussions	12.5%	12.5%	31.3%	43.7%
Inadequate judicial preparation for conferences or proceedings	0.0%	43.7%	0.0%	56.3%
Failure by judge to assign reasonably prompt trial dates	31.2%	31.2%	18.8%	18.8%
Failure of judge to meet assigned trial dates	25.0%	43.7%	25.0%	6.3%
Failure by judge to give sufficient advance notice of trial	0.0%	12.5%	31.2%	56.3%

The following questions describe solutions which have been implemented in other districts or are under active consideration in this or other districts to address concerns regarding unnecessary delays and unreasonable costs in federal civil litigation. With respect to each proposed solution, please indicate your opinion as to its effectiveness in expediting civil litigation or reducing its cost.

	Substantial effect	*Moderate effect*	*Slight effect*	*No effect at all*	*No opinion*
Question 13					
Shorter time limits for completing the various stages of litigation	11.1%	31.1%	24.4%	26.7%	6.7%
Question 14					
Requiring counsel to attempt to resolve issues before court intervention	26.1%	28.3%	26.1%	19.5%	0.0%
Question 15					
Permitting pre-motion conferences with the court on any motion at the request of any party	19.6%	28.3%	23.9%	23.9%	4.3%
Question 16					
Requiring pre-motion conferences with the court for the following categories of motions:					
Dispositive motions	29.7%	27.0%	18.9%	21.6%	2.7%
Discovery motions	25.0%	27.8%	22.2%	22.2%	2.8%
Other motions	21.2%	15.1%	27.3%	21.2%	15.2%
Question 17					
Permitting the filing of procedural, non-dispositive motions (for example, motions to amend and motions to add parties) by letter rather than by formal motion and brief	23.9%	23.9%	8.7%	34.8%	18.7%
Question 18					
Providing a 30 page limitation for memoranda of law, except for cause	19.6%	26.1%	39.1%	15.2%	0.0%

	Substantial effect	Moderate effect	Slight effect	No effect at all	No opinion
Question 19					
Requiring mandatory arbitration of all disputes in which the amount in controversy is less than:					
$100,000	38.4%	25.0%	9.1%	15.9%	13.6%
$200,000	26.3%	13.2%	21.0%	15.8%	23.7%
$1,000,000	22.2%	11.1%	19.45%	19.45%	27.8%
Question 20					
Providing court-annexed mediation upon mutual consent of parties for some or all issues in dispute	28.2%	43.5%	15.2%	12.2%	10.9%
Question 21					
Making available attorneys who are experts in the subject matter in dispute to evaluate claims and defenses and to assist parties in settlement negotiations ("early neutral evaluation")	20.0%	31.1%	20.0%	22.2%	8.7%
Question 22					
Requiring attendance of parties and/or their insurers at court settlement conferences	33.3%	31.1%	28.9%	14.5%	2.2%
Question 23					
Requiring rule 11 sanctions motions to be separately filed and not appended to another motion	8.9%	17.8%	8.9%	38.8%	26.8%
Question 24					
Increased availability of telephone conferences with the court	37.0%	30.4%	21.7%	8.7%	22.0%

	Substantial effect	*Moderate effect*	*Slight effect*	*No effect at all*	*No opinion*
Question 25					
Requiring automatic disclosure of the following information shortly after joinder of issue:					
The identity of witnesses reasonably likely to have information which bears significantly upon claims, defenses or damages	28.3%	39.1%	23.9%	8.7%	0.0%
General description of documents relied upon in preparing pleadings or contemplated to be used in support of the parties' allegations or calculation of damages	26.6%	35.5%	22.2%	15.6%	0.0%
Existence and contents of insurance agreements	26.6%	28.9%	15.6%	24.4%	4.5%
Question 26					
Requiring automatic disclosure prior to the final pre-trial conference of the qualifications, the opinions and the basis for those opinions of experts intended to be called as trial witnesses	28.9%	22.2%	33.3%	13.4%	2.2%
Question 27					
Conditioning grants by the court of broader discovery upon the shifting of costs in instances where the burden of responding to such requests appears to to out of proportion to the amounts or issues in dispute	33.3%	20.0%	26.6%	15.6%	4.5%
Question 28					
Defining the scope of permissible discovery by balancing the burden of expenses of the discovery against its likely benefit	24.4%	22.2%	35.6%	13.3%	4.5%

	Substantial effect	*Moderate effect*	*Slight effect*	*No effect at all*	*No opinion*
Question 29					
Assessing the costs of discovery motions on the losing party	33.3%	20.0%	31.1%	13.3%	12.3%
Question 30					
Providing less time for completion of discovery	13.6%	25.0%	29.6%	22.7%	9.1%
Question 31					
Requiring discovery relating to particular issues (e.g., venu, class certification) or a specified stage of the case (e.g., liability) to be completed before permitting discovery respecting other issues or another stage (e.g., damages, experts)	19.7%	31.7%	17.1%	29.3%	12.4%
Question 32					
Limiting the type of interrogatories (e.g., identification, contention) presumptively permitted at various stages of discovery	11.1%	20.0%	35.5%	28.9%	4.5%
Question 33					
Limiting the number of depositions presumptively permitted	13.3%	31.3%	28.9%	24.5%	2.2%
Question 34					
Limiting the length of depositions presumptively permitted	13.3%	28.9%	28.9%	26.7%	2.2%
	Substantially improved	*Moderately improved*	*Remained unchanged*	*Moderately worsened*	*Substantially worsened*
Question 35					
During the past three years, the cost and time it takes to litigate civil action has	4.5%	22.2%	24.4%	40.0%	8.9%

Question 36 *During the past three years, how many months (on average) has it taken from the time your civil cases were ready for trial to the time that trial actually commenced?*

AVERAGE RESPONSE 5 Months

APPENDIX B

CIVIL JUSTICE REFORM ACT OF 1990
ADVISORY COMMITTEE
SURVEY
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

Litigant (Nonlawyer) Survey Questionnaire **RESULTS**

There were 23 surveys returned, of which 22 were partially or completely filled out. Most questions could be answered with more than one answer, therefore the percentages are based on the total number of answers given for that question rather than on the number of surveys returned. For answers requesting explanations, any explanations that were given are provided below the answer.

1. What type of case(s) were you involved in?

Total responses: 22	Number and percentage of times checked	
a. contract	7	31.8%
b. personal injury, products liability	5	22.7%
c. civil rights, discrimination in employment, age, sex, race	2	9.1%
d. habeas corpus	0	0.0%
e. other	8	36.4%

Trademark infringement
Social Security appeal (3)
Patent infringement
Property seizure
Slander

2. What was the nature of your participation.

Total responses: 28	Number and percentage of times checked	
a. plaintiff	16	57.1%
b. defendant (only)	2	7.1%
c. defendant & counter claimant	2	7.1%
d. individual	4	14.3%
e. corporation	3	10.7%
f. prisoner pro se	0	0.0%
g. other entity	1	3.6%

claimant

3. What was the location of the court in which your case was filed?

Total responses: 22	Number and percentage of times checked	
a. Louisville	10	45.5%
b. Paducah	6	27.3%
c. Owensboro	3	13.6%
d. Bowling Green	3	13.6%

4. Who presided over or heard your case?

Total responses: 19	Number and percentage of times checked	
a. Judge	17	89.5%
b. Magistrate	2	10.5%

5. If you were a plaintiff or counter claimant, what were you seeking?

Total responses: 21	Number and percentage of times checked	
a. money damages	11	52.4%
b. injunction	2	9.5%
c. other	8	38.1%

Social Security refund (3)
Seniority and back pay
Reinstatement
Disability benefits
Job
Recovery of expenses

6. What was the type of payment arrangement between lawyer and client in your case?

Total responses: 23	Number and percentage of times checked	
a. contingent	11	47.8%
b. hourly rate	7	30.4%
c. hourly rate with maximum	1	4.4%
d. set fee	3	13.0%
e. government or salaried attorney	0	0.0%
f. other	1	4.4%

7. How would you characterize outcome of the case from your standpoint?

Total responses: 25	Number and percentage of times checked	
a. victory	9	36.0%
b. defeat	6	24.0%
c. mixed result	6	24.0%
d. other	4	16.0%

Limbo
Still not resolved
Appealed
Not a victory

8. How was your case disposed of or resolved?

Total responses: 23	Number and percentage of times checked	
a. settlement	10	43.5%
b. trial by judge	4	17.4%
c. trial by jury	2	8.7%
d. summary judgment	4	17.4%
e. dismissal	0	0.0%
f. other	3	13.0%

Limbo
Not yet resolved
U.S. attorney

9. How long did your case take from the time it was filed in court to this conclusion?

Total responses: 20	Number and percentage of times checked	
a. 1 to 6 months	0	0.0%
b. 6 to 12 months	3	15.0%
c. 12 to 18 months	5	25.0%
d. 18 to 24 months	2	10.0%
e. 24 to 36 months	4	20.0%
f. over 36 months	6	30.0%

10. Did you think that your case took too long?

Total responses: 22	Number and percentage of times checked	
a. no	3	13.6%
b. slightly too long	4	18.2%
c. much too long	15	68.2%

10a. If you think your case took too long to resolve, why did it take too long?

Total responses: 19	Number and percentage of times checked	
a. too much or inappropriate management by the court	2	10.5%
b. not enough case management by the court	5	26.3%
c. actions by attorneys	8	42.2%

Smokescreen by defense attorney
No evidence against us but case not dropped
Postponements
Too many attorneys
Delay to wear down plaintiff
Interrogatories and depositions over and over

10a.	d.	actions by a party or parties	2	10.5%
		Defendants counterclaim		
		Failure of Social Security to act		
	e.	uncontrollable factors	2	10.5%
		Overload of cases by court		
		Dragging their feet		

10b. If you think your case took too long to resolve, what part took too long?

Total responses: 29		Number and percentage of times checked
a.	filing complaint and getting parties before court	7	24.1%
b.	discovery	6	20.7%
c.	rulings by the court on motions	8	27.6%
d.	getting a trial date	8	27.6%

10c. Please indicate what should be done to speed up the process.

Total responses: 41		Number and percentage of times checked
a.	hold an early pre-trial conference	8	19.5%
b.	hold pretrial activities to a firm schedule	4	9.8%
c.	set and enforce limits on allowable discovery	4	9.8%
d.	narrow issues through conference or other methods	2	4.9%
e.	rule promptly on pretrial motions	4	9.8%
f.	refer the case to alternative dispute resolution, such as mediation or arbitration	4	9.8%
g.	set an early and firm trial date	6	14.6%
h.	conduct or facilitate settlement discussions	6	14.6%
i.	exert firm control over trial	1	2.4%
j.	other	2	4.9%
	Set time limit on filing of gov't seizure notices		
	All of the above		

11. Who do you feel was responsible for delays in resolving your case?

Total responses: 37		Number and percentage of times checked
a.	yourself as a litigant	0	0.0%
b.	your attorney	3	8.1%
c.	other party	5	13.5%
d.	opposing attorney	9	24.3%
e.	the judge	5	13.5%
f.	the system	15	40.6%
g.	other	0	0.0%

12. **How long should your case have taken from the time it was filed in court to its conclusion?**

Total responses: 21	Number and percentage of times checked	
a. 1 to 6 months	12	57.1%
b. 6 to 12 months	6	28.6%
c. 12 to 18 months	3	14.3%
d. 18 to 24 months	0	0.0%
e. 24 to 36 months	0	0.0%
f. over 36 months	0	0.0%

13. **Was the trial of your case postponed after a date had been set?**

Total responses: 18	Number and percentage of times checked	
a. yes	8	44.4%
b. no	10	55.6%

13A. **If yes, please five the number of times it was postponed.**

Total responses: 6

Number of times postponed
1 checked two times
2 checked two times
3 checked once
4 checked once

14. **How do you feel about the expenses, including all expenditures, court costs, and attorney's fees, involved in your case?**

Total responses: 21	Number and percentage of times checked	
a. much too high	9	42.9%
b. somewhat too high	3	14.3%
c. about what I expected	7	33.3%
d. lower than I expected	2	9.5%

15. **If you think the expenses of your case were too high, what parts were too high?**

Total responses: 28	Number and percentage of times checked	
a. attorney's fees	6	21.4%
b. court costs such as the filing fee and subpoena fees	1	3.6%
c. discovery costs such as depositions, copying documents & telephone calls	11	39.3%
d. fees to employ experts	4	14.3%
e. your own costs such as travel expenses, time lost from your other affairs	6	21.4%

16. Who do you feel was responsible for the high costs of your case?

Total responses: 28	Number and percentage of times checked	
a. yourself as litigant	0	0.0%
b. your attorney	6	21.4%
c. other party	3	10.7%
d. opposing attorney	5	17.9%
e. the judge	2	7.1%
f. the system	11	39.3%
g. other	1	3.6%

All the paperwork filing for depositions just to get into court

17. What could be done to reduce expense?

Total responses: 24	Number and percentage of times checked	
a. more control of case by court	4	16.7%
b. more control of case by my attorney, or by myself as an attorney	1	4.2%
c. more control of case by myself	0	0.0%
d. a speedier resolution of the litigation	16	66.6%
e. other	3	12.5%

Disallowing frivolous counterclaims that do not relate to the issue of the original complaint

Reasonable requests from Social Security

18. Which of the following would you have accepted as an alternative way to resolve?

Total responses: 21	Number and percentage of times checked	
a. mediation	9	42.9%
b. non-binding arbitration	2	9.5%
c. binding arbitration	6	28.6%
d. trial by magistrate	4	19.0%

18A. In general, which of the following alternative dispute methods do you think would reduce the amount of time spent in litigation?

Total responses: 19	Number and percentage of times checked	
a. mediation	9	47.4%
b. non-binding arbitration	3	15.7%
c. binding arbitration	4	21.1%
d. trial by magistrate	3	15.8%

18B. Which of the following alternative dispute methods do you think would reduce the amount of money spent in litigation?

Total responses: 20	Number and percentage of times checked	
a. mediation	8	40.0%
b. non-binding arbitration	3	15.0%
c. binding arbitration	4	20.0%
d. trial by magistrate	5	25.0%

19. Please elaborate upon any of your observations in regard to the cause of excessive delays and costs in litigating in federal court as well as suggestions for improving the situation.

Of the 22 completed questionnaires, 14 had comments addressing this question. The comments written in those 14 are recreated as accurately as possible below; their value is left for the reader to decide. The number in parenthesis after the comment is a reference to the document from which it came.

This was a clear cut case of contractor insolvency (bankruptcy) and supplier (me) sueing the bonding company. Bonding company attorneys threw up incredible smokescreens claiming misappropriation of prior payments; demanded reams of past records that took my office personnel weeks to accumulate, and generally delayed the process hoping we would just give up. We mere driven by principle not to let that happen - the outcome was obvious (we won) but it cost us a fortune in time and money.
Any sensible, reasonable, mediator/arbitrator could have seen what was going on and the matter could have been settled early and equitably. (2)

We were never accused - just investigated. Our discovery/legal expenses were totally unwarranted. (3)

Before this went to actual court, there were pretrials, Federal _____ and many things within a 9 yr. period before being settled. But even between trials there were 3 to 6 mos. in between, some up to a year. We had come to the conclusion that nothing would have been done. (4)

Although the delays and unusual costs of our litigation were a result of futile defensive tactics. I salute you for the dissemination of this questionnaire. Thank you for the opportunity. (5)

I've had an on going dispute with the SSA for over 5 yrs.. The SSA finally agreed that they were wrong and rendered a favorable decision after several appeals. No one should suffer as I have in this matter. (6)

APPENDIX C

Copies of these rules are available at the following locations:

Clerk's Office
U.S. District Court
Eastern District of NY

BROOKLYN OFFICE
225 Cadman Plaza East
Brooklyn, New York 11201

UNIONDALE OFFICE
Uniondale Avenue At
Hempstead Turnpike
Uniondale, New York 11553

HAUPPAUGE OFFICE
300 Rabro Drive
Hauppauge, New York 11788

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

STANDING ORDERS OF THE COURT ON EFFECTIVE DISCOVERY IN CIVIL CASES

AMENDED FEBRUARY 27, 1987
EFFECTIVE UNTIL MARCH 1, 1991

MARCH, 1987 Edition

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STANDING ORDERS OF THE COURT ON
EFFECTIVE DISCOVERY IN CIVIL CASES

to the power of any judge or magistrate to rule otherwise for good cause
e following are adopted as Standing Orders of this Court:

GENERAL PROVISIONS

peration Among Counsel. Counsel are expected to cooperate with each
sistent with the interests of their clients, in all phases of the discovery
nd to be courteous in their dealings with each other, including in mat-
ng to scheduling and timing of various discovery procedures.

lations. Unless contrary to a prior order of the court entered specifically
on, the parties and when appropriate a non-party witness may stipulate
itable writing to alter, amend or modify any practice with respect to

II.
JUDICIAL INTERVENTION

cheduling Conference. Promptly after joinder of issue, but in any event
practicable and reasonably before the expiration of the 120 day period
by Fed. R. Civ. P. 16(b), the judge shall determine whether the judge
gistrate shall deal with the scheduling order, and if the magistrate, the
ll make a suitable reference.

eduling Order. Prior to any scheduling conference, the attorneys for
s shall attempt to agree to a scheduling order and if agreed to, shall
to the court. If such scheduling order is reasonable, the court will ap-
nd advise counsel. The court may for any reason convene a conference
sel by telephone or otherwise to clarify or modify the scheduling order
by counsel. If the attorneys for the parties cannot agree on a scheduling
cy shall promptly advise the court.

4. Reference to Magistrate.

(a) Selection of Magistrate. A magistrate shall be assigned to each case at random on a rotating basis upon the commencement of the action, except in those categories of actions set forth in Civil Rule 45 of this Court. A magistrate so assigned shall take no action with respect to any matter until a suitable order of reference is received.

(b) Scope of Reference. At the time the judge determines whether the judge or the magistrate shall deal with the scheduling order, the judge shall determine whether discovery matters shall be referred to the magistrate and the scope of such reference. The judge may at any time enlarge or diminish the scope of any reference to the magistrate.

(c) Orders of Reference. The attorneys for the parties shall be provided with copies of all orders referring a matter to the magistrate, the scope of such reference, and any enlargement or diminution thereof.

5. Review of Magistrate's Rulings.

(a) Procedure. A party may make application to the judge to review a ruling of the magistrate on a discovery matter pursuant to Fed. R. Civ. P. 72(a). Such application shall be made by short-form notice of motion as appears in Form A, delineating the scope of the issues to be reviewed by the judge.

(b) Timing. An application for review of a magistrate's order shall be made to the judge within ten days after the entry of such order.

(c) Written Exposition of Magistrate's Rulings. The magistrate shall enter into the record a written order setting forth the disposition of the matter within such ten-day period if requested to do so by the judge or a party considering review. Such written order may take the form of an oral order read into the record of a deposition or other proceeding.

6. Mode of Raising Discovery Disputes with the Court.

(a) Premotion Conference. Prior to seeking judicial resolution of a discovery dispute, the attorneys for the affected parties or non-party witness shall attempt to confer in good faith in person or by telephone in an effort to resolve the dispute.

(b) Resort to the Court.

(i) Depositions. Where the attorneys for the affected parties or non-party witness cannot agree on a resolution of a discovery dispute that arises during