CIVIL JUSTICE ADVISORY GROUP

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

CIVIL JUSTICE ADVISORY GROUP
TO
THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

BENJAMIN F. GIBSON, CHIEF JUDGE
RICHARD A. ENSLEN, DISTRICT JUDGE
JAMES H. GEARY, CHAIRMAN
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☐ 410 W. MICHIGAN, B-35
KALAMAZOO, MI 49005

Memorandum of Transmittal

To: Honorable Benjamin F. Gibson

From: James H. Geary

Ralph Clark Chandler

This memorandum respectfully transmits the report of the Civil Justice Advisory Group to the United States District Court of the Western District of Michigan.

The report represents the consensus of the Advisory Group, and not always the clear individual preference of each member. It was a communal labor of personal and professional commitment to the purposes of the Civil Justice Reform Act, and it is forwarded in the hope that our work will benefit others as well as improve the administration of justice in our own district.

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REPORT

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NOVEMBER 22, 1991

CIVIL JUSTICE ADVISORY GROUP

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I

INTRODUCTION

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.
>
> -The Constitution of the United States
> Article III, Section 1

The first Congress of the United States was scheduled to convene on March 4, 1789. It was not until April 6 that a quorum was achieved, however, and during that month of waiting, three lawyers named Oliver Ellsworth of Connecticut, Caleb Strong of Massachusetts, and William Patterson of New Jersey developed an idea. It would become Senate Bill 1, and it would establish the federal court system of the United States.

Senate Bill 1 came to be known as the Judiciary Act of 1789, or, officially, "An Act to Establish the Federal Courts of the United States." It was signed into law by President Washington on September 24, 1789. Interestingly, the Bill of Rights proposed by Representative James Madison was accepted by the House of Representatives on the same day. The intricate link between personal liberties and the vehicle through which they were to be protected was forged at the very beginning.

The jurisdictional questions debated in Congress during that summer of 1789 are still being debated in the American legal community. The fundamental question at that time was whether lower federal courts should be created at all, or whether

federal claims should first be heard in state courts. One group in the first Congress believed that federal law should be adjudicated in the state courts first and by the United States Supreme Court only on appeal. Their fear was that the new government would destroy the rights of the states.

Another group was suspicious of the parochialism of state courts and feared that litigants from other states and other countries would be dealt with unjustly. These lawmakers favored a judicial system that included lower federal courts, and they had enough votes to win. The law that emerged--the Judiciary Act of 1789--set up a judicial system composed of a Supreme Court, consisting of a chief justice and five associate justices; three circuit courts, each composed of two justices of the Supreme Court and a district judge; and thirteen district courts, each presided over by one district judge. Thus the Constitutional power to create inferior federal courts was immediately exercised by the first Congress.

United States District Courts are said to be the workhorses of the federal judiciary. They are the trial courts, and as such they are the basic point of input for the federal judicial system. Most federal cases never move beyond them. Now increased to 94 from the original 13, the district courts still reflect the state boundary scheme outlined in Section 2 of the Judiciary Act of 1789. Section 2 made each of the eleven states then in the union a federal district,[1] and made the part of Massachusetts that would become Maine and the part of

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[1]Since North Carolina did not ratify the Constitution until November 21, 1789, and Rhode Island not until May 29, 1790, they were not yet in the Union.

Virginia that would become Kentucky, into separate districts. The federal judiciary was, and is, state contained, with the administrative and political structure of the states framing the organizational structure of the federal courts.

Congress later divided many of the states into more than one district. California, New York, and Texas have the most, with four each. Other than consistently honoring state lines, the organization of district constituencies appears to follow no rational plan. Size and population vary widely from district to district. Over the years, a court was added for the District of Columbia and several territories. There are now United States District Courts designated for each of the fifty states, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, and the Northern Mariana Islands.

Congress has specified organizational detail by creating divisions within a district. It precisely lists the counties included in a particular division, as well as the cities in which judges will sit.

The original district courts were each assigned one judge, but with the growth in population and litigation, Congress has periodically added judges to most of the districts. In 1978, for example, it passed the Omnibus Judgeship Act, which created 177 new federal district judgeships and 35 new court of appeals judgeships, the largest number of judgeships ever created by a single act of Congress. The net effect of that legislation was to increase the number of

federal district judges from 398 to 515. Subsequent legislation brought the total number of authorized judgeships to 649.[2]

By 1991 all districts had been assigned more than one judge. The Southern District of New York, which includes Manhattan and the Bronx, currently has 27 judges and is the largest. Since each federal district court is normally presided over by a single judge, several trials may be in session at various cities within the district at any given time.

Congress has given district courts original jurisdiction over virtually all federal cases. District courts are the only federal courts in which attorneys examine and cross-examine witnesses. The factual record is established at this level, and subsequent appeals of trial court decisions focus on correcting errors rather than reconstructing the facts.

Students of the judiciary frequently make a distinction between norm enforcement and policy making by the courts. Trial courts are viewed as engaging primarily in norm enforcement, while appellate courts are seen as having a greater opportunity to make policy. District courts actually do both. They practice norm enforcement when they make decisions based on statutes, administrative regulations, prior court decisions, and community traditions related to a particular case at hand, and they make policy when these same decisions are projected as guideposts for future actions.

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[2]This number includes 13 temporary judgeships. There are also 323 full-time and 153 part-time magistrate judge positions authorized by Congress as of August 1, 1991.

The discretion that a federal trial judge exercises cannot be underestimated. In a litigation-conscious society, disputes that once were resolved informally are now more likely to be decided in a court of law. The courts find themselves increasingly involved in domains once considered private, and these new areas of judicial involvement tend to be relatively free of clear, precise, appellate court and legislative guidelines. There is a standing opportunity for trial court jurists to write on a clean slate and make public policy.

Congress has reorganized the federal courts many times over the history of the republic. It has steadily expanded their jurisdiction while also defining and redefining their role. Beginning with the adoption of the Federal Rules of Civil Procedure in 1938, for example, Congress attempted to shift the civil process from an adversarial proceeding to a fact-finding exchange of information facilitating just and equitable settlements. That goal is still being pursued fifty years later as court rules are periodically amended and new ways of resolving disputes are identified. A statement Chief Justice Earl Warren made on April 4, 1960, is as true today as it was when he first uttered it. The occasion was the announcement of the appointment of six nationally-organized committees of judges, lawyers, and legal scholars to study and recommend improvements in the rules of practice and procedure in the federal courts.

> The rules of court are the most important tools of the courtroom lawyer. So long as we have the inevitable changes in our social, economic, and political lives, the demand for amendments in the rules, and also for new rules, by which we resolve conflicts in the courts is equally inevitable.[3]

As early as 1941, three years after the adoption of the Federal Rules of Civil Procedure, a committee on pretrial procedure in the District of Columbia called for pretrial case management by judges.

> Necessarily, pretrial procedure envisages the invocation of initiative on the part of the judge. It transforms him from his traditional role of moderator passing on questions presented by counsel, to that of an active director of litigation. [It makes it] possible to dispose of the contest properly with the least possible waste of time and expense. By exercising his authority to the fullest extent in this direction, the pretrial judge not only advances the cause of the administration of justice, but also enhances respect for the courts on the part of the public.[4]

The federal courts have made great strides in streamlining court management procedures over the past twenty-five years. In 1969, metropolitan federal courts began to transfer case management from a master calendar system to an

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[3]Chief Justice Earl Warren, "Announcement of the Chief Justice of the United States," Federal Civil Judicial Procedure and Rules, as amended to February 1, 1991 (St. Paul, Minnesota: West Publishing Company, 1991), p. VII.

[4]Pretrial Procedure Abridged Report of the Committee on Pretrial Procedure to the Judicial Conference of the District of Columbia, 4 Federal Rules Service 1015 (1941). Cited in Robert F. Peckham, "A Judicial Response to the Costs of Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution," 37 Rutgers Law Review, 253-277 (Winter 1985).

individual assignment system. Under the old system, a trial was not assigned to a judge until the day of the trial. Thus pretrial motions were sometimes heard by several different judges. The new system allowed a judge to follow a single case from filing to disposition. It frequently motivated judges to monitor their cases more closely, which made them more familiar with the cases and more effective in presiding over them.

The development of judicial case management evolved from programs first established by the Federal Judicial Center in 1967. These programs encouraged federal judges to be more active in managing their dockets. It was not until 1983, however, when the Federal Rules of Civil Procedure were amended to "provide for pretrial conferences, scheduling, and management" that many federal judges overcame their hesitancy to implement a case management system. After 1983, they had clear authority to do so.

The American Bar Association has also been instrumental in bringing to the forefront of American law the task of reducing the costs of litigation in the civil justice system. In 1979, for example, the ABA established the "Action Commission to Reduce Court Cost and Delay," and a decade later it played a major role in developing the reforms envisioned in the Civil Justice Reform Act of 1990.[5]

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[5]The Civil Justice Reform Act of 1990 is an abbreviation of the Judicial Improvements Act of 1990, Public Law Number 101-650 (1990), found in Title 28, United States Code, sections 471-482.

The Civil Justice Reform Act of 1990 addresses forthrightly and comprehensively the need for judicial officers to reduce cost and delay in civil litigation. The Act called for the establishment of advisory groups in each of the nation's district courts to represent the range of litigants and practitioners in the court, and to assess the state of the court's civil and criminal dockets. From this study of the current operations of the court would come a plan and set of recommendations about how the court could embrace state-of-the-art management principles to reduce cost and delay, while also serving the interests of justice.

The Western District of Michigan is one of five demonstration districts cited in the Act. Along with the Northern District of Ohio, it was instructed to experiment over a four year period with systems of differentiated case management for processing cases under distinct and explicit rules, procedures, and time frames. The Northern District of California, the Northern District of West Virginia, and the Western District of Missouri were instructed to experiment with various alternative methods of resolving disputes selected by the courts and the Judicial Conference of the United States to reduce cost and delay in civil litigation.[6]

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[6]Public Law 101-650, section 104, codified in Title 28, United States Code, section 471, notes.

This report contains the assessment of the United States District Court for the Western District of Michigan mandated by the Civil Justice Reform Act of 1990, as well as the district's plan for becoming an Early Implementation District Court.[7]

[7]Public Law 101-650, section 103 (c)(1), codified in Title 28, United States Code, section 471, notes.

II

DESCRIPTION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

The United States District Court for the Western District of Michigan is one of two district courts in the State of Michigan as illustrated in Map 1. The court serves a district with a population in excess of three million people. Geographically, the district is spread over approximately 37,000 square miles encompassing the western half of the lower peninsula and the entire upper peninsula of the state. It includes 49 counties arranged in two divisions.

> The *Northern Division* consists of 15 counties: Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon, and Schoolcraft.
>
> The *Southern Division* consists of 34 counties: Allegan, Antrim, Barry, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Clinton, Eaton, Emmet, Grand Traverse, Hillsdale, Ingham, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanau, Manistee, Mason, Mecosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa, St. Joseph, Van Buren, and Wexford.

The demographic characteristics of the district are such that the controlling statute authorizes the court for the Northern Division to sit in Marquette and Sault Sainte Marie. The court for the Southern Division may sit in Grand Rapids, Kalamazoo, Lansing, and Traverse City.[8] A review of court activity

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[8]Title 28, United States Code, section 102.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN

for calendar year 1990 indicates that 1,707 civil cases were filed in the district,[9] with the majority of them filed in Grand Rapids, the primary location of the court.[10] Nineteen percent of the cases were filed in Marquette, followed by 10 percent in Kalamazoo, and 6 percent in Lansing, the other three current locations of the court. A breakdown of cases by category shows general filings with 47 percent;[11] civil rights with 36 percent; habeas corpus with 10 percent; social security with 5 percent; and student loan cases with 1 percent. Recent trends show that contract and social security cases have decreased over the past four years, while there has been a sharp increase in personal injury litigation and prisoner petitions. Prisoner petitions represent the single most dominant category of cases.

Civil actions terminated in 1990 numbered 1,903, indicating the court was able to dispose of civil cases at a higher rate than they were being filed. The maintenance of this pace since 1987 has relieved the court of the significant backlog of cases existing before that time. Pending actions have decreased over this period from 2,156 in 1987 to 1,479 in 1990.

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[9]This number includes 1670 new cases and 37 reopened cases.

[10]The case activity reported in this section is for the period January 1 through December 31, 1990. Later in the report, statistical years, July 1 through June 30 for any given year, are used in the graphs and figures.

[11]The general filings category includes contract, forfeiture, labor, penalty/tax, personal injury, personal property, real property, property rights, and other specialized causes of action.

There were 167 criminal filings in 1987. This number decreased to 157 in 1988, went up to 209 in 1989, and decreased again to 192 in 1990. As with civil litigation, criminal litigation is terminated at basically the same rate at which it is filed. The number of pending criminal cases has increased over the last four years from 80 to 120. The number of defendants in criminal cases has consistently exceeded the number of cases, indicating multi-defendant prosecutions.

Judicial Resources

The court currently has four active judgeships. One of these positions is vacant, but a nomination has been made, although not yet confirmed, by the United States Senate. Two judges sit in Grand Rapids, and the third in Kalamazoo. Two senior judges also sit in Grand Rapids as of late 1991. Each of the senior judges, Judge Douglas W. Hillman and Judge Wendell A. Miles, with active Judge Robert Holmes Bell, travel to Marquette for Northern Division cases when necessary, while all five judges are available for Southern Division cases by random draw. In 1990, Judge Hillman had not yet assumed senior status, nor had Judge Gibson yet been elected Chief Judge, that changeover taking place on February 15, 1991. Thus the last full year available for study, 1990, does not show the current status of these two judicial officers. The five judges together--four active and one on senior status--maintained the following caseload in 1990.

Judge Benjamin F. Gibson, Chief Judge		407
Judge Robert Holmes Bell		467
Judge Richard A. Enslen		444
Judge Douglas W. Hillman		338[12]
Judge Wendell A. Miles	(senior status)	14[13]
		1,670 Total Civil Cases

The reader should not equate the numbers above with level of effort by each judge, or use them as a measure of individual productivity. The numbers do not indicate, for example, the degree of complexity of each case. The Advisory Group notes the extremely efficient case disposition record of the district as a whole, and the teamwork and good management practices that produce such a record.

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[12]During this period, 1990, Judge Hillman was Chief Judge, and he therefore received 20.2 percent of the draw as compared to 24.4 percent for Judge Gibson, 28.0 percent for Judge Bell, 26.6 percent for Judge Enslen, and 0.8 percent for Judge Miles.

[13]Also during this period, 1990, Judge Miles sat on the Foreign Intelligence Surveillance Court, district courts in Florida, Texas, and Puerto Rico, and the United States Court of Appeals for the Sixth Circuit.

The statute governing the senior status of judges says, "Any retired circuit or district judge may be designated as a senior judge and assigned by the Chief Judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake." Title 28, United States Code, section 294 (c).

Congress also requires that a senior judge maintain a 25 percent workload for certification. In response to this requirement, in the Ethics Reform Act of 1989, Public Law 101-194, section 705, 103 Statute 1716, 1770-71, the Judicial Conference of the United States promulgated Rules for the Certification of Senior Judges on September 12, 1990.

The three active judges are responsible for the primary workload of the court. They preside over jury and bench trials in both civil and criminal proceedings, pretrial conferences, sentencings, and other activities related to the disposition of cases in the district. They also hear appeals from cases heard by magistrate judges and from the United States Bankruptcy Court. The court scrupulously follows the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, with the judges also exercising the discretion each case may demand.

Both civil and criminal cases in the Western District are assigned to a presiding judge by random draw upon filing, unless the case is related to an action already pending. An exception to the random draw principle is the method of assigning cases in Marquette. The upper peninsula in Michigan is a distinct geographical region with a distinct regional culture. It has proved beneficial to all concerned for cases originating in the upper peninsula to stay there. Marquette is over 800 miles and 13 hours round trip by car from Grand Rapids. It is both costly and inefficient for a judge to travel there, but the willingness of Judge Hillman, Judge Bell, and Judge Miles to do so, and the efficient work of the resident Magistrate Judge, Timothy P. Greeley, has kept the docket current.

The judicial facility in Marquette is an excellent one, and it appears to be advantageous for the temporary judgeship authorized in 1990[14]--the fifth

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[14]Public Law 101-650, enacted by Congress on December 1, 1990.

judgeship--to be located there. The authorization of the additional judgeship has caused the number of vacant judgeship months to rise considerably for the current reporting period, underlining the necessity of filling the position as soon as possible. *[The recommendations of the Advisory Group will appear in the report as they first and normally present themselves in the narrative, as well as in summary form at the end of the report. The first recommendation follows.]*

RECOMMENDATION ONE

Congress should establish a fifth permanent judgeship for the Western District of Michigan, and upon such action the court should give serious consideration to locating an Article III judge in Marquette to assure the currency of the docket throughout the district.

It is anticipated that the vacant judgeship created by Judge Hillman taking senior status--the fourth judgeship--will become a full-time assignment in Lansing in 1992. Mr. David W. McKeague has been nominated to the position by President Bush and is now awaiting confirmation by the United States Senate.

Cases assigned to a district judge in the Western District of Michigan may be referred to a United States magistrate judge. The Federal Magistrates Act of 1968 created the position of United States Magistrate, and the Judicial Improvements Act of 1990 changed the title to United States Magistrate Judge. Magistrate judges are empowered to perform many of the duties previously performed only by federal district judges.

There are four magistrate judges in the Western District of Michigan, one each in Kalamazoo and Marquette, and two in Grand Rapids. The magistrate judges play a vital role in the work of the court, with each judge free to employ his magistrate judge in the way he sees fit. The magistrate judge in Kalamazoo serves the district judge in Kalamazoo and Senior Judge Miles, while the two magistrate judges in Grand Rapids carry out assignments for all four of the active and senior judges there. Along with the duties specified by statute,[15] the magistrate judge in Marquette accepts assignments from the judges who travel from Grand Rapids to preside over cases in the northern region. This particular magistrate judge takes on more case-handling responsibilities than do his colleagues in Grand Rapids and Kalamazoo, since no district judge sits in Marquette on a full-time basis.

The majority of cases handled by magistrate judges fall into three categories: 1983 civil rights cases, habeas corpus cases, and social security cases. In 1990, out of a total of 1,707 civil cases filed, 875 fell into these categories and were disposed of collectively by the four magistrate judges. It is apparent from this large number of actions that the magistrate judges are an essential means of freeing federal district judges to focus on those matters requiring Article III attention.

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[15]Title 28, United States Code, section 636.

Court Resources

The consensus of the judges, lawyers, and litigants involved in the work of the district court is that its administrative staff is highly efficient in carrying out its responsibilities. The clerk's office is universally praised for its effectiveness in processing documents and papers, maintaining accurate case records and court calendars, providing juries, and registering the actions of the court in a timely fashion. The Advisory Group believes that the judges, magistrate judges, case managers, secretaries, and law clerks who make up the judicial teams are more than adequately supported in the management of their civil and criminal caseloads. The management concept operative in the district is that the control of all non-judicial functions delegated by the court is the responsibility of the clerk of the court and his staff, while the case manager position is delegated to each judge as a resource for supervising case flow.

The Marquette court is staffed by a full-time magistrate judge, the magistrate-judge's secretary, the resident deputy-in-charge, a deputy clerk, a magistrate courtroom deputy, and a part-time secretary. The Lansing court is staffed by a resident deputy-in-charge, plus one additional clerk. Kalamazoo has a full judicial team including a district judge, a magistrate judge, a case manager, two law clerks, the judge's secretary, the magistrate judge's secretary, a resident deputy-in-charge, two deputy clerks, a courtroom deputy assigned to the magistrate judge, and a part-time secretary also assigned to the magistrate judge. Full judicial teams are assigned to the two active judges in Grand Rapids as well, and the two judges on senior status there also have adequate

staff support. There are two pro se law clerks, one in Kalamazoo and one in Marquette, who serve the needs of the entire district. Chart 1 summarizes the complete staff support system now in place.

The center of administration for the district is in Grand Rapids, and the federal building there houses the majority of the staff assigned to the court, including the Unites States Attorney, the United States Marshal, the United States Probation Office, and the Bankruptcy Court.

The United States Attorney for the Western District of Michigan, like each of the other 93 judicial districts, is chosen by the President, with the approval of the Senate. His caseload involves federal criminal cases and the civil cases in which the United States government is a party.

Among the services provided by the United States Marshal are:

(1) transportation and custody of federal offenders;

(2) apprehension of federal criminals who fail to appear, violate parole, or escape from prison;

(3) protection of federal judges, witnesses, and attorneys;

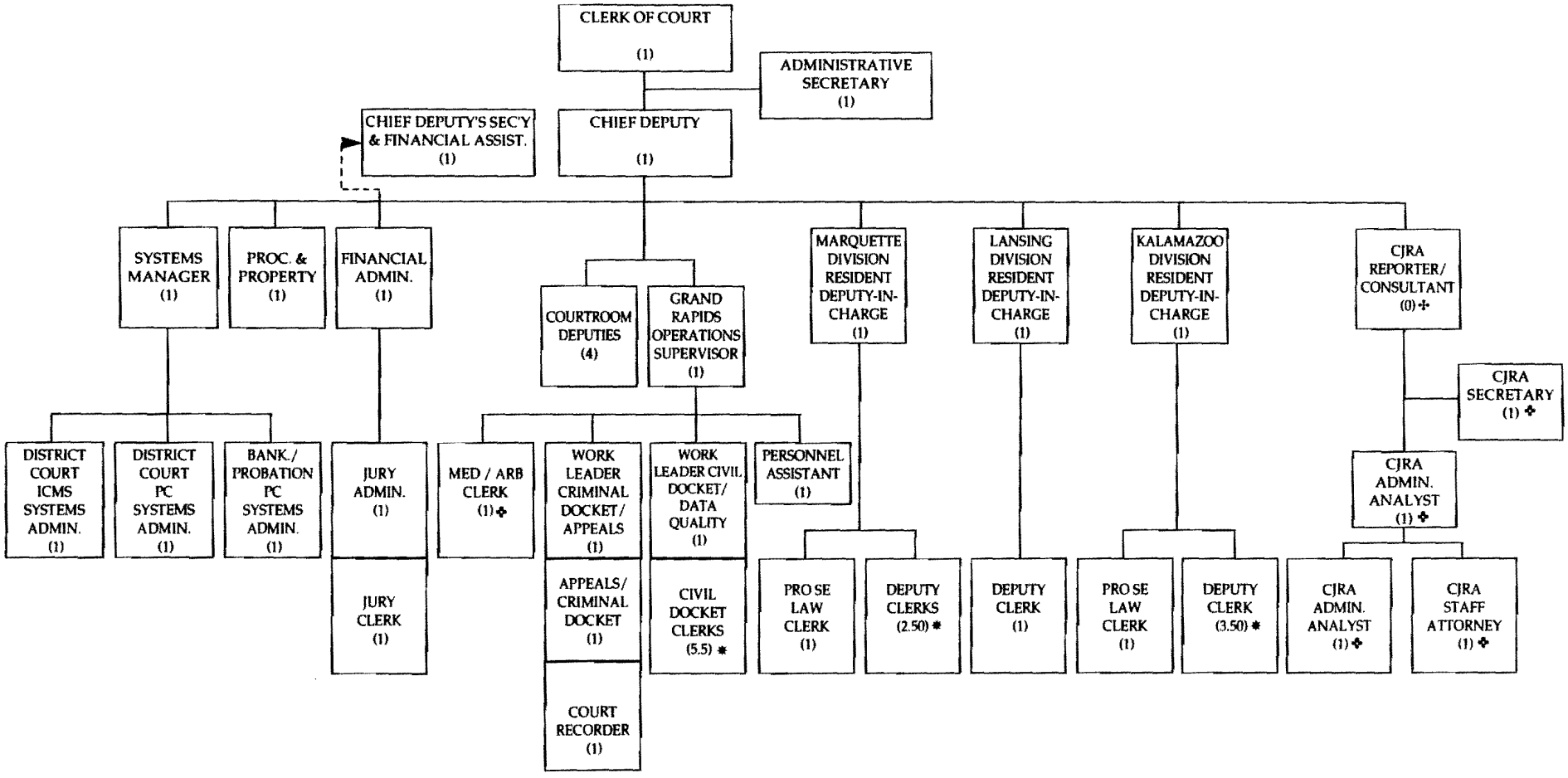
(4) enforcement of court orders, including the service of process; and

(5) management of forfeited assets from criminal activities.

As an officer of the court, the United States Marshal has responsibility for serving documents related both to the criminal and civil matters before the court.

U.S. DISTRICT COURT - WESTERN DISTRICT OF MICHIGAN

Organization Chart



AUTH. POS.		FILLED
39	FT	39
5	FT-TEMP	5
44	TOTAL	44

REVISED: October 1, 1991

✣ The Reporter/Consultant is not counted as an authorized position.

* Two Civil Docket Clerk positions are filled with four part-time employees.

❖ There are actually five positions authorized to the Clerk's office in this category as full-time temporary employees.

An additional support resource for the court and an integral part of the organizational culture in which the court operates is the United States Probation Office, established by statute in 1925. This office handles the investigative work of the courts and paroling authorities, as well as the case supervision of probationers and parolees.[16]

Among a variety of tasks, the role of the probation officer is to:

(1) protect society by reducing the risks posed by the offender;

(2) report the past and present conduct and circumstances of defendants, pretrial releasees, and parolees;

(3) prepare evaluations and recommendations related to incarceration or probation, including individualized sentencing alternatives and plans that are compatible with the safety and welfare of the community;

(4) participate in the supervision and social reintegration of federal probationers and parolees; and

(5) provide for correctional treatment of offenders.

The Bankruptcy Court of the Western District of Michigan has four bankruptcy judges, appointed to hear both individual and corporate bankruptcy cases. The judges serve 14-year terms and work with statutes and laws making up a highly specialized field. The volume of cases proceeding through the bankruptcy process numerically exceeds all civil and criminal cases combined. There has been a steady increase in bankruptcy filings over the past three years, from 3,791 in 1989 to a projection of more than 7,000 for 1991.

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[16]The United States Probation Office operates under provisions of Title 18, United States Code, section 3654-3655.

Three of the four judges of the bankruptcy court hold active status and one is retired and recalled, Judge David E. Nims, Jr. Judge Nims has maintained a caseload almost as large as the active judges since 1986. Each judge has a secretary and a law clerk, with an administrative staff in the bankruptcy clerk's office numbering 40. The staff serves a wide variety of functions including docketing, courtroom coordination and intake, and the provision of logistical and staff support to the court. The staff support system in the bankruptcy clerk's office is presented as Chart 2.

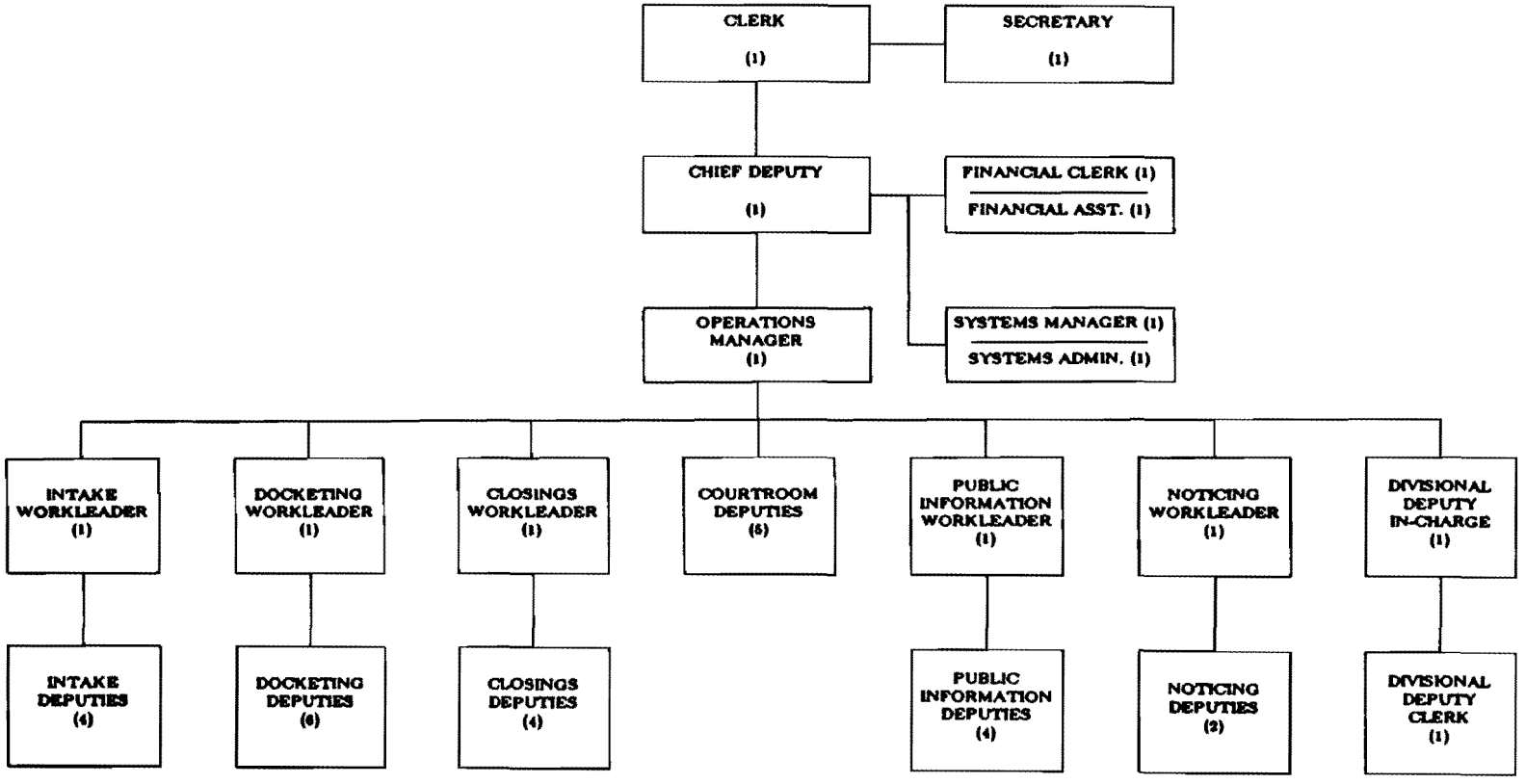
Bankruptcy judges are assigned to hear cases primarily in Grand Rapids, but they also travel to Kalamazoo, Marquette, Lansing, and Traverse City when necessary.

The federal district court hears appeals of the decisions made by bankruptcy judges, but the percentage of cases appealed is very small, less than one-half of one percent. There were 14 appeals pending as of September 13, 1991.

The appeals court serving the Western District of Michigan is the United States Court of Appeals for the Sixth Circuit, located in Cincinnati, Ohio. A defendant found guilty in a federal criminal case and the losing party in a federal civil case both have the right to appeal to the Sixth Circuit. There were 227 appeals filed for the year 1987; 306 for 1988; 356 for 1989; and 343 for 1990. Only one of the 1990 cases was granted certiorari by the United States Supreme Court. The other cases remained in the Sixth Circuit.

U.S. BANKRUPTCY COURT — WESTERN DISTRICT OF MICHIGAN

Organization Chart



REVISED: May 1, 1991

CHART 2

The district's jury plan for the selection of petit and grand jurors strictly adheres to the Jury Selection and Service Act of 1968. The district's plan lists the counties comprising the district, the policies and procedures governing the jury selection process, who is and is not qualified to serve, who may be exempt from service, and specific methods for the selection of names, including the mathematical equations for determining an interval, and the starting number for all the qualified prospective jurors in the district.

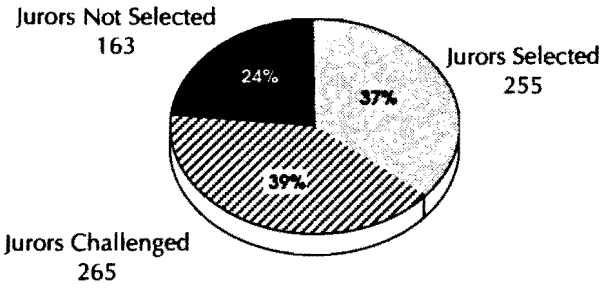
In 1990, the district judges presided over the selection of petit jurors for 43 trials. The number of jurors present for jury selection for those trials was 1,239. Of these, 408 were selected; 458 were challenged; and 373 were unused. The district's policy is to minimize as much as possible the percentage of unused jurors. The jury usage charts on the two following pages show categories of jury analysis by each location of the court and by the Western District as a whole. The percentage of unused jurors was lowered from 33 percent in 1989 to 30 percent in 1990.

Grand jurors are drawn at the request of the United States Attorney and seated for a period of eighteen months. Nine grand juries were convened in 1990. Four completed their term of service and were discharged, and five remained. Grand juries met for a total of 95 days last year and returned 95 indictments.

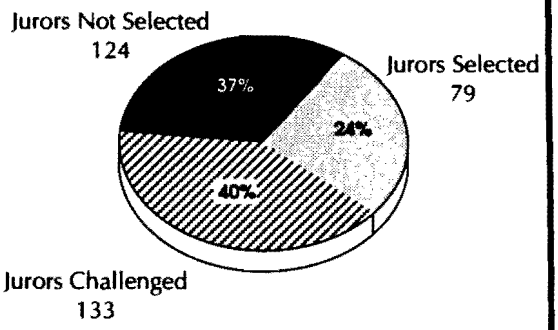
JUROR USAGE
BY JURY WHEEL

January 1, 1990 - December 31, 1990

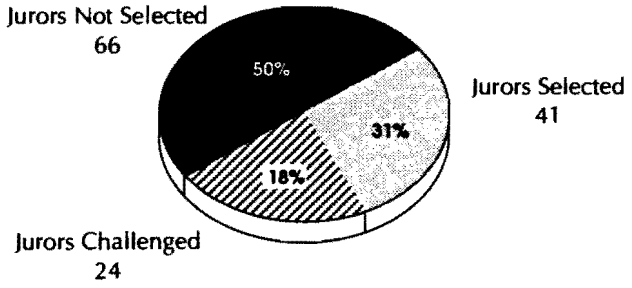
Grand Rapids



Kalamazoo



Lansing



Marquette

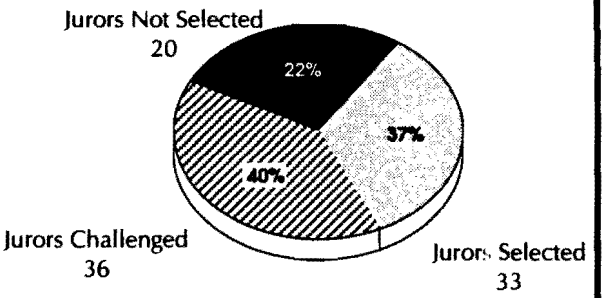


CHART 3

JUROR USAGE
DISTRICT WIDE

January 1, 1990 - December 31, 1990

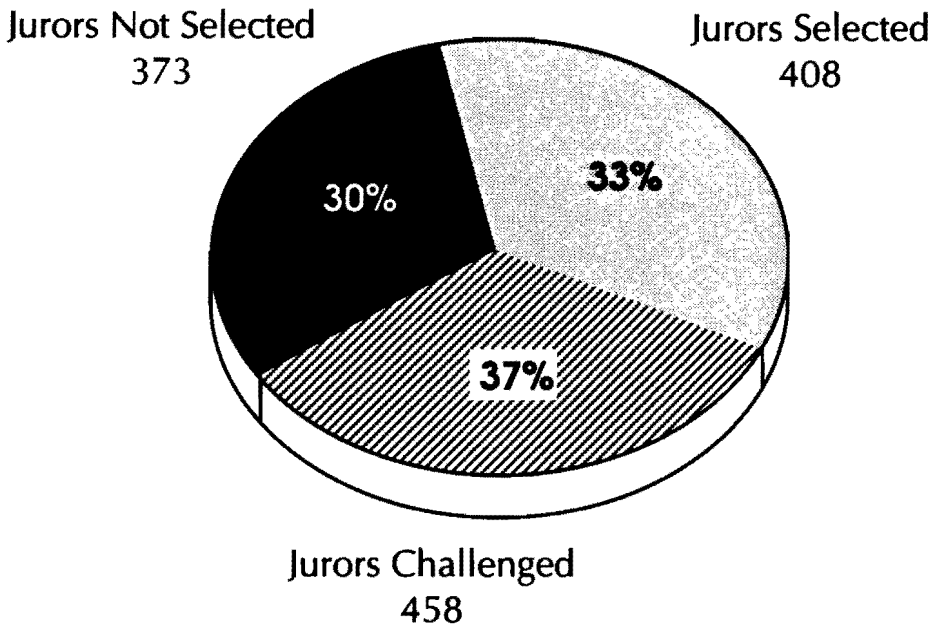


CHART 4

The local rules for the Western District of Michigan encourage the use of Alternative Dispute Resolution, or ADR.[17] Mediation and summary jury trials have been used in the district since 1983. A mandatory, court-annexed, non-binding arbitration program began in July of 1985, with the first hearing conducted on February 1, 1986. The following data on arbitration and mediation will illustrate the success of ADR in the district.

An arbitration hearing is like a mini-trial conducted by a single attorney appointed to serve as an arbitrator. Witnesses may be called and evidence admitted. Arbitration is designed to focus on case issues early in the process, keeping costs associated with full discovery to a minimum. Its purpose is to provide litigants in less complex cases an opportunity for neutral input at a cost more commensurate with the value of the case. The primary job of the arbitrator is to render a decision based on the merits of the case. There have been 1,487 cases placed in arbitration since July 1, 1985. Currently, 1,412 of those cases are closed, with only 75 still active. Thus 94 percent of the cases assigned to arbitration were disposed of prior to trial. Of the actions in which an arbitration hearing was held, the arbitrator's decision was accepted 21 percent of the time. This figure is somewhat misleading because the arbitrator's decision frequently put the case in such a new perspective that the litigants

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[17]As codified in United States District Court Rules for the Western District of Michigan, Rules 41-44, the forms of Alternative Dispute Resolution practiced in the district are arbitration, court-annexed arbitration, early neutral evaluation, mediation, mini-hearings, and summary jury trials.

attached values to the controversy they had not yet considered and were therefore more likely to settle.

Mediations are conducted before a panel of three attorneys selected by the parties. Mediation evaluations focus on the settlement value of the case. To date, 1,207 cases have been placed in mediation, 1,125 are now closed, and 82 remain open. Thus 89 percent of the cases assigned to the mediation track were disposed of without trial. Of the cases in which mediation hearings were held, the mediation evaluation was accepted 30 percent of the time. The same caveat applied to the 21 percent acceptance figure for arbitration fits the 30 percent acceptance figure for mediation as well. The process itself encouraged settlement.

Automation has played a prominent role in reducing docket size and backlog in the district, as well as allowing the court to operate more efficiently on a day-to-day basis. Besides having access to a mainframe support system, the court also has 49 personal computers to allow on-line interaction with court records. The Bankruptcy Court is scheduled to receive the PACER system, an automated information system providing public access to the court's data base, in 1992.

The district court is interested in exploring the development of a system for the electronic transfer of data. Linked with the law firms most often approaching the court, this capability would reduce the need for the paper processing of motions, speed up response time to requests for information, and

streamline a variety of other form transmittal functions which make up the huge volume of paper exchanged in the judicial process.

The criminal docket, unlike the civil docket, is still basically a manual system in the Western District and is not as efficient as the civil processes. Automation of the criminal docket would allow the clerks and case managers to maintain an on-line system for the immediate processing and disposition of data. It is estimated that automation would increase the efficiency of criminal case disposition by at least 25 percent, because it would significantly reduce the need for paper communication as it has already done for the civil docket.

RECOMMENDATION TWO

In response to the upsurge in criminal cases, the criminal docket of the United States District Court for the Western District of Michigan should be automated as soon as possible on a scale similar to that of the civil docket, using state of the art electronic technology.

Another prospective innovation, particularly helpful in light of the distances which must be traveled to access federal courts in the Western District of Michigan, is the use of video conferencing. Such a system would significantly expedite disposition of actions brought by prisoners for alleged deprivation of civil rights, which make up close to one-half of the magistrate judges' caseloads. Since the district has jurisdiction over a majority of the prisons in the state, it must regularly evaluate a large number of prisoner petitions. Video conferencing would offer a way of allowing prisoners face-to-face access to

judicial deliberations, while minimizing costs in both time and money. Prisoner civil rights actions are not the only category of potential application of a video conferencing system. Attorneys sometimes travel great distances to the district from around the nation at significant expense to their clients for brief Rule 16 conferences, for example. Not all Rule 16 conferences would lend themselves to electronic meetings of the minds, but as long as the Civil Justice Reform Act mandates the reduction of cost, as well as delay, in civil proceedings, such means of cost reduction must be considered.

RECOMMENDATION THREE

A plan should be devised to determine the nature and circumstances of cases requiring personal appearances, video, or telephonic conferences and/or hearings, and systems put in place to conduct such procedures when appropriate. The immediate application of this capability is in prisoner civil rights cases, but it can be extended to other types of actions as well.

The competent and innovative judicial leadership that has characterized the Western District of Michigan for some time has produced results in the management of its civil and criminal dockets that now will be analyzed and reported in detail. Further improvements suggest themselves in response to the mandates of the Civil Justice Reform Act and will be brought forward at the end of the report as a plan of action under the court's anticipated designation as an Early Implementation District Court under Public Law 101-650, Section 103(c).

III

ASSESSMENT OF THE DOCKET IN THE WESTERN DISTRICT

The Civil Justice Advisory Group conducted a systematic and comprehensive assessment of docket conditions in the Western District. The two major questions guiding the effort were: (1) What is the status of the civil and criminal dockets in terms of case filings and dispositions? and (2) Does litigating in the Western District result in excessive costs and delays? The results of the assessment follow. First we will describe the methods used for collecting and analyzing the data, then we will present our key findings and major conclusions.

Methodology

The court engaged the services of consultants to collect data and conduct interviews by which an assessment of the court's docket and litigation management procedures might be made. Two different methods of assessment were used, and together they provide a comprehensive and detailed picture of how the district functions both quantitatively and qualitatively.

Interviews were conducted with 47 people who make up a significant sample of the court's working environment, including judges, magistrate judges, case managers, and selected members of the clerk's staff, as well as users of the court. The interviews were willingly granted and proved to be a valuable link between common *perceptions* of the court and the reality of the court's everyday practical life. The personal contact allowed a level of flexibility that could not be attained through a group interview or a mailed survey, and it provided the occasion to establish rapport between the court and the attorneys

and litigants who use its services. Such attention increased the validity, reliability, and richness of the data, and it afforded an opportunity to clarify questions and responses when necessary. When the interviews and statistical analysis had been completed, the facts had established an overwhelmingly positive view of the court by its users.

Docket Analysis

All cases closed between January 1, 1991, and June 30, 1991, were analyzed based on information obtained from case reports and dockets. Data on case complexity and activity were taken from each file, then coded and entered into a data base for statistical analysis. The collection instrument underwent continuous revision as it was being used. (See Appendix A.) Since the data was stored in various information systems, the court staff had to be resourceful in pulling it together.

The Western District of Michigan has seen the same increase in case filings that has characterized federal district courts nationwide. A large part of the reason for this is the recent activity of Congress in enacting new statutes for criminal offenses in response to the war on drugs and crime, as well as establishing mandatory minimum sentencing requirements and increasing procedural requirements for certain civil claims.

The docket analysis focused on the number of cases filed, terminated, and pending. Data going back to 1980 were studied to determine trends and changes in the condition of the docket.

Major Findings

The condition of the docket in the Western District has improved greatly in the last decade and is currently in excellent shape. The reason is the competent and skillful management of the docket by the court's judges, magistrate judges, and court staff, as well as a commitment to principles of differentiated case management and the regular use of alternative dispute resolution techniques.

These are the major findings regarding the condition of the docket:

(1) Civil case filings increased 70 percent between 1980 and 1990, but the number of terminated cases increased 135 percent. The result is a 37 percent decrease in pending civil cases.

(2) In comparison to the Sixth Circuit districts and nationally, the Western District has brought about a significant decrease in pending civil cases.

(3) About 25 percent of pending civil cases have been pending less than three months, and another 25 percent less than six months. Only 4 percent have been pending for more than three years. Litigation is not excessively delayed in the Western District of Michigan.

(4) The average litigation time for cases in the district was 309 days (about 10 months), while the median was 221 days (about 7 months).

(5) Seventy-one percent of all cases in the district were closed within one year, and about one-fourth of these (24 percent) were closed within three months. Eighty-five percent of all cases were closed in less than 18 months, and only 8 percent took more than two years.

(6) More than 75 percent of all bankruptcy, social security, property rights, and forfeiture cases, and 70 percent of all prisoner rights and contract cases, were closed within one year of filing. Only about half of the real and personal property and personal injury cases were closed within a year.

(7) The highest percentage of cases pending in the district as of June 30, 1991, were prisoner rights (39 percent) and personal injury (13 percent) cases. The lowest percentage of total pending cases were real property, property rights, tax, personal property, bankruptcy, and forfeiture cases.

(8) While the number of criminal and civil cases has significantly increased since 1980, as has the number of terminations, criminal cases have shown the greatest impact on the court's resources.

(9) Between 1980 and 1991, criminal filings increased 117 percent, but criminal case terminations increased only 22 percent. The current number of pending criminal cases is significantly higher than was the number in 1980.

(10) Alternative dispute resolution is regularly used in the district. Approximately half of the personal injury and personal property cases, and about one-third of the contract and civil rights cases have been referred to ADR.

Although not a requirement of the Civil Justice Reform Act, the Advisory Group was also interested in determining the level of satisfaction of litigants and attorneys involved in court actions in the district. The data from individual

interviews showed that most district court users were quite satisfied with the policies and practices employed in the district.

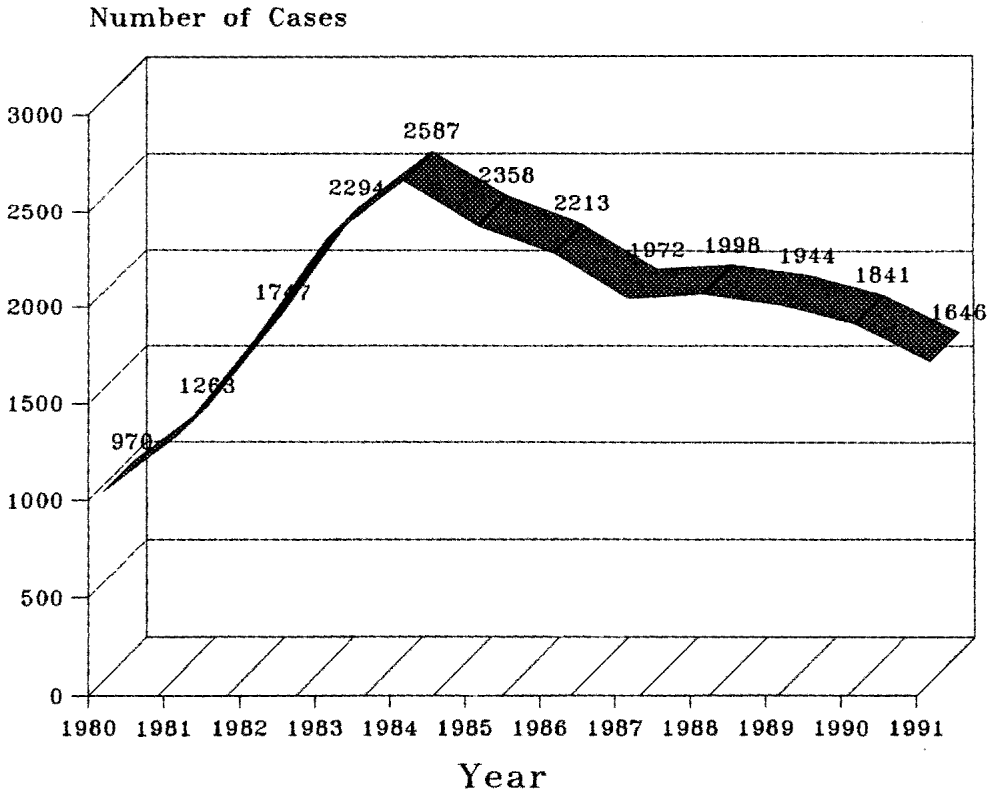
Case Filings

The number of new criminal and civil cases filed since 1980 has increased dramatically. In statistical year 1980 (July 1, 1979, through June 30, 1980), there were 85 criminal cases filed in the Western District compared to 184 between July 1, 1990, and June 30, 1991, an increase of 117 percent. In the civil category, 970 actions were filed in 1980, and 1,646 in the statistical year ending June 30, 1991, an increase of 70 percent.

Figure 1 presents summary data on the total number of civil cases filed each statistical year from 1980 to 1991. It shows that the number of cases increased

Figure 1

CIVIL CASES FILED IN THE WESTERN DISTRICT, 1980 TO 1991



steadily between 1980 and 1984 and then started a gradual decline. Interviews with court staff and attorneys and a review of the relevant literature yielded plausible reasons for this pattern.

The Reagan Administration's program for economic recovery stipulated the reduction of social security spending which resulted in major cutbacks in social security benefits in 1981. By 1984, the total amount of cuts from social security entitlements was estimated at $17 billion. The termination of social security benefits during this period--1981 to 1984--escalated to such proportions that the federal courts were inundated with termination appeals. Thus the civil case filings in the district rose from 970 in 1980; to 1,263 in 1981; to 1,747 in 1982; to 2,294 in 1983; and to 2,587 in 1984.

Prior to 1984, benefit termination cases were based solely on a subjective assessment of a person's medical condition and whether or not any improvement nullified his or her right to continue receiving social security benefits. In response to a public outcry from the large number of people whose benefits were terminated, Congress enacted the Social Security Disability Benefits Reform Act of 1984. This act required the Secretary of Health and Human Services to apply a "medical improvement standard" to determine whether a person could continue to receive disability benefits.[18] The application of this standard meant that more people remained within the system, and fewer appeals were filed. The decrease in the number of termination appeal cases after 1984 contributed

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[18]Title 28, United States Code, section 423(f).

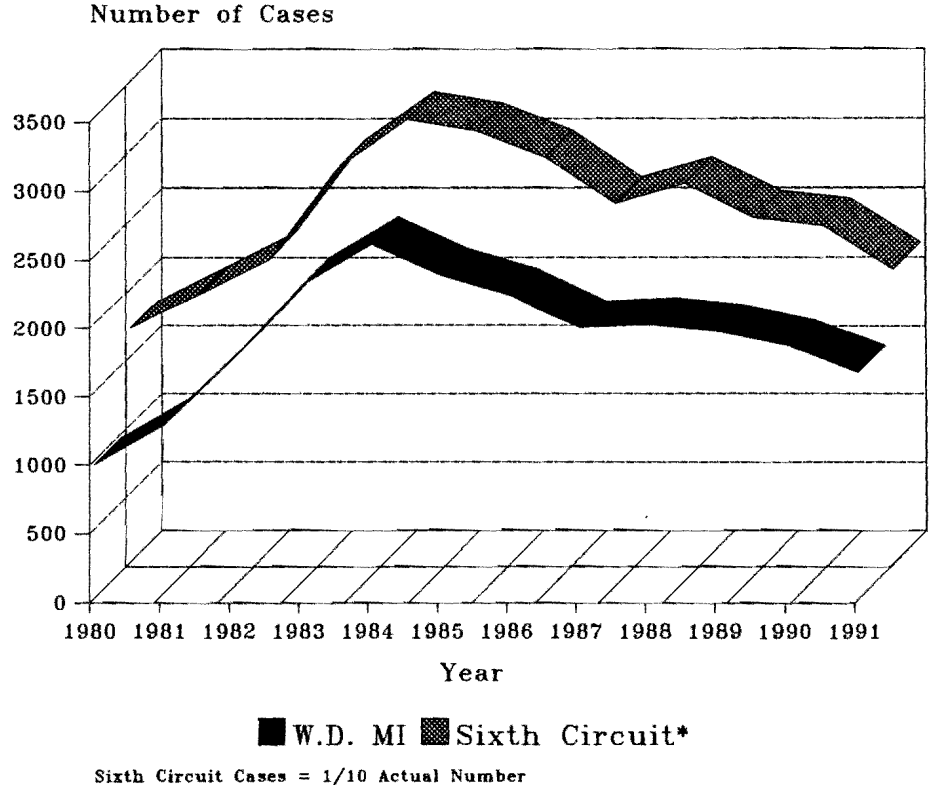
measurably to the steady overall decline of civil case filings in the district.

A contributing factor was a change made in the threshold of diversity cases from a previous jurisdictional amount of $10,000 before 1989 to $50,000 after 1989. Increasing the jurisdictional amount made it more difficult for litigants to bring a diversity case in federal court.

Figure 2 compares data on case filings between the Western District and the Sixth Circuit districts. Although there are more cases filed in the circuit than in the district, the pattern of increases and decreases is similar. All filing activity in the geographical area studied is acutely and directly affected by new federal legislation.

Figure 2

CIVIL CASES FILED IN THE WESTERN DISTRICT AND THE SIXTH CIRCUIT DISTRICTS, 1980 TO 1991



*This figure includes all federal district courts in Kentucky, Michigan, Ohio, and Tennessee.

Case Terminations

A primary indicator of docket activity and court efficiency is case terminations. Two sets of data were analyzed in this regard. The first was the total number of terminations each year from 1980 to 1991. The second was the types of cases closed between January 1 and June 30, 1991.

Figure 3 presents data on case terminations beginning in 1980. From 1980 through 1985, the number of terminated cases rose from 794 to more than 2,200. This striking improvement is because of the hard work and dedication of Judge Wendell A. Miles and the three federal judges appointed in the Western District in 1979. They were Douglas W. Hillman, appointed on September 28, 1979, Benjamin F. Gibson, appointed on October 3, 1979, and Richard A. Enslen, appointed on December 21, 1979. It took these three judges almost five years to relieve the district of its considerable backlog of unresolved cases.

A previously underutilized tool for reducing overburdened court dockets and lowering litigation costs came into prominence in 1986. In that year the Supreme Court significantly expanded the application of summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Rule 56 denies litigants access to trial when the court determines that there is "no genuine issue as to any material fact" to preclude "judgment as a matter of law." In a trilogy of cases,[19] the Supreme Court recognized that summary judgment is properly used

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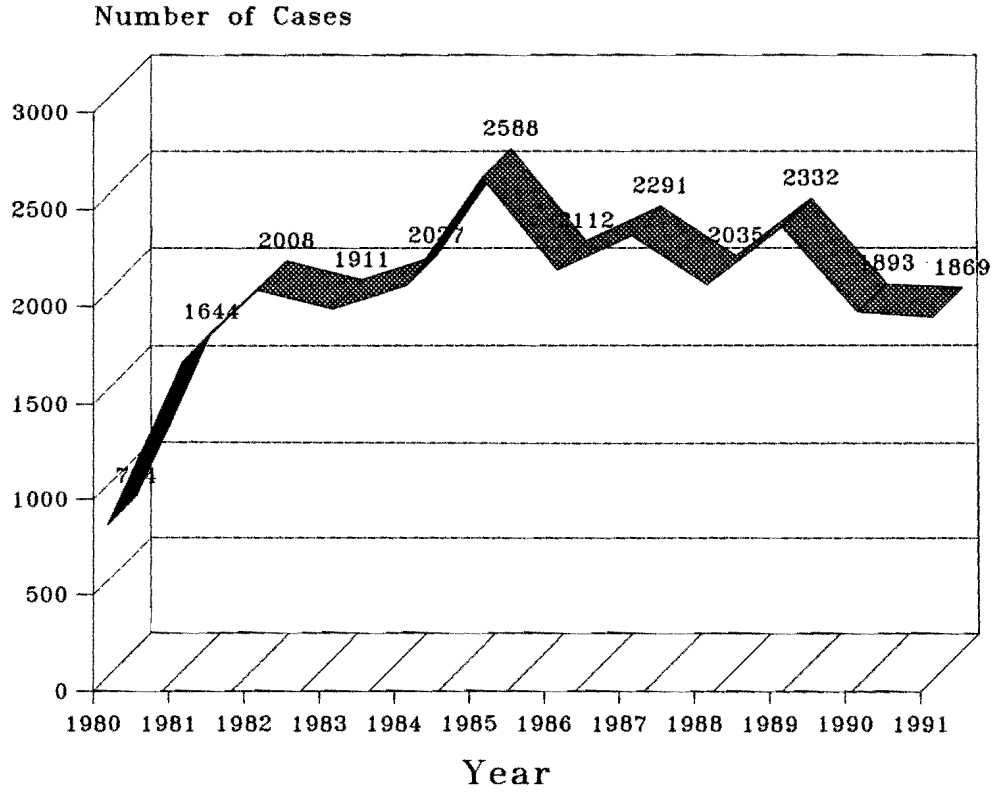
[19]Celotex Corporation v. Catrett, 477 U.S. 317 (1986); Anderson, et al. v. Liberty Lobby, Incorporated, et al., 477 U.S. 242 (1986); and Matsushita Electric Industrial Corporation v. Zenith Radio Corporation, et al., 475 U.S. 574 (1986).

whenever a suit can be resolved without trial, thus encouraging federal courts to grant summary judgment more freely. As the court noted in Celotex, "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to insure the just, speedy, and inexpensive determination of every action.'"[20]

Figure 3 shows that 794 cases were closed in 1980 compared to 1,893 in the period between July 1, 1990, and June 30, 1991. In general, terminations

Figure 3

CIVIL CASES TERMINATED IN THE WESTERN DISTRICT
1980 TO 1991



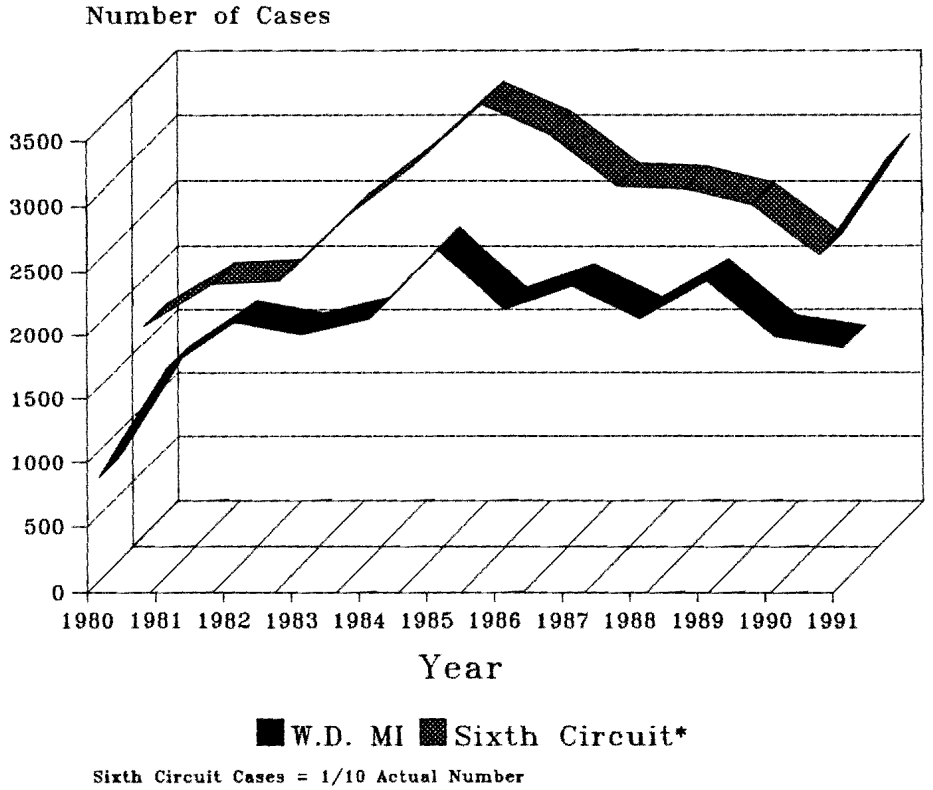
[20]Celotex Corporation v. Catrett, 477 U.S. 317 (1986).

have increased through the years in proportion to case filings. In 1980, 970 cases were filed and 794 were terminated. In 1991, there were 1,646 filed and 1,893 terminated. Such a trend demonstrates that the district is functioning efficiently and effectively.

Figure 4 compares the case terminations of the Western District to those of the Sixth Circuit districts. It shows similar trends over the same time period with the Sixth Circuit districts as a whole achieving a slightly higher case termination rate between 1980 and 1991.

Figure 4

CIVIL CASES TERMINATED IN THE WESTERN DISTRICT AND THE SIXTH CIRCUIT DISTRICTS, 1980 TO 1991



*This figure includes all federal district courts in Kentucky, Michigan, Ohio, and Tennessee.

From January 1 through June 30, 1991, the district closed 947 civil and criminal cases. An analysis of these cases by type yielded the following results. The largest proportion (42 percent) were prisoner rights cases (N=397), while criminal cases and contract cases each represented 8.6 percent of the total. All other civil cases decreased in the proportions shown in Table 1 and Figure 5.

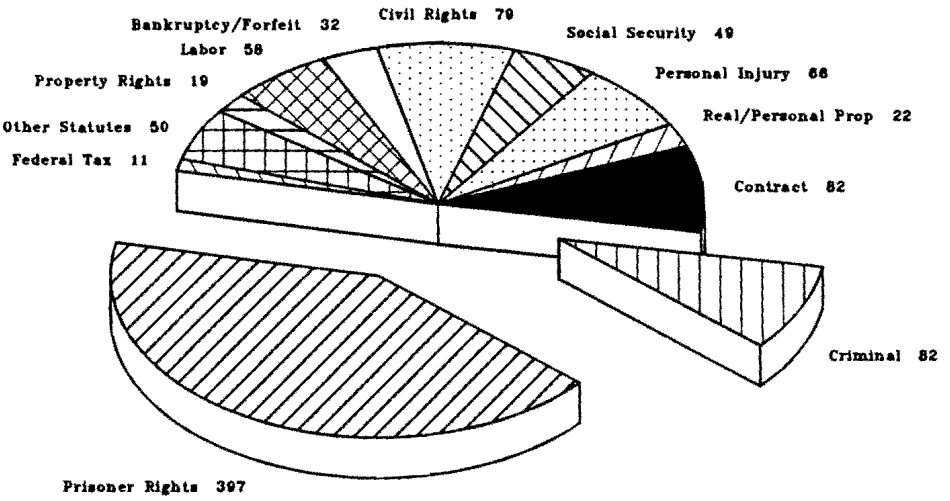
TABLE 1

DISTRIBUTION OF CLOSED CASES IN THE WESTERN DISTRICT, JANUARY 1--JUNE 30, 1991

NATURE OF CASE	NUMBER	PERCENT
Prisoner Rights	397	41.9
Criminal	82	8.6
Contract	82	8.6
Civil Rights	79	8.3
Personal Injury	66	7.0
Labor	58	6.1
Other Statutes	50	5.3
Social Security	49	5.2
Property Rights	19	2.0
Bankruptcy	18	1.9
Real Property	16	1.7
Forfeiture/Penalty	14	1.5
Federal Tax	11	1.2
Personal Property	6	0.6
Total	947	99.9

Figure 5

CASES CLOSED IN THE WESTERN DISTRICT
BETWEEN JANUARY 1 AND JUNE 30, 1991

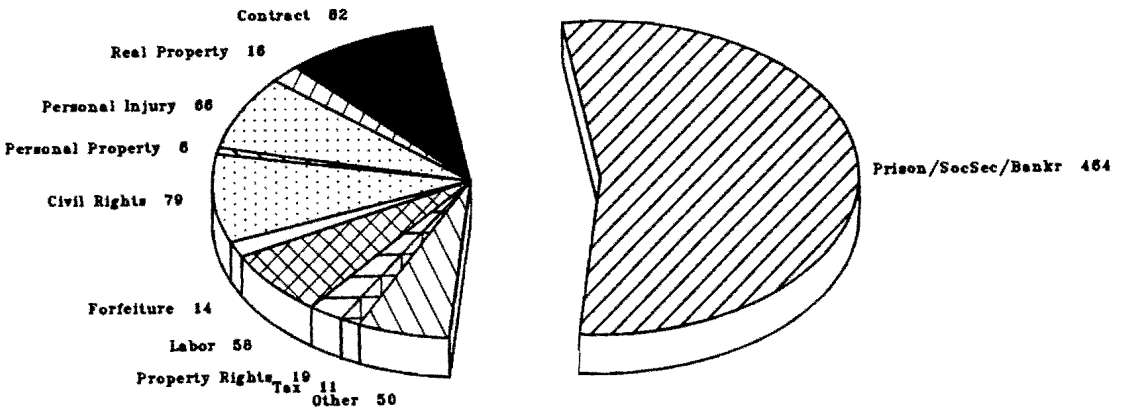


N=947

Figure 6 shows the proportional distribution of civil cases by type between January 1, 1991, and June 30, 1991.

Figure 6

CIVIL CASES CLOSED IN THE WESTERN DISTRICT
BETWEEN JANUARY 1 AND JUNE 30, 1991



N=865

Cases Pending

In an unpublished paper written for the Federal Judicial Center by John Shapard in 1991,[21] he argues that one can better understand the momentum of court caseloads by calculating the ratio of pending to terminated cases. Doing so gives an indication of the relative length of time cases remain in the system. The logic suggests that if the ratio remains constant, the court is staying abreast of its caseload. If it decreases, the court is gaining ground. If it increases, the court is falling behind. The ratio of pending cases to annual case terminations is an estimate of the life expectancy of cases.

An analysis of the ratio of pending to terminated civil cases in the district shows a significant improvement from 1980 through 1991. In 1980 the ratio was 2.9. The average life expectancy of a civil case was 2.9 years. In 1991 the ratio had been reduced to .79. The average life expectancy of a civil case was 9 months.

As of June 30, 1991, there were 1,471 civil cases pending, the lowest number in a decade. Prisoner civil rights cases were the largest single category, comprising 39.4 percent of the entire caseload. A large number of prisoner rights cases are dismissed for various reasons without any relief granted to the litigants, but the average length of time such cases remain pending is approximately 364 days before dismissal. The next largest group is personal injury cases which represent 13.3 percent of the current docket. The distribution

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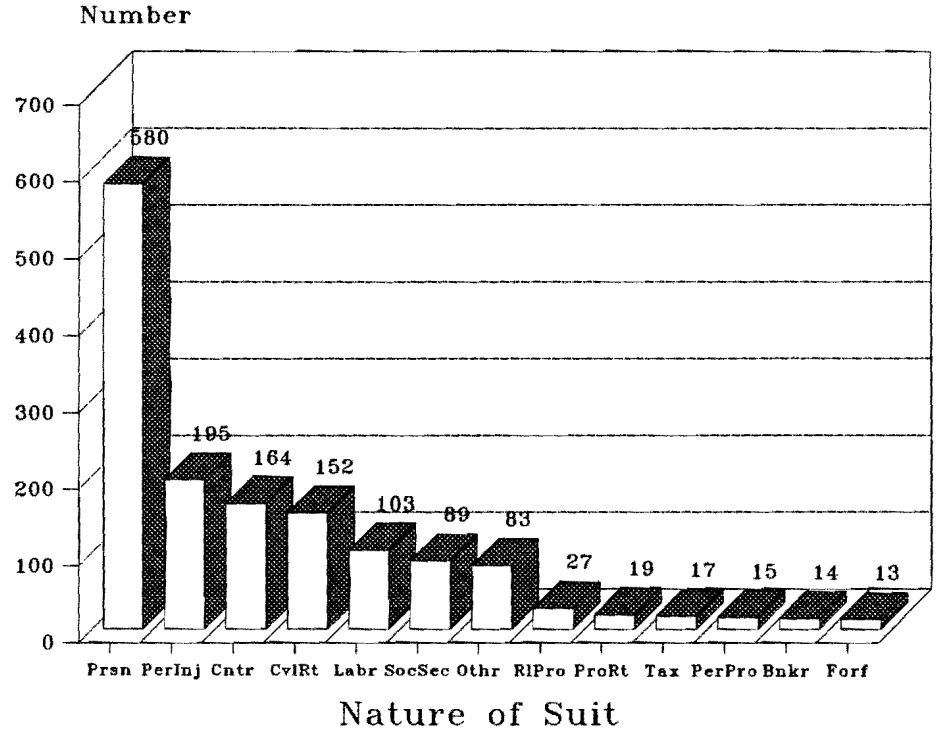
[21]"How Caseload Statistics Deceive," prepared for the Chief Judges Conference in May, 1991.

of cases by nature of suit is shown in Figure 7 and Table 2. The fewest cases pending are real property, property rights, tax, personal property, bankruptcy, and forfeitures.

Figure 7

CIVIL CASES PENDING IN THE WESTERN DISTRICT ON JUNE 30, 1991



N=1471, In Rank Order by Suit

TABLE 2

PENDING CIVIL CASES IN THE WESTERN DISTRICT OF MICHIGAN ON JUNE 30, 1991

NATURE OF SUITE	NUMBER	PERCENT
Prisoner Rights	580	39.4
Personal Injury	195	13.3
Contract	164	11.1
Civil Rights	152	10.3
Labor	103	7.0
Social Security	89	6.1
Other	83	5.6
Real Property	27	1.8
Property Rights	19	1.3
Federal Tax	17	1.2
Personal Property	15	1.0
Bankruptcy	14	1.0
Forfeiture	13	0.9
Total	1,471	100.0

The mean (average) length of time cases remain pending is 331 days, reflecting a range of two days to 6,656 days, or nearly 18 years. The longest pending case is an "other statutory actions" classification (890) and involves an agricultural matter. The second longest pending case, 6,002 days (16 years), is a classification 440 civil rights case. Two additional cases have been pending

more than 12 years. The civil cover sheet (form JS 44) which provides information on the nature of the suit such as "agriculture" or "civil rights" contains an "other statutes" section including as many as seventeen causes of action. This category is too broad and needs specificity.

RECOMMENDATION FOUR

Record keeping categories on the civil cover sheet (form JS 44) should be thoroughly reviewed and supplemented at the district level and refined at the national level to provide more precise information. Such a revision should be part of an improved management information system designed to expedite the court's role as an early implementation district.

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Use of median time gives a clearer picture of delay. The median is a measure of location sometimes used to describe the center or middle when the average might be skewed by extreme points. The median time current cases have been pending is 214 days or about 7 months. Closer analysis reveals that about 25 percent of the cases have been pending less than three months, and 25 percent have been pending for less than six months. Only 4 percent (N=54) have been pending more than three years. Two-thirds (N=1001 or 68 percent) have been pending less than a year.
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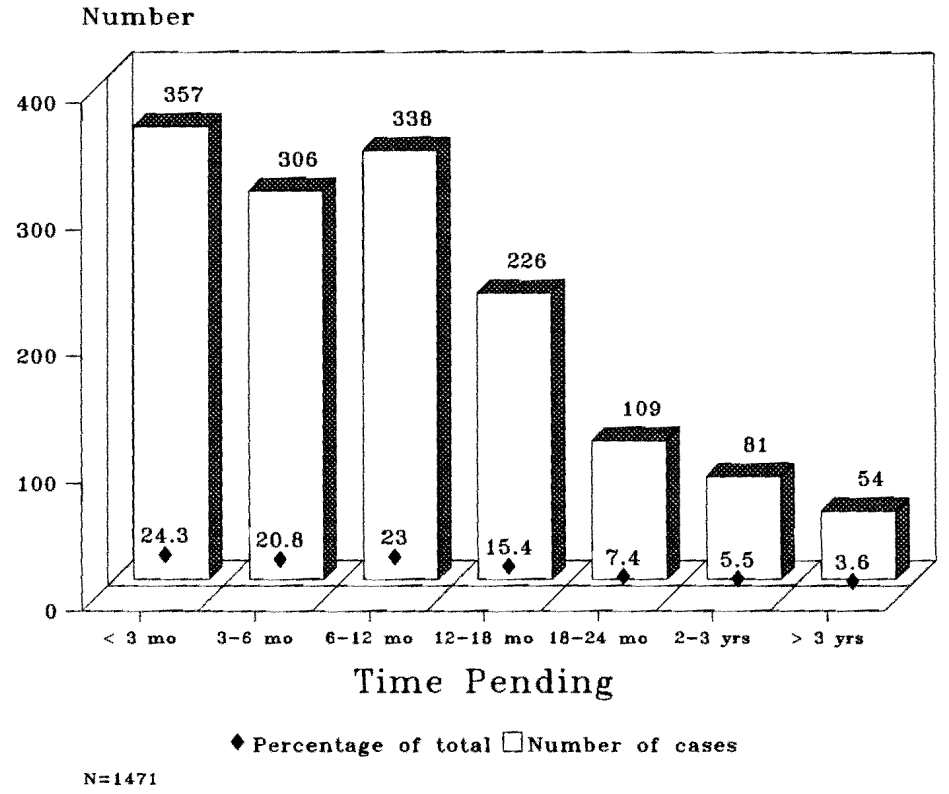
The distribution of pending cases by time is shown in Figure 8.

Figure 8

PENDING CIVIL CASES BY MONTHS IN
THE WESTERN DISTRICT ON JUNE 30, 1991



There are important differences between the length of time a case is pending and the nature of the case. Property rights cases tend to average the longest pending period, 542 days, while social security and federal tax cases have the shortest average pending period, 133 and 146 days, respectively. Because extremes skew averages, cases pending over 4,000 days (N=4) were excluded for

the general purposes of comparison, and the average pending time by nature of the suit was calculated. The results are in Figure 9.

Figure 9

PENDING CIVIL CASES BY DAYS IN THE WESTERN DISTRICT ON JUNE 30, 1991

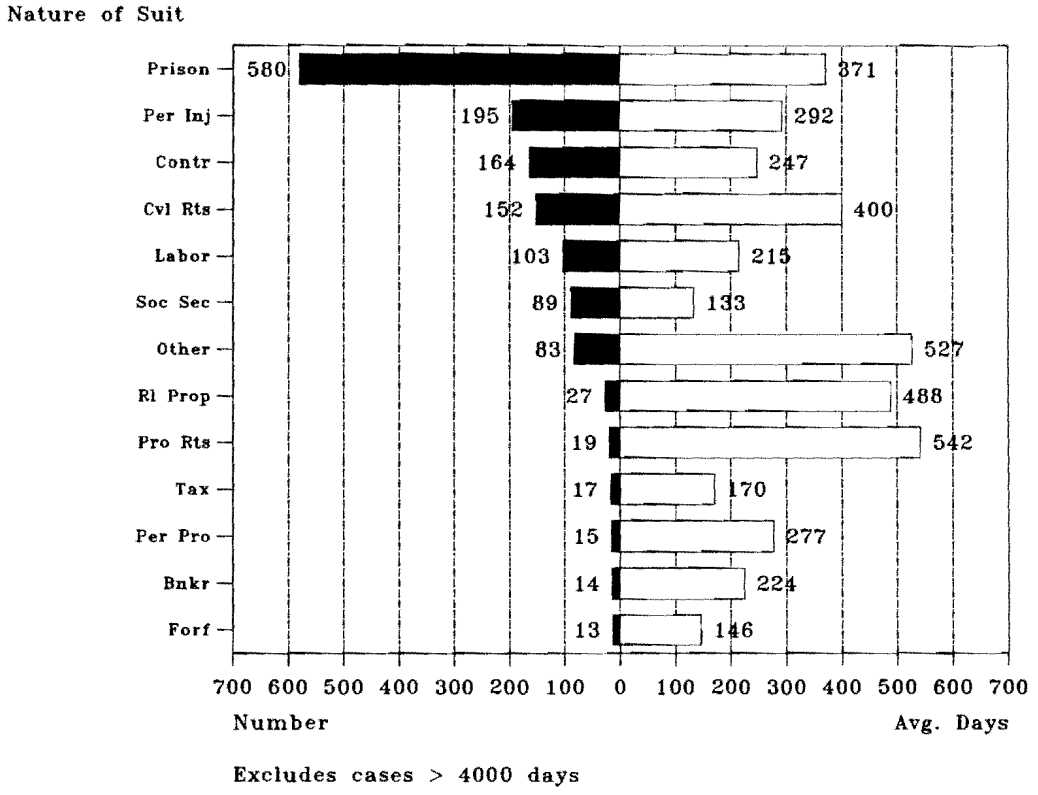


Figure 9 shows that property rights and other cases, while relatively small in number, have the longest pending times. But prisoner and civil rights cases, which are relatively large in number, also have long pending periods. If time pending is considered a measure of delay, then delay can be impacted by special attention to those cases pending a year or more. The issue of delay as reflected

in days pending can be seen even more clearly in an analysis of the time it takes to terminate cases.

Time in the system can be determined from an analysis of closed cases. While both days pending and days to close do not necessarily reflect an active case, they do provide an indication of the burden facing the court and the amount of time required before the litigants can determine if justice has been served in their case.

As of June 30, 1991, there were 1,471 civil cases and 130 criminal cases pending. The civil cases pending are down 244 (14 percent) from 1990 but the criminal cases are up 10 (8 percent). The district's distribution of the pending to terminated ratio for both criminal and civil cases is shown in Table 3. The average life expectancy for criminal cases has increased, while the life expectancy of civil cases has decreased.

TABLE 3

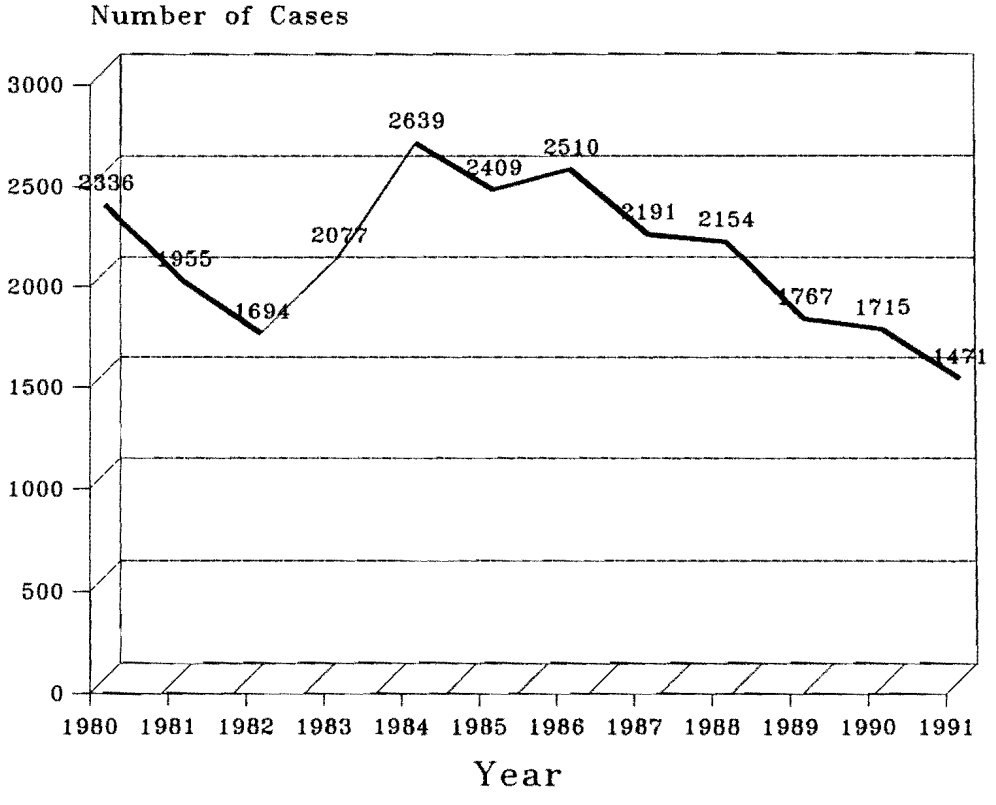
RATIO OF PENDING AND TERMINATED CRIMINAL AND CIVIL CASES, 1980 TO 1991

	RATIO	
YEAR	CRIMINAL	CIVIL
1980	.35	2.9
1981	.45	1.19
1982	.54	0.84
1983	.39	1.09
1984	.39	1.29
1985	.55	0.93
1986	.45	1.88
1987	.48	0.96
1988	.46	1.06
1989	.81	0.76
1990	.61	0.90
1991	.75	0.79

The number of civil case filings has not increased as dramatically as the number of criminal case filings. What has changed in the civil docket is the increase in the number of terminations and the subsequent reduction in the number of pending cases. While filings were up between 1980 and 1990 by 70 percent, the number of terminations increased by 135 percent, causing a decline of 37 percent in the number of pending cases. For the period ending June 30, 1980, there were 2,336 cases pending on the docket, with the previous 12 months showing 970 filings and 794 terminations. On June 30, 1991, with 1,646 new filings the previous 12 months and 1,869 terminations, the pending docket showed only 1,471 cases. Figure 10 depicts the number of pending cases in the Western District from 1980 to 1991.

Figure 10

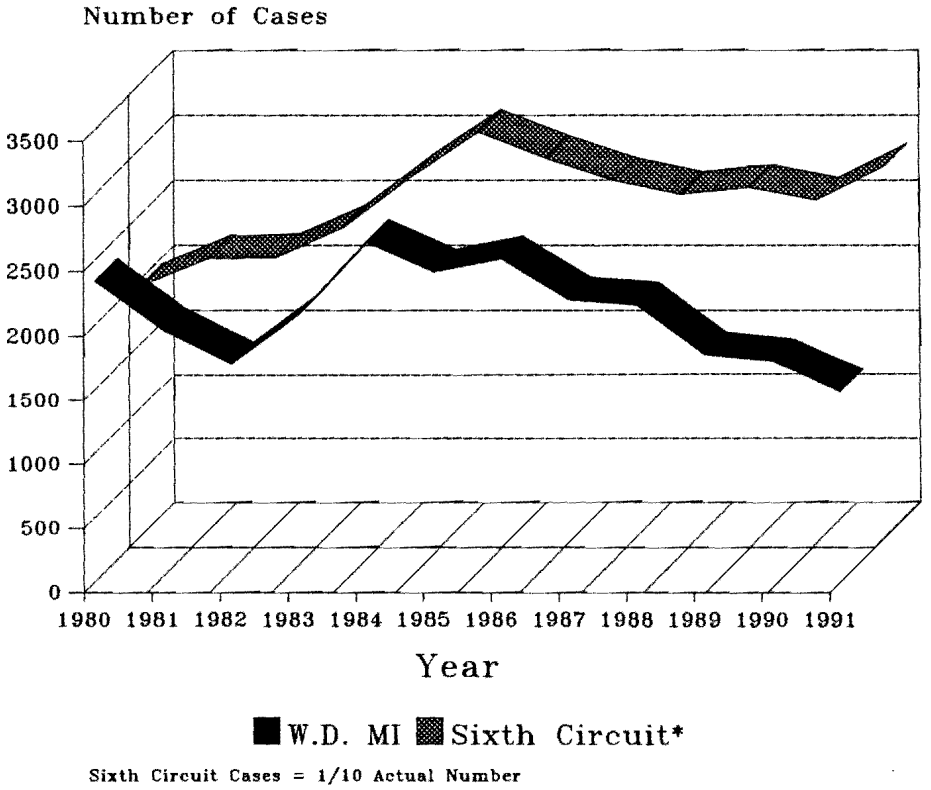
CIVIL CASES PENDING IN THE WESTERN DISTRICT - 1980 TO 1991



A primary indicator is the number of cases that remain pending at the end of a statistical year. The decline is steady from 1980 to 1982, rises again for two years, then attains a consistent rate of decline, 44 percent, after 1984. The district departs from the circuit's trend line at this point, showing a notable decline in the number of pending cases, while the circuit's number shows a recent tendency toward increase. This information is illustrated in Figure 11.

Figure 11

CIVIL CASES PENDING IN THE WESTERN DISTRICT AND SIXTH CIRCUIT DISTRICTS, 1980 TO 1991

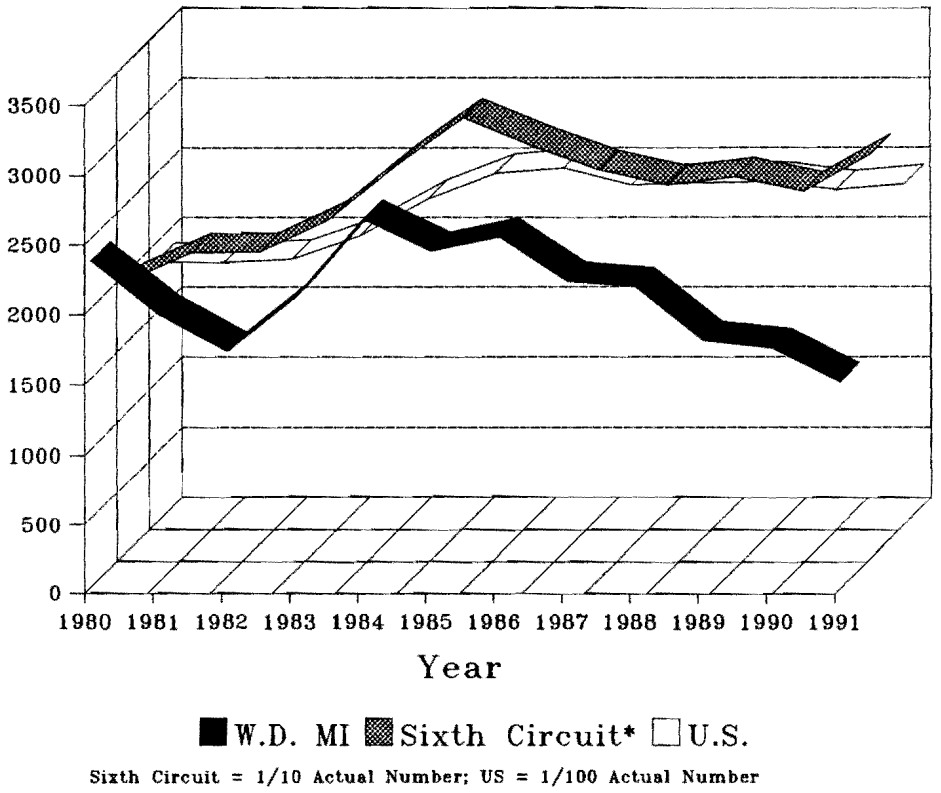


*This figure includes all federal district courts in Kentucky, Michigan, Ohio, and Tennessee.

It is important to note that the trend line for pending cases in the circuit is not dissimilar to that of the country as a whole. National figures are juxtaposed with the Sixth Circuit districts and the Western District of Michigan in Figure 12, demonstrating that pending cases in the Western District run counter to the national and circuit trends. This is an effective argument for differentiated case management.

Figure 12

CIVIL CASES PENDING IN THE WESTERN DISTRICT OF MICHIGAN, THE SIXTH CIRCUIT DISTRICTS, AND THE UNITED STATES, 1980 TO 1991



*This figure includes all federal district courts in Kentucky, Michigan, Ohio, and Tennessee.

Conclusion

Three variables define the overall trends in the court's docket management practices and their effectiveness. Figure 13 presents these variables--filed, terminated, and pending cases--for the criminal docket from 1980 to 1991. Figure 14 presents the comparable data for the civil docket.

The data in Figures 13 and 14 demonstrate clear differences in the trend lines of criminal and civil cases. Pending criminal cases have steadily increased since 1980, while pending civil cases have decreased since 1984. The Advisory Group believes that the efficiency in disposing of civil cases is a direct result of

Figure 13
FILED, TERMINATED, AND PENDING CRIMINAL CASES
IN THE WESTERN DISTRICT, 1980 TO 1991

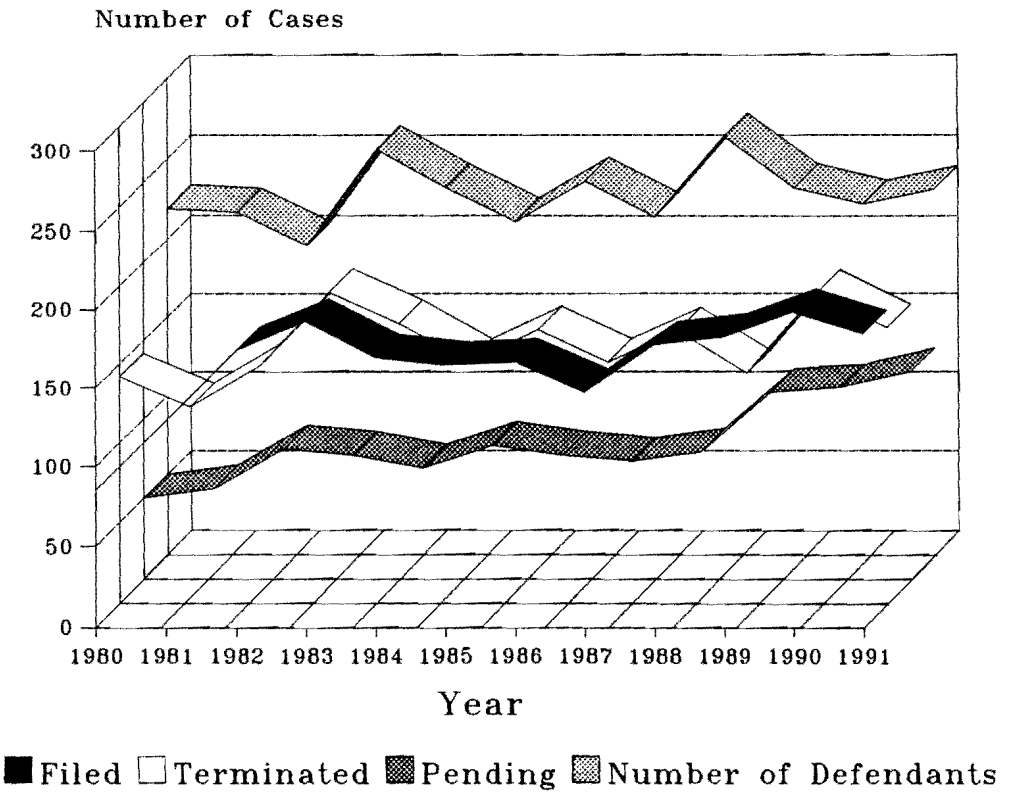
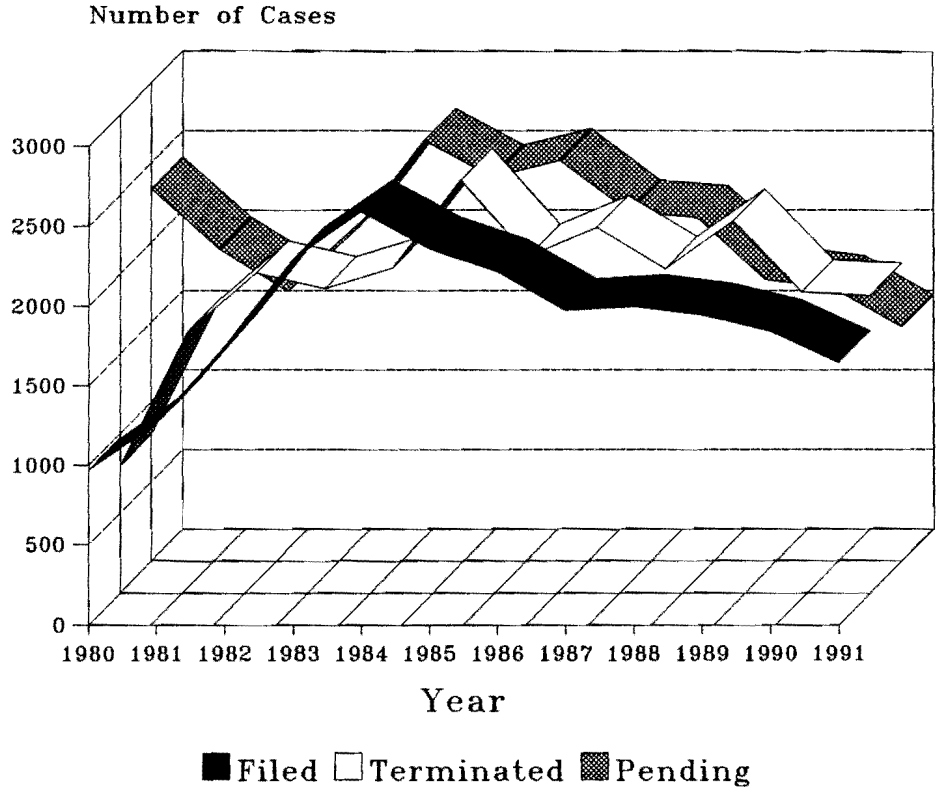


Figure 14

FILED, TERMINATED, AND PENDING CIVIL CASES IN THE WESTERN DISTRICT, 1980 TO 1991



the Western District's adherence to sound differentiated case management practices and alternative dispute resolution methods.

The rise in the criminal case load has significantly impacted the court's resources. The number of filings has increased 117 percent since 1980, but the number of terminations has not kept pace. Terminations increased only 22 percent, leaving 160 percent more cases pending at the end of June, 1991, than at the end of June, 1980. The number of defendants involved did not increase significantly during the decade, with 219 involved in 1980 and 231 in 1991.

The data presented in this section support the conclusion that the condition of the docket in the Western District of Michigan has improved greatly in the last decade.

IV

COST AND DELAY

The Advisory Group spent considerable time discussing the cost of civil litigation in the Western District. It concluded that excessive costs cannot be known until reasonable costs are determined. A comprehensive search of various reports and documents was conducted to try to determine what reasonable costs are. No valid, reliable, or precise figures could be found. Without an empirically derived baseline, excessive costs cannot be computed. If costs are based solely on the length of time it takes to resolve a case, litigation costs in the district are not excessive. But no scientific evidence exists to support a correlation between cost and time. The Advisory Group is therefore unable to ascertain at this time whether the costs of civil litigation in the district should be a matter of imminent concern.

The Advisory Group had difficulty in determining the meaning of excessive delay. "Excessive" is an abstract and subjective term that lacks agreed-upon meaning in and of itself. Until a reasonable time period for disposing of civil suits in federal courts is established, it is not possible to say with absolute certainty that the Western District is or is not experiencing excessive delay.

In conducting our analysis of these issues, each district court judge, magistrate judge, and case manager was queried regarding the current case management practices of the court, suggested changes or improvements in the practices, and the opinions of the respondents about the issues of cost and delay. The opinions of litigants and attorneys were also solicited.

In trying to understand and subsequently describe the processes which make up the everyday life of the court, the consultants concentrated on the following issues directly related to cost and delay.

(1) The setting of time limits for court processes

(2) The use of Rule 16 conferences

(3) Discovery practices

(4) Alternative dispute resolution methods

(5) Motions

(6) Settlement conferences

(7) The impact of criminal cases on civil case processing

(8) Other factors which may affect delay and cost

Each person interviewed was encouraged to express his or her thoughts about the state of the docket, individual court procedures, and the various methods employed by the court to control cost and delay.

Can Reasonable and Excessive Costs Be Determined?

The Advisory Group doubts whether reasonable and excessive costs can be precisely identified and determined on a case-by-case basis. There are several reasons for this conclusion.

A great deal of variance exists in the types of suits filed in the district. Each suit can be classified by cause of action, origin, basis of jurisdiction, number of parties involved in the dispute, and other factors. The idiosyncratic nature and range of complexity of each suit precludes the use of a universal formula for determining reasonable or excessive costs.

There is considerable variation in the fees charged by attorneys. In a free market economy, attorneys generally are allowed to set fees as they see fit. Among the attorneys interviewed, the fees ranged from $60 to $150 an hour, although the hourly billing rates reported by the Michigan Bar Journal, and listed in Table 10, range higher than these figures. Fees affect the cost of litigation, of course, but what is reasonable and what is excessive remains a matter of opinion, not subject to empirical verification.

The number of litigants in a suit and the degree of involvement of each one also affects cost, since the lawyer time invested is correlated with each disputant. Costs vary greatly as a function of the interest of the parties in each suit.

Methodology for Assessing Costs

Interviews with attorneys and litigants were helpful in obtaining general impressions about litigation costs. Twenty interviews with litigants and attorneys involved in a wide range of suits adjudicated in the district were conducted. Each interview lasted about one hour.

Neither attorneys nor litigants believed that costs were excessive. Obtaining opinions about litigation costs from these sources had its limitations, however. Asking attorneys whether their costs are reasonable is a loaded question that will produce predictable responses. Too much self-interest is at stake to expect an objective answer.

Litigants are also in a difficult position to render an objective opinion about the reasonableness of litigation costs. Infrequent users have no baseline for

comparison and thus are not knowledgeable about what constitutes reasonable expenses. Experienced litigants weigh the costs of litigation against possible monetary outcomes. If an attorney obtains a large sum of money for the litigant, or saves him or her from having to pay a large sum of money, the litigant is likely to consider the cost for this outcome reasonable, whether it is excessive or not.

Can Reasonable and Excessive Delay Be Determined?

All cases require time to evolve, and the amount of time a case is in the adjudication system may not necessarily mean delay. It is also not self-evident that time equals cost, since there may be periods in the life of a case when there is no real activity, although the case is still pending. The meaning of reasonable and excessive delay must be assessed independently of reasonable and excessive cost.

As previously discussed, the ratio of pending to terminated cases is a measure of the general life expectancy of the cases. By this measure, the Western District of Michigan does not experience excessive delay. Further attempts to decrease time and cost must be focused on those types of cases which *do* experience some kind of delay, and what can be done about it.

Both attorneys and litigants agreed with the finding that excessive delay does not exist in the Western District. The respondents felt that all actors in the system worked in an efficient and professional manner to move cases through the adjudication process in a reasonable period of time.

Methodology for Assessing Delay

Several concerns about excessive delay were raised during the interview process. First was the amount of time it occasionally takes for the court to rule on summary judgment motions and motions to dismiss. Ruling more expeditiously on dispositive motions could eliminate the need to rule on any other motion relevant to the case.

Several attorneys observed that a significant number of prisoner civil rights suits are frivolous. They recommended close scrutiny of these cases by court staff shortly after their filing to determine if they have merit.

Concern was also expressed about the amount of time it occasionally takes for parties to reach a settlement agreement. One attorney suggested that a knowledgeable person, either a judge, magistrate judge, or trained specialist, could determine where the possible problems with a settlement are before the parties are called in and alternative solutions prepared. The attorney said, "If the judge gets a strong feel for the case at the start and gets involved in it at the pretrial, the parties might be able to work out a settlement sooner." The attorney described a cycle in which the judge is too busy to invest time in pretrial work, thus allowing more cases to go to trial, thus leaving the judge with little time to get involved in pretrial work. Additional judicial training in the art of negotiation would be beneficial to all, he said.

RECOMMENDATION FIVE

Judges, magistrate judges, and other members of the district's case management teams should afford themselves of opportunities for further training in the art of negotiation so that pretrial interventions can be more widely used for settlements. Trained specialists might also be added to the case management teams on occasion to serve this purpose.

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A sample of terminated cases was selected and analyzed to determine the length of time cases typically remain in the system. Information available from closed cases included the nature of the suit, the cause of action, case complexity and weight, recorded docket activity, and the time elapsed before a disposition. This inquiry enabled the Advisory Group to understand the dynamics of case flow on a suit by suit basis, and to assess, at least in terms of time, the impact of mediation and arbitration.

Closed case analysis also provides a baseline for measuring the effectiveness of the innovations contained in any cost and delay reduction plan which might be proposed under the Civil Justice Reform Act. The data ground the evaluator in knowledge about the length of time cases typically take, as well as the proportion of court time each type of case takes. A reference point is established to measure the impact a redesigned case management system has on delay, and it provides a support base for the application of the tracking system proposed by the Western District later in this report. It highlights the types of cases which will probably function without significant delay independent
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of the recommended tracking system, and it identifies the cases which should be targeted to reduce delay.

All civil cases closed between January 1, 1991 and June 30, 1991, were analyzed and the conclusion reached that the great majority of these cases moved through the system within an acceptable time period and were not excessively delayed. Of these cases, 75 percent were closed within one year and 85 percent were closed within 18 months of their filing date. Criminal cases did not move as quickly and were more prone to delay.

Although reasonable and excessive costs and delay cannot be explicated with scientific accuracy, the *average* costs of litigation for different types of suits in the Western District can in fact be ascertained. It would be a gross estimate, to be sure, but it would still be helpful in establishing some kind of baseline for evaluating the district's litigation cost and delay reduction plan. The Advisory Group's suggested methodology for pursuing such a goal is contained in the plan presented as section VII of this report.

A comment from one of the attorney respondents puts the entire effort in perspective. "It is reasonable people who move cases and get settlements," he said. "Moving the case along is often out of the court's control, since the court cannot legislate reasonableness." In response to reading this comment in a draft of the report, one magistrate judge said, "Some of us think reasonableness can be encouraged to the extent that it sets the stage for break-throughs at the human level of understanding and reciprocity. In a way, you *can* legislate reasonableness."

Principal Causes of Cost and Delay

In its assessment of terminated cases, the Advisory Group was able to ascertain the length of time that different types of cases remain active in the court. There is no evidence that length of time in court is directly related to increased litigation costs. Costs are rather a function of the length of time an attorney spends in performing the various tasks incident to litigation, including his or her professional fees, expert witness fees, travel expenses, and other case-related activities. Neither does any particular type of case appear to be more costly than other types.

Distinct from cost, delay is simply the amount of time it takes for a case to move from filing to disposition. Average and median times for disposition can be calculated for each type of suit and a baseline figure of current practice can be set. A delicate balance exists between justice and swift justice, however. Sometimes swift justice is not really justice but only the appearance of it.

The sample of cases closed between January 1 and June 30, 1991, reflects a wide range of closing times, from a minimum of one day to a maximum of 4,833 days (13.2 years). The average litigation time of cases was 309 days (approximately 10 months), while the median time (the point where half the cases fall) was 221 days (about 7 months).

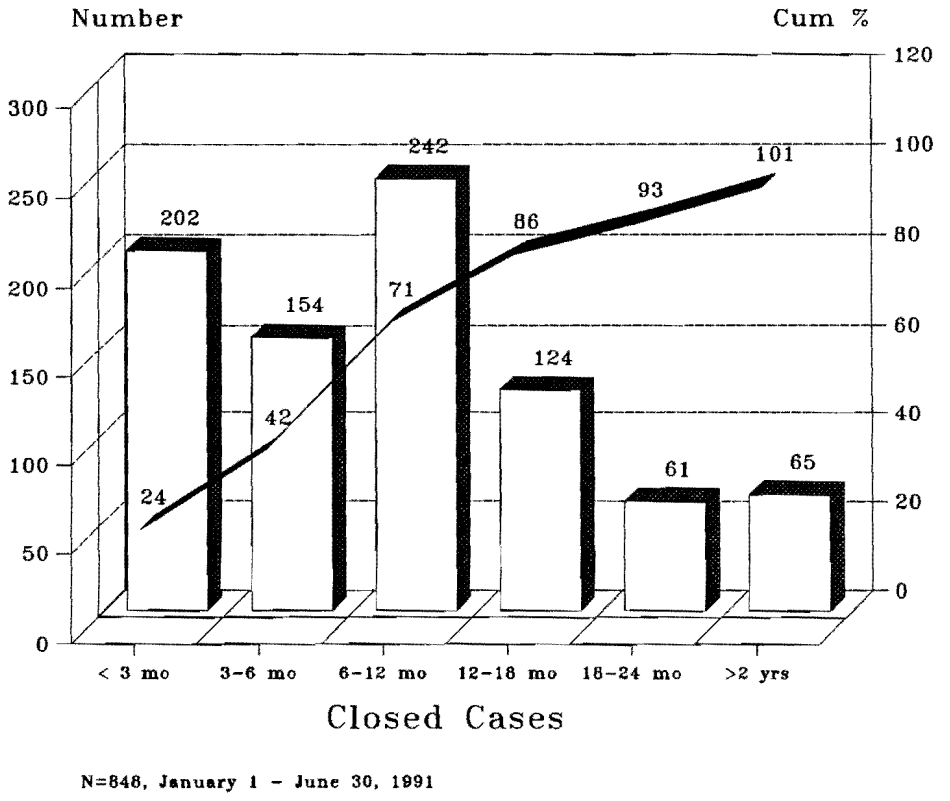
Disposition data were available for 848 of the 865 civil cases closed in this period. Seventeen cases were handled separately by magistrate judges with the consent of the parties involved. Ten of these, representing about 2 percent of

the civil cases, were prisoner civil rights cases, and the remaining seven were distributed among civil rights, contract, and personal injury suits.

Figure 15 shows the number of cases closed within specific time periods and the cumulative percent closed for the district as a whole. On the surface, these delay times do not appear to be a problem, but interpretation is also subject to individual litigant and attorney perceptions. Some delay is necessary for adequate and responsible case preparation, and, paradoxically, some delay is generally necessary for litigants to feel that their case is getting adequate attention.

Figure 15

LITIGATION TIME IN THE WESTERN DISTRICT OF MICHIGAN



Both plaintiffs and defendants typically approach litigation as though their claims are prima facie indisputable. Each party tends to have a strong emotional and/or financial investment in the process. Cases need to mature to the point where litigants satisfy the emotional definitions they attach to the litigation and are therefore prepared to modify their expectations regarding an acceptable outcome. This point is measurable as an empirical question, but it will vary by the personality of the parties and the nature of the suit. In this sense a certain number of procedural steps must be taken before any alternative dispute resolution process is acceptable to many of the parties in litigation.

In terms of time alone, the overall length of time cases take to be resolved in the district does not appear to be excessive. The Advisory Group does not consider delay to be a major issue in the district, since 71 percent of the cases were closed within one year and nearly one-fourth (24 percent) were closed within three months. Eighty-five percent were closed in less than 18 months, with only 8 percent taking over two years to close.

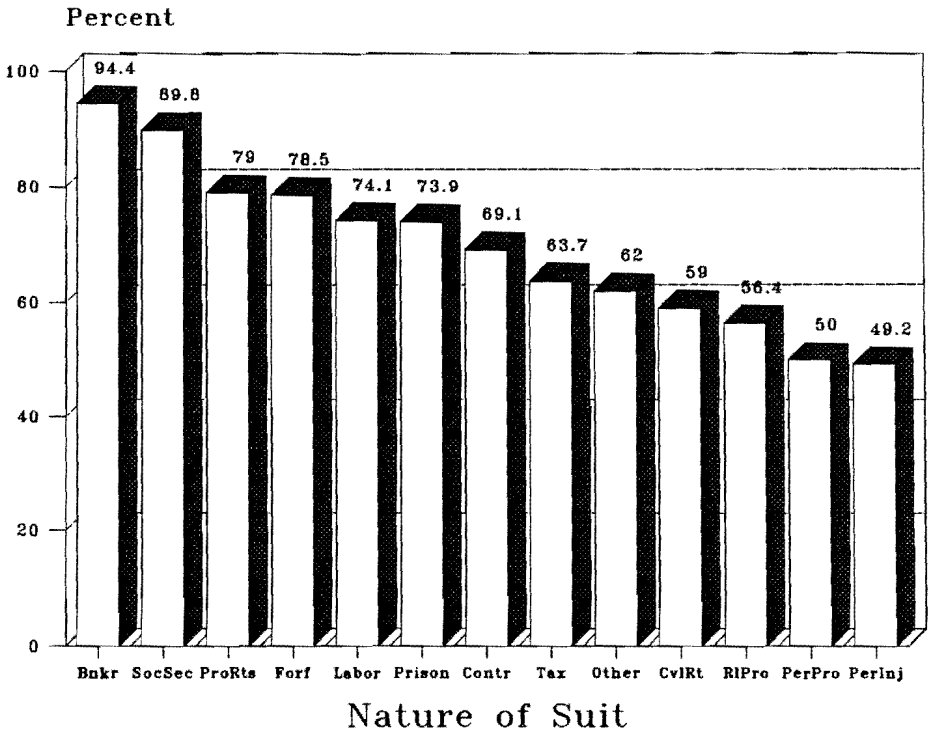
Some types of suits close more quickly than others. A close analysis of the case sample described above revealed that about one-third of all forfeiture, bankruptcy, contract, and property rights cases close in less than three months. Seventy-one percent of the forfeiture and two-thirds of the bankruptcy cases close within six months. Figure 16 shows the proportion of cases which were closed within one year by nature of suit.

Figure 16 illustrates that the largest proportion of cases closed within one year are bankruptcy and social security cases. The Advisory Group recommends

that these types of suits be handled in its differentiated case management plan without any method of alternative dispute resolution. Whereas three-fourths of the property rights, forfeiture, labor, and prison cases are also closed within one year, only about half of the real and personal property and personal injury cases are closed within that period. Obviously, some types of cases can be closed relatively quickly without special intervention, which strongly suggests that a super fast track or fast track can be established in the differentiated case management plan for such cases.

Figure 16

PERCENT OF CASES CLOSED WITHIN ONE YEAR BY NATURE OF SUIT



The length of time specific types of closed cases were in the adjudication process is shown in Table 4. The types of suits are rank ordered by median days, minimizing the differential and skewing effect of extreme cases. Table 4 also shows the litigation time elapsed for cases referred to arbitration and mediation.

TABLE 4

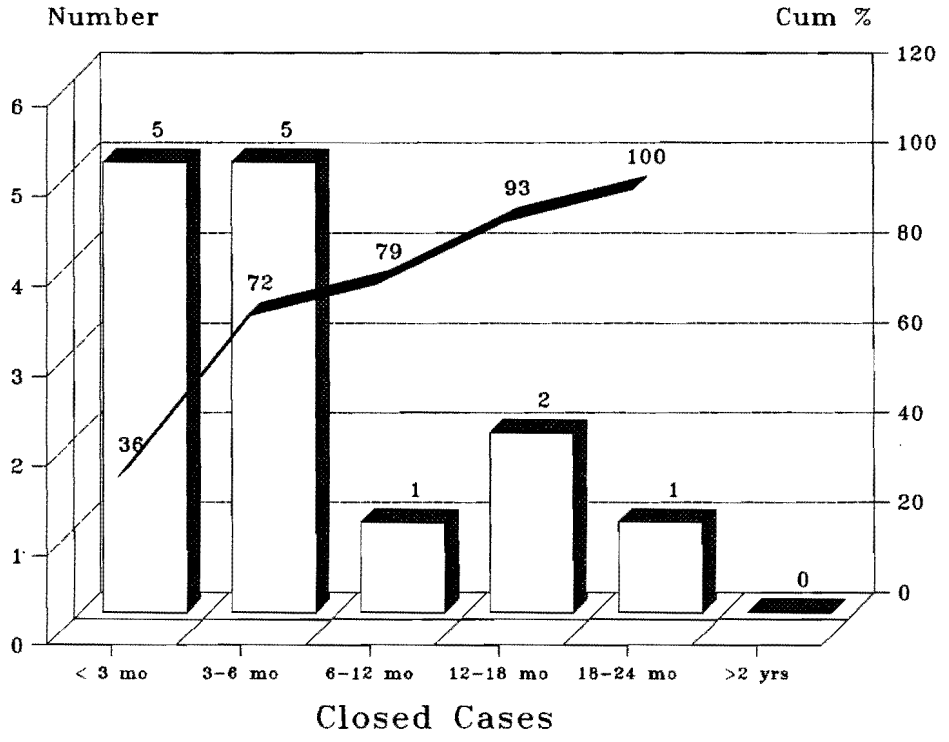
LENGTH OF LITIGATION BY NATURE OF SUIT

	Minimum Days	Median Days	Average Days	Maximum Days
DISTRICT	1	221	309	4833
Forfeiture	7	95	195	693
Bankruptcy	15	153	163	413
Social Security	20	162	203	566
Property Rights	21	192	244	850
Prison	1	206	282	1459
Contract	1	218	285	1780
Labor	11	223	268	1294
Federal Tax	77	225	288	667
Other	1	261	478	3554
Real Property	46	286	610	4833
Civil Rights	10	305	364	1239
Personal Injury	42	386	434	1736
Personal Property	44	390	391	782
Arbitration Cases	59	357	403	1029
Mediation Cases	193	478	548	1736

The length of time cases were in the system is shown in Figures 17 through 21, by individual category of suit. In all instances the median number of days to close was about six months. These data serve as a baseline to measure the impact of differentiated case management.

Figure 17

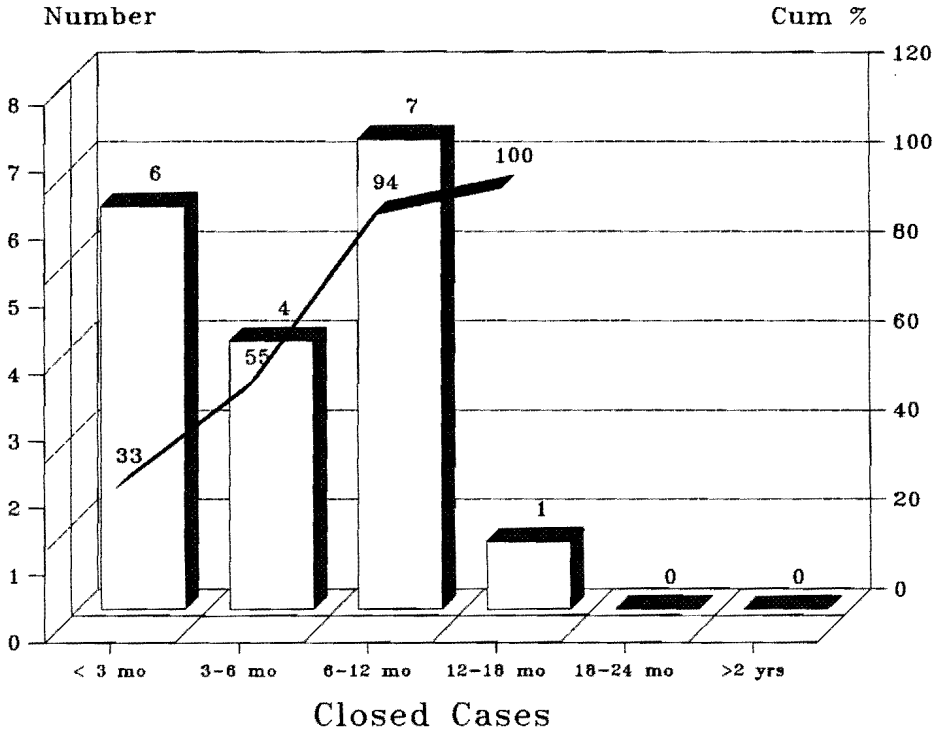
FORFEITURE/PENALTY CASE CLOSING TIMES



N=14, January 1 - June 30, 1991

Figure 18

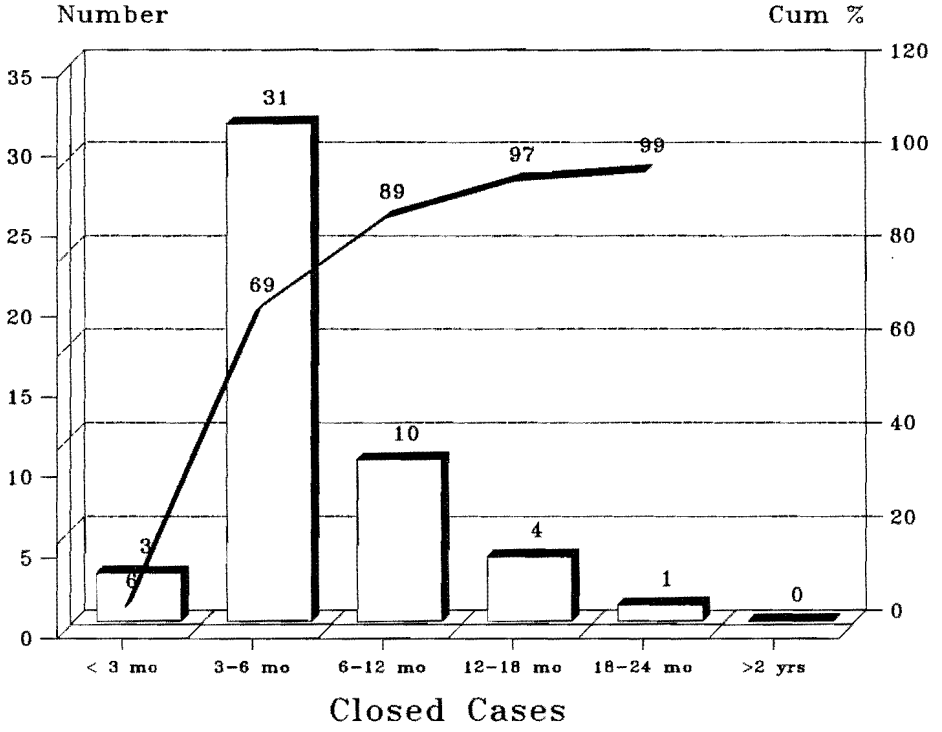
BANKRUPTCY CASE CLOSING TIMES**



N=18, January 1 - June 30, 1991

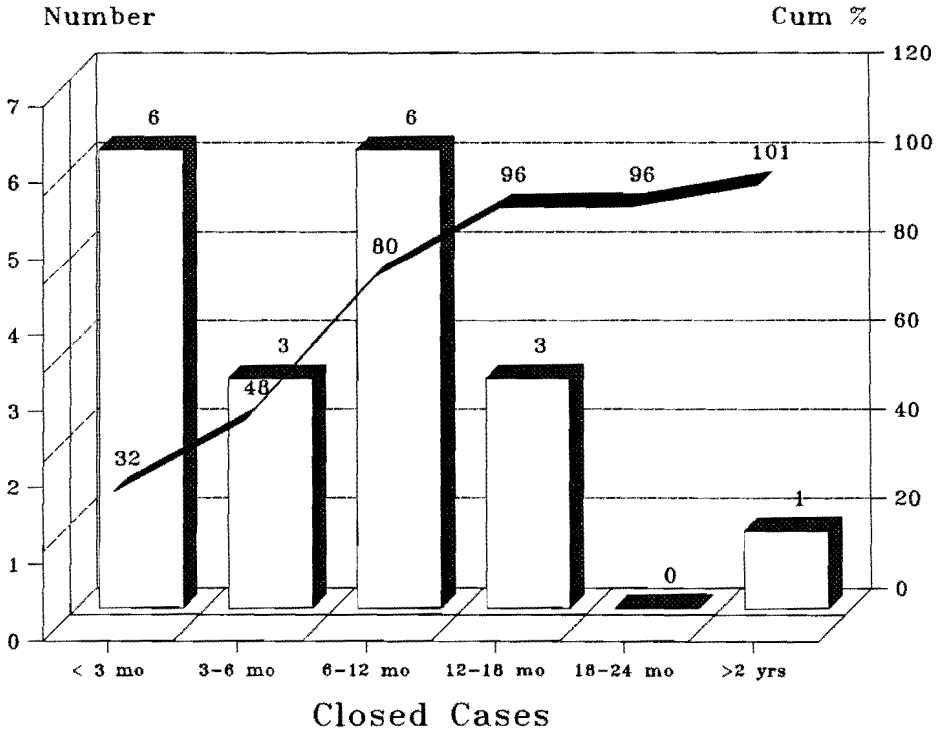
**Both bankruptcy appeals and withdrawals are contained in this category.

Figure 19
SOCIAL SECURITY CASE CLOSING TIMES



N=49, January 1 - June 30, 1991

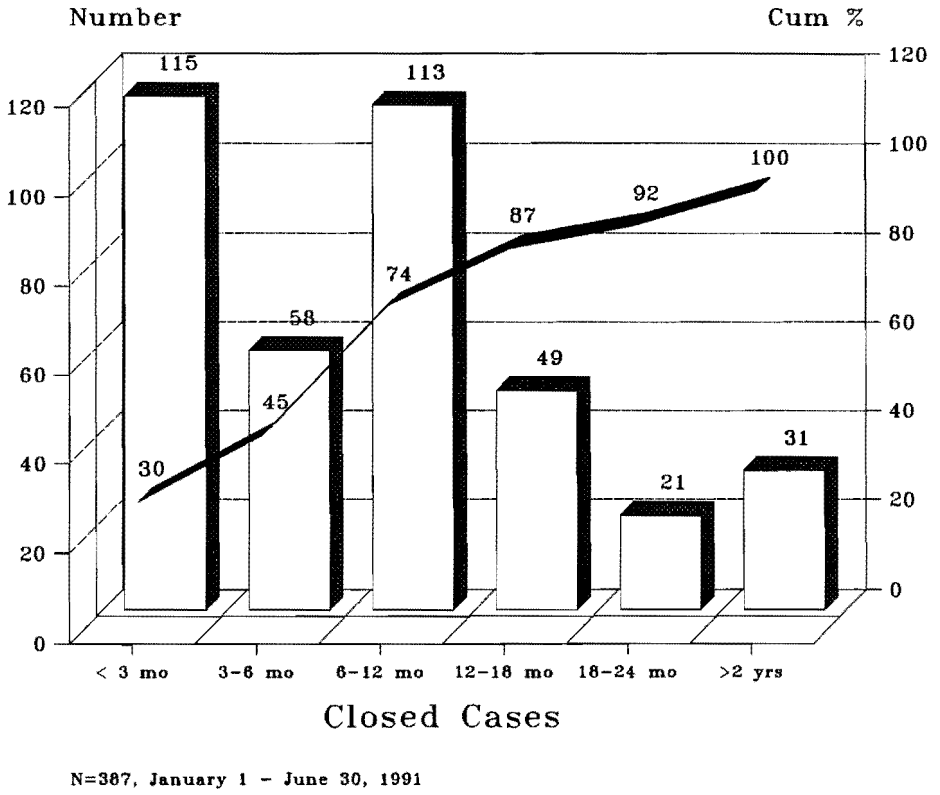
Figure 20
PROPERTY RIGHTS CASE CLOSING TIMES



N=19, January 1 - June 30, 1991

Figure 21

PRISONER PETITION CLOSING TIMES



N=387, January 1 - June 30, 1991

The following facts regarding the nature of the suits and the time they remain in the adjudication process will serve as part of the basis for assigning specific cases to a system of differentiated case management.

Forfeiture Litigation

Of all types of cases, forfeitures have the shortest median time in the system. Seventy percent are closed in less than six months. Likewise, property rights cases have a median time of 192 days, with 79 percent being closed within a year. Both categories of suit are similar in time of disposition to bankruptcy and social security cases, which are not subject to alternative dispute resolution.

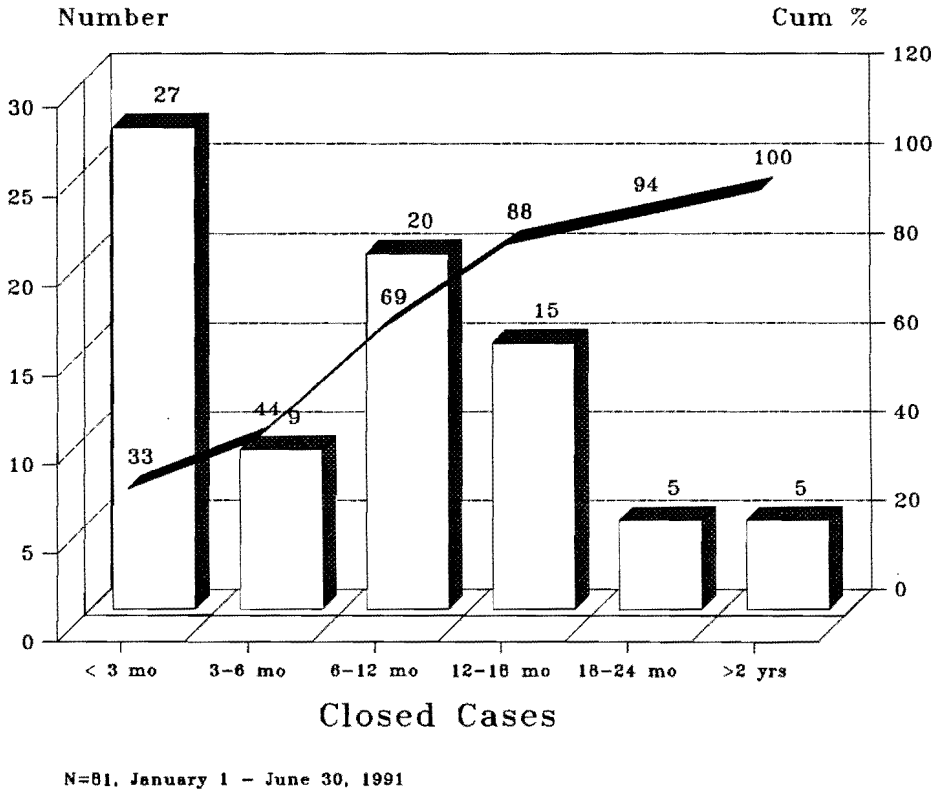
In a tracking system of differentiated case management, forfeiture and property rights cases might therefore be assigned to a fast track which would preclude the use of ADR methods.

Contract Litigation

Contract cases reflect the lowest median and mean closing times of the types of suits where alternative dispute resolution is an option. Seventy percent of this category of cases close within a year, and about one-third close within three months as Figure 22 illustrates.

Figure 22

CONTRACT CASE CLOSING TIMES



N=81, January 1 - June 30, 1991

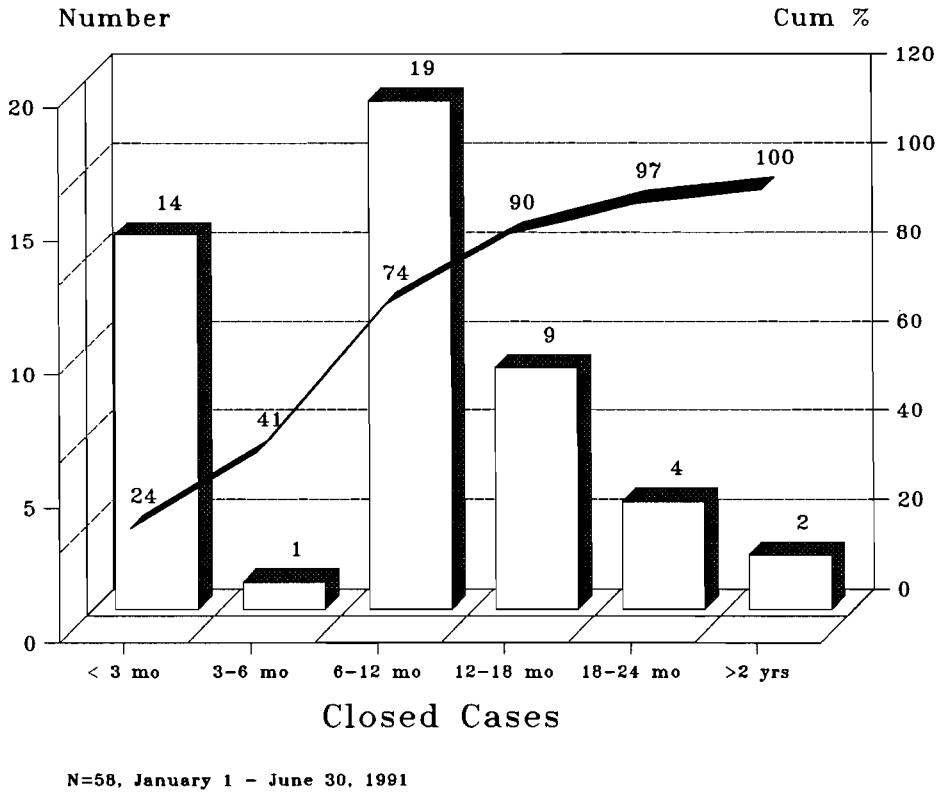
Specific types of contract litigation have differential closing times. For example, recovery/default and overpayment contracts often settle within three months, while half of the insurance cases take over 12 months. The distribution will serve as a baseline in the tracking process of the district's differentiated case management plan.

Labor and Tax Litigation

Seventy-five percent of labor cases settled within a year, with four-fifths of the fair labor cases resolved in less than six months as Figure 23 illustrates.

Figure 23

LABOR CASE CLOSING TIMES

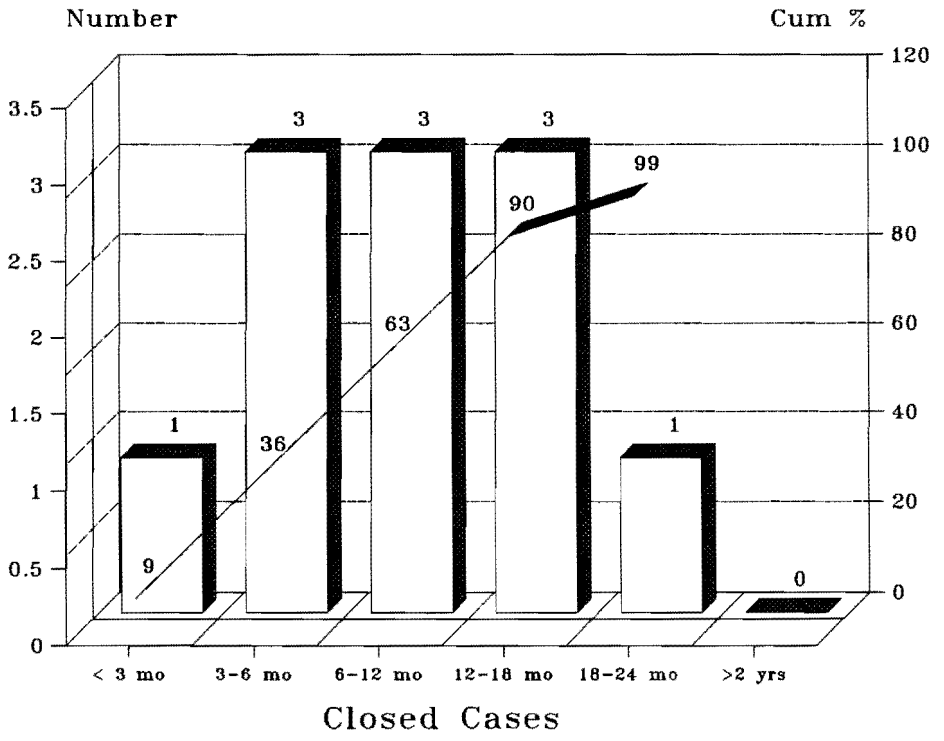


N=58, January 1 - June 30, 1991

Tax cases have a median time from filing to disposition of 225 days, with the shortest case being 77 days and the longest 667 days. The closing times for tax cases are depicted in Figure 24.

Figure 24

FEDERAL TAX CASE CLOSING TIMES



N=11, January 1 - June 30, 1991

"Other Statutes" and Litigation

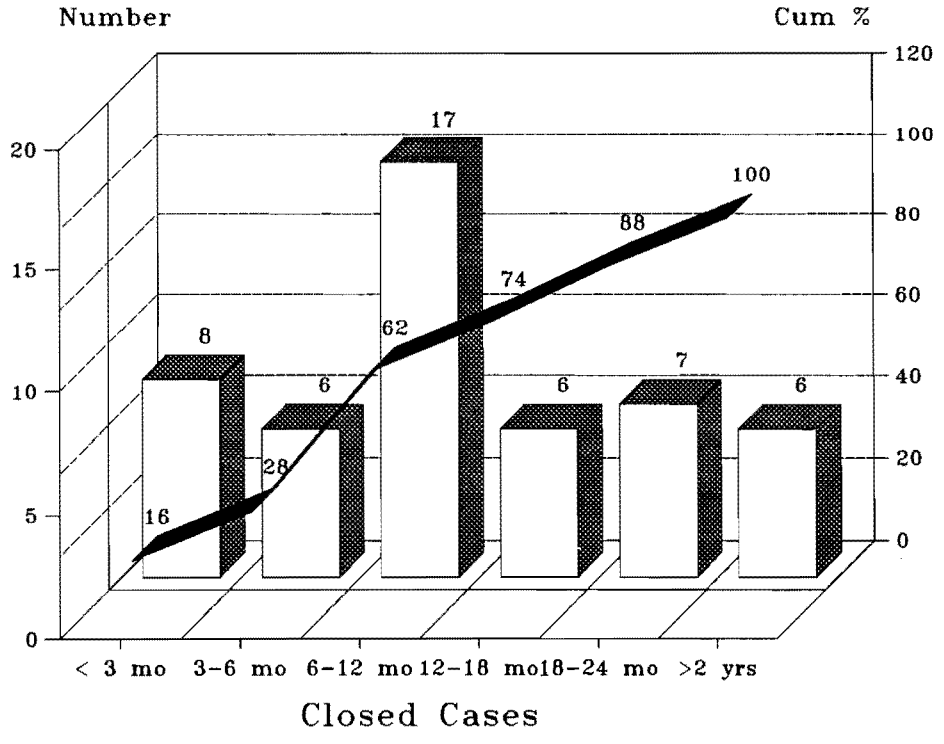
The form JS-44 Civil Cover Sheet is a statistical tool used by the Administrative Office of the United States Courts, the Federal Judicial Center, federal district courts, and others. The data from this sheet which pertain to the nature of suits filed in the district are incorporated into the court's docket

records. These in turn were the basis for the information gathered by the Advisory Group's consultants for assessing the condition of the docket. A group of cases classified as "other statutes" on the civil cover sheet is a composite of diverse cases that are heavily weighted and show the longest time in the system. Further clarification of the cases assigned to this category would enable the Advisory Group to conduct a more thorough analysis of those cases requiring special attention.

From January 1 through June 30, 1991, "other statutes" cases had a range of one day to 3,554 days (9.7 years) from filing to disposition. The median time was 261 days, while the average was 478. Sixty-two percent of this category close within a year, as illustrated in Figure 25.

Figure 25

"OTHER STATUTES" CIVIL CASE CLOSING TIMES



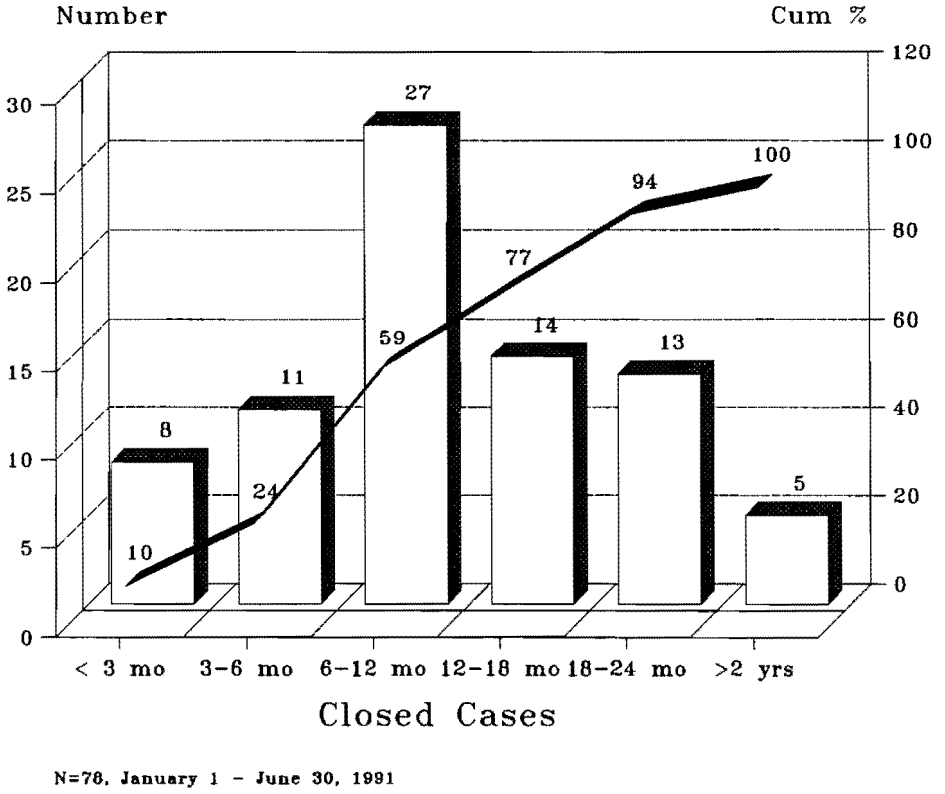
N=50, January 1 - June 30, 1991

Civil Rights Litigation

Civil rights cases are substantial in terms of number, weight, and time. They can also be quite complex. The classification system on the civil cover sheet is such that most of these suits fall within the category of "440-Other." The category needs to be broken down into separate causes of action, since about one-half close in less than a year and the other half take longer than a year, but with no discernible pattern to distinguish them otherwise. The distribution of civil rights cases by the amount of time taken to close is shown in Figure 26.

Figure 26

CIVIL RIGHTS CASE CLOSING TIMES



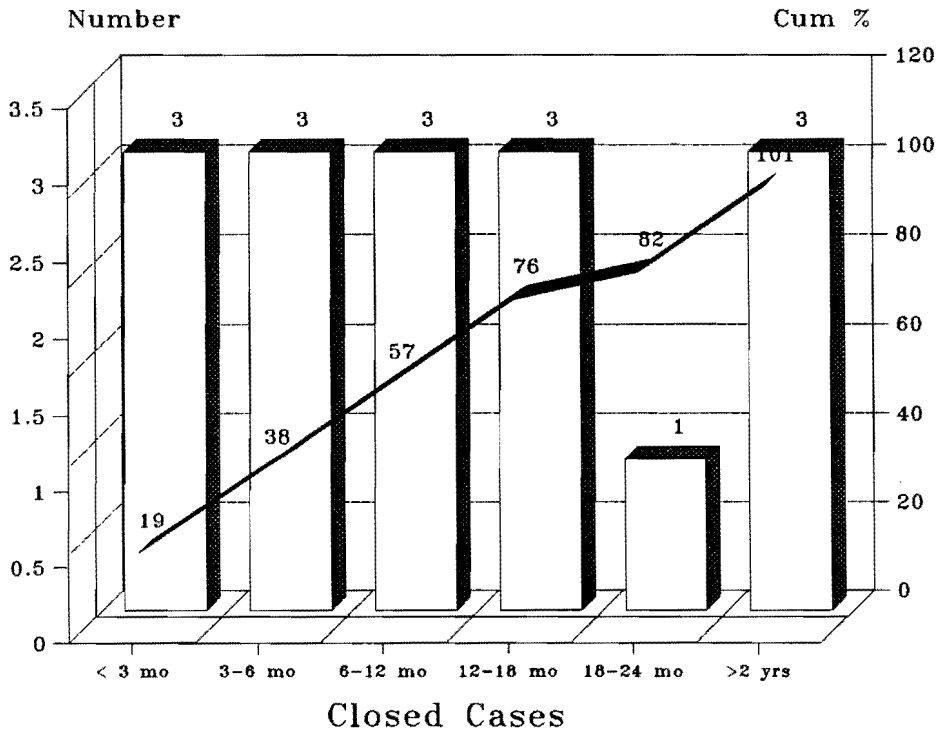
N=78, January 1 - June 30, 1991

Real Property Litigation

Real property cases represent a small number (16), but they tend to be complex and long. Only 57 percent closed within a year, with a median time of 286 days. The longest case, 4,833 days, skews the average, as evidenced by the case closest to it, which took 879 days. The overall closing times are set forth in Figure 27.

Figure 27

REAL PROPERTY CASE CLOSING TIMES



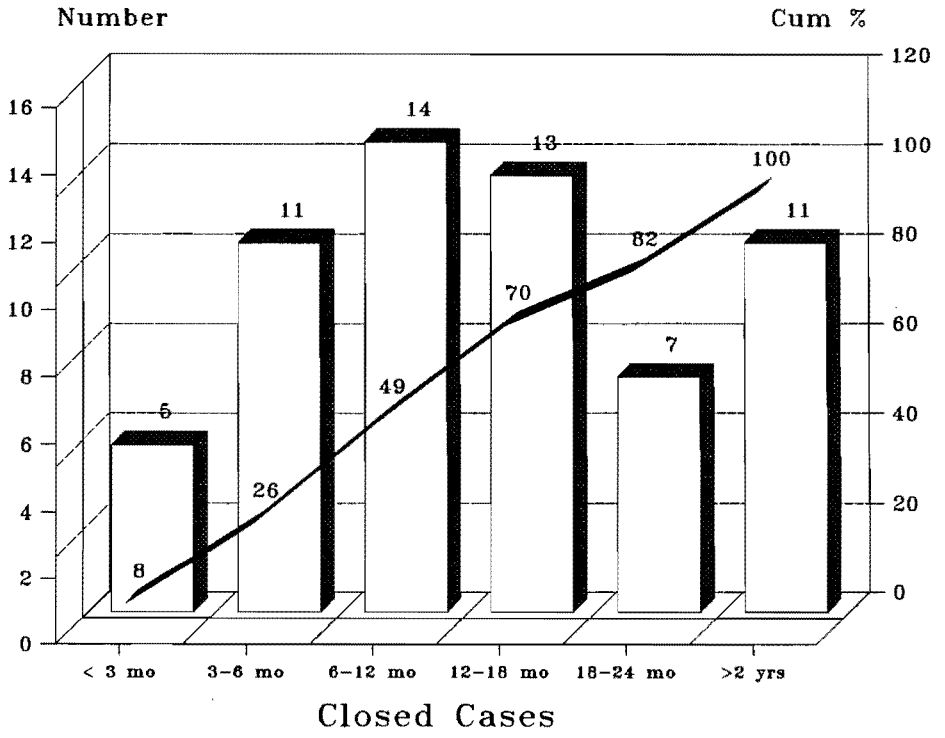
N=16, January 1 - June 30, 1991

Personal Injury Litigation

Personal injury cases represent 16 percent of the cases closed within the period of our sample, with a median closing time of 386 days. The shortest case took 42 days, and the longest took 1,736 days to reach disposition. Few cases in this category settle in less than six months. Product liability and federal employer liability cases take the longest time to close. See Figure 28.

Figure 28

PERSONAL INJURY CASE CLOSING TIMES



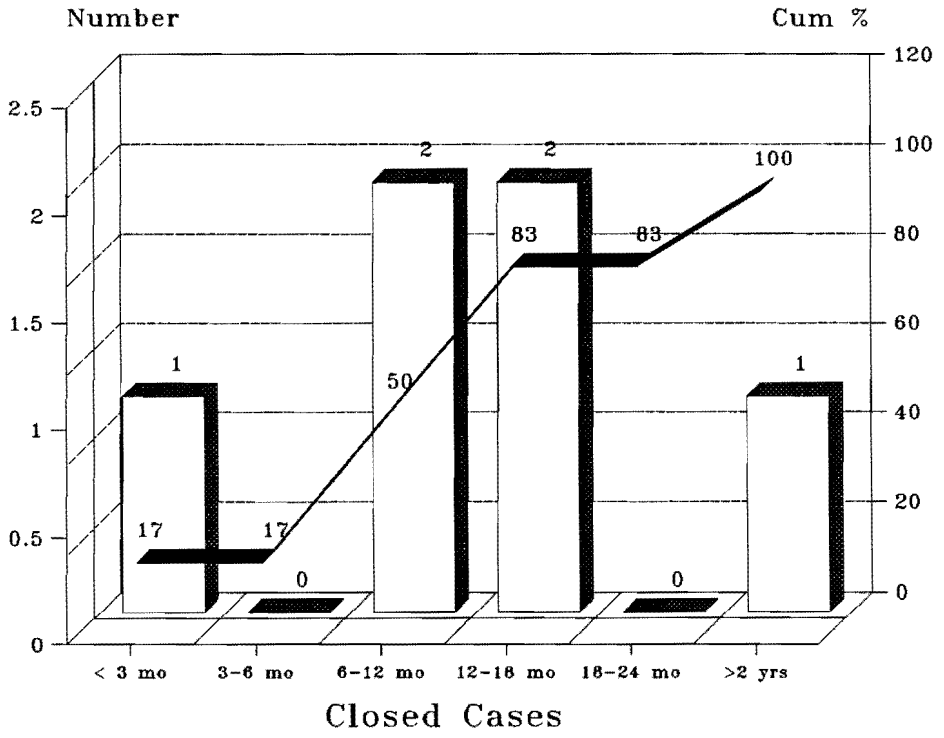
N=61, January 1 - June 30, 1991

Personal Property Litigation

Personal property cases show the longest median time to disposition. The number of cases (6) is small, however, and the times are skewed. The sample is too small to determine a pattern. See Figure 29.

Figure 29

PERSONAL PROPERTY CASE CLOSING TIMES



While the overall time of suits in the system is not a problem in terms of the purposes of the Civil Justice Reform Act, certain types of suits are likely to last longer than others. *Identifying probable time frames for the disposition of each suit is the first step in developing a format for differentiated case management in an empirically based tracking system.* It also offers an

opportunity to focus judicial attention on those types of cases which tend toward delay and which might benefit from special processing. These time frames are the benchmarks against which a case tracking model can be evaluated.

Case Weighting System

Within types of suits, some cases are more complex than others. Thus differential weights can be assigned to different cases based upon the nature of the suit's management characteristics.[22] Each suit is assigned a weighting factor which reflects judicial time. Using this formula on the closed cases in the universal sample reported here, i.e., all cases closed in the first six months of

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[22]The fact that no two cases are exactly alike and that many types of cases consistently demand more attention than others presents a dilemma to the court about how to measure the amount of judge time necessary to resolve each case. For the past 45 years, the judiciary has attempted to adjust for differences among case types by assigning a weight which represents the true amount of time a judge spends on each case. Weight assignment is based on the theory that the average case is worth one point, so every type of case is worth more than, equal to, or less than one point, depending on how time consuming it is.

The data used for determining weights is collected in a time study. These analyses require judges to record the time they spent on each type of case over a specific period. Originally, the time period was three months, but the method currently in place covers a period of three years, allowing more accurate measures. The Annual Report of the Director of the Administrative Office of the United States Courts 1980, specifies that the weights derived be calculated as follows: "If a particular case type is one percent of all cases terminated but takes up two percent of the time spent on all cases, then it takes twice as long as the average case. A case which takes twice as long as the average should logically be given a weight of two, obtained by dividing the two percent of the time spent on those cases by the one percent of cases terminated in that category."

1991, it was apparent that the formula does indeed reflect real time judicial effort.

Table 5 shows the eight categories of cases eligible for alternative dispute resolution in descending order of weighted percent and compares them to the total proportion of cases comprising the court's docket. The weighted percent column indicates the actual amount of judicial time spent on each category.

TABLE 5

RANK ORDER OF WEIGHTED SUITS*

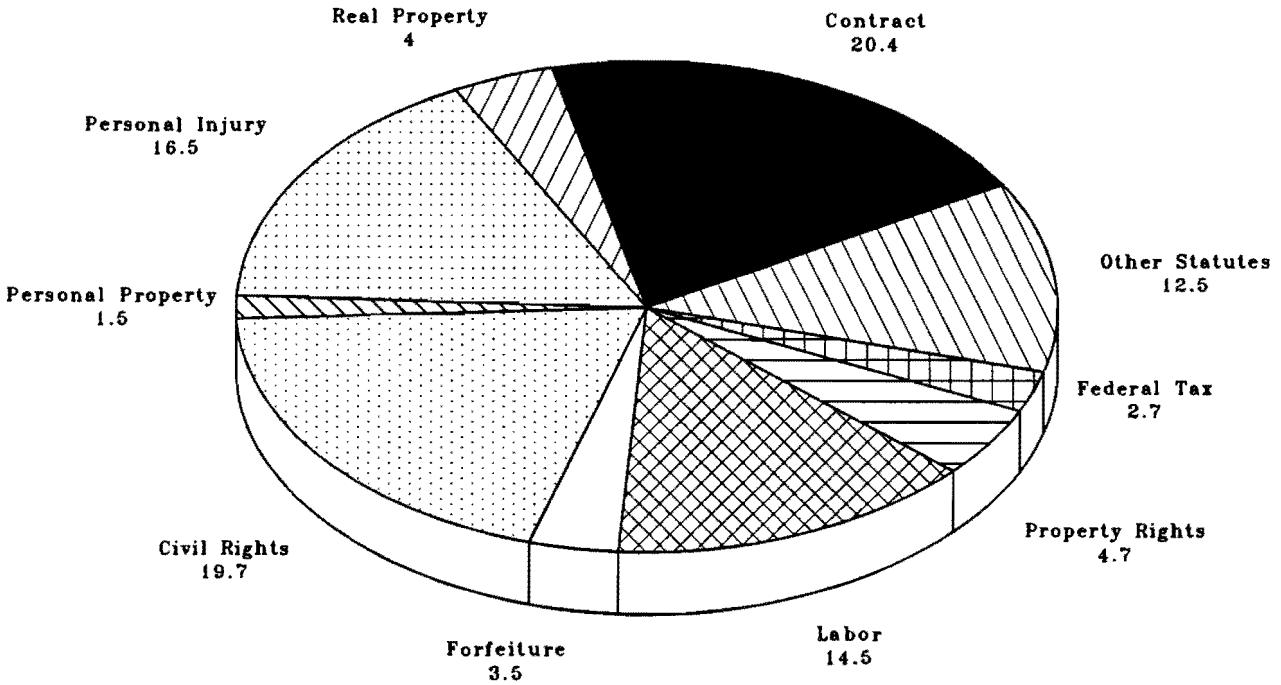
NATURE OF SUIT	NUMBER	PERCENT	WEIGHTED PERCENT
Civil Rights	79	19.7	32.6
Other Statutes	50	12.5	20.2
Contract	82	20.4	13.0
Personal Injury	66	16.5	11.0
Labor	58	14.5	10.3
Property Rights	19	4.7	4.9
Real Property	16	4.0	3.0
Forfeiture	14	3.5	2.3
Federal Tax	11	2.7	1.7
Personal Property	6	1.5	1.0
TOTAL	401	100.0	100.0

*Weighted in percentage based on assigned weights for each suit closed.

Figures 30 and 31 show that the largest proportion of cases eligible for ADR tracking are contract cases, which represent 20.4 percent of the total of 401. When all cases are weighted, however, contract cases reflect only 13 percent of the demand on the court's time. In contrast, civil rights cases, which numerically represent 19.7 percent of the total, reflect 32.6 percent of the court's weighted load. Similarly, cases classified as "other statutes" represent 12.5 percent numerically, but 20.2 percent actually, when the formula for weighting is applied.

Figure 30

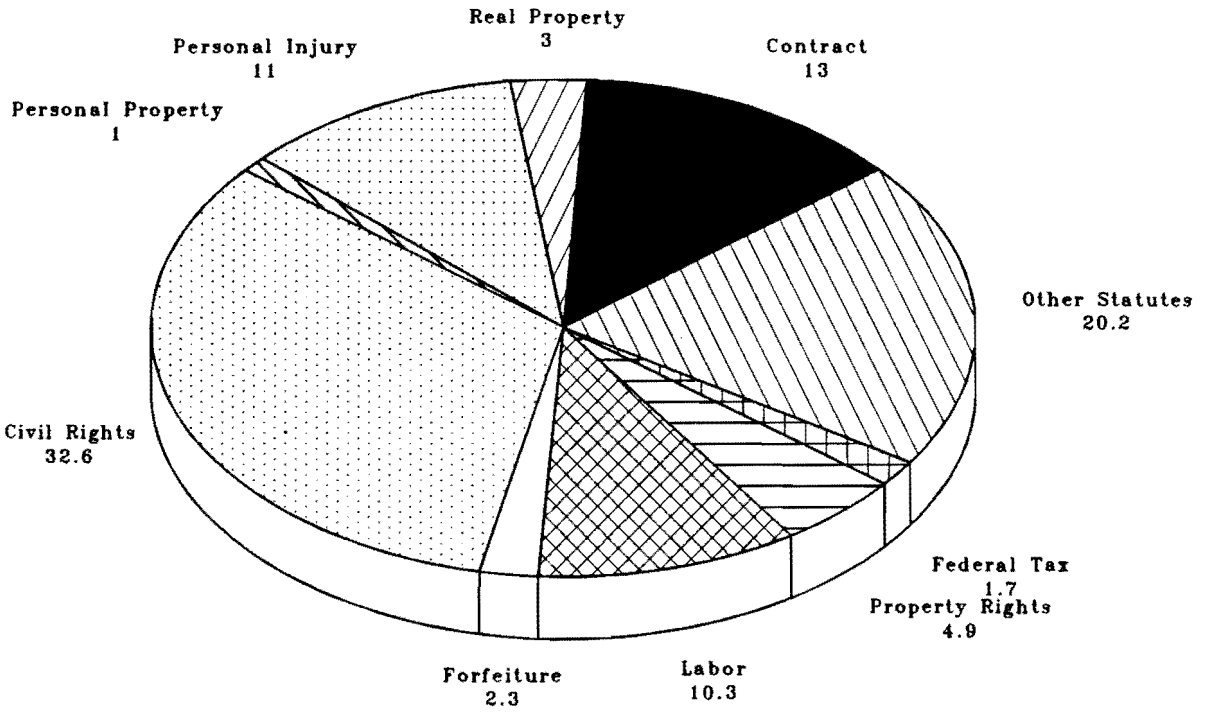
UNWEIGHTED CASES AS PERCENTAGE OF COURT LOAD



Closed Cases, January 1 - June 30, 1991

Figure 31

WEIGHTED CASES AS PERCENTAGE OF COURT LOAD



Closed Cases, January 1 - June 30, 1991

Differentiated case management can more successfully impact the demand on the court's time if particular attention is paid to case weighting when an appropriate track is selected.

Large Scale Litigation as a Disproportionate Share of Judicial Resources

The district has a few civil cases that have been pending an extraordinarily long time. An agriculture case, for example, has been pending 18 years. A civil rights case has been pending over 16 years and two additional cases have been pending over 12 years. These cases should be given special attention. The Advisory Group recommends the occasional use of special masters to help resolve such cases, as well as other complex and highly specialized matters the court must consider from time to time. Rule 53 of the Federal Rules of Civil Procedure allows the appointment of such masters by "the court in which any action is pending." It specifies, however, that "a reference to a master shall be the exception and not the rule."

Masters have been used by courts since the fourteenth century when specialists were trained to assist the chancery courts in drawing up writs, taking affidavits, and certifying documents. These specialists eventually became clerks, and the concept of master was expanded in the United States to include subject area experts, arbitrators, auditors, referees, monitors, and implementors of court orders. Typically masters have been used to help sort out complex issues in cases that require time and expertise a judge or magistrate judge may not have.

RECOMMENDATION SIX

Special masters should be used in the district when it appears that such an appointment would reduce the cost and delay of complex judicial proceedings. Rule 53 of the Federal Rules of Civil Procedure should be scrupulously followed when making such appointments, and they should be the exception and not the rule of court management practice.

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The Effect of New and Complex Litigation on the Judiciary

Complex and contentious litigation in American society has created the need for attorneys to narrow their practice and develop specialized skills in individual areas of the law. While the practice of law as a profession has changed in this respect, the practice of judging has not. Judges are increasingly and unrealistically expected to become proficient in numerous subfields of the law where even experts may disagree. The Advisory Group perceives the need for additional training of judges to enable them more easily to handle cases which require particular expertise. The use of special masters may assist in these areas and provide some relief to judges whose dockets are overloaded, but they cannot entirely relieve judges of the need for specialized knowledge. The key question is the extent to which the additional training of judges and the use of special masters can reduce cost and delay.

The Impact of Court Procedures and Rules on Litigation in the Western District of Michigan

Interviews with attorneys and litigants generated rich qualitative data on how various court practices affect litigation costs and delay in the district. There
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was general agreement that the court-administered case management process now in effect does indeed reduce cost and delay, and it will continue to do so as long as the court remains flexible. Respondents liked the way cases are managed in the district now, and most of them thought cases could be managed even more tightly.

There was a consensus among the attorneys interviewed that the trailer docket system now in place increases the costs of litigation. Of particular concern to them was the cost associated with preparing for trial more than once. They said it is costly to rearrange the schedules of the parties with little advance notice, and to bring in expert witnesses several times because of postponements. The attorneys were agreed that establishing firm trial dates in advance would result in reduced litigation costs. The Advisory Group is aware that the bench sees some of the matters differently, but it must report the data as gathered. Sometimes only case managers know how frequently cases have been rescheduled, and it is apparent from the interviews that attorneys have felt free to say things to the Advisory Group that they may not say to judges. The Advisory Group is also cognizant of the differences that exist between perception and reality.

The setting of discovery deadlines as required by statute was considered an acceptable way to limit costs as long as the court recognized that there are instances when attorneys must exceed these deadlines. Having to file and argue a motion to extend discovery does indeed increase costs. As one attorney put a typical quandary, "What if I have an afterthought?" Careful consideration

should be given to the concerns of the parties before such deadlines are established. Several attorneys said that discovery gets out of hand too easily and should be more tightly controlled by the court from the outset.

The Advisory Group believes that setting firm deadlines is an effective way to reduce litigation costs. Several respondents felt that the court should be more willing to impose sanctions for failure to comply with deadlines without good cause. The court should also meet reasonable deadlines, particularly as they apply to rulings on motions and summary judgments.

Most respondents were in favor of using alternative dispute resolution methods to resolve suits, but they did not believe all cases were suited for ADR. It is necessary for the court carefully to differentiate which cases should go to ADR, and which processes of ADR should be used for specific suits. Cautions were raised that judicial officers should not determine particular ADR methods without first obtaining input from attorneys and litigants. The attorneys agreed that an unsuccessful ADR process ultimately increases the cost of litigation. Alternative dispute resolution may be more effective if sanctions are imposed upon the parties who reject the decision given in the proceeding, and who do not fare better at trial. One attorney said, for example, "There needs to be some teeth in ADR, or it's a game that runs up costs with no yield."

Particular concerns were raised about mediation. Another attorney pointed out, "Every case cannot be mediated in the same way. There should be more leeway and varying models of mediation." Yet another was concerned about

the quality of mediation. "It is bad practice to order parties to mediate without paying mediators adequately," he said. "You end up with an unprepared panel. We should pay them more so that they serve as a blue ribbon group."

Another factor that creates additional costs to litigants in the judgment of the attorneys interviewed is the practice of requiring attorneys to appear in person to argue motions. Several attorneys would like to see more use of teleconferencing so that travel time and expenses can be reduced. Telephone and video conferencing are currently being used successfully in some of the lower courts, especially the state circuit courts, attorneys point out, so the technology is in place.

Requiring parties to participate in person at Rule 16 conferences may also increase litigation costs. Several respondents thought that personal attendance should be determined on a case-by-case basis, and that there were times when parties should be allowed to communicate by telephone. There was general agreement, however, that face-to-face contact at Rule 16 conferences was the determining factor in achieving an early resolution of specific kinds of suits.

These topics and their particular effect on cost and delay in the district are discussed in more detail below.

The Trailer Docket

The court's trailer docket is a topic requiring special attention. The current length of the trailer docket was highly criticized by both lawyers and litigants. It is the consensus of the Advisory Group, based on respondent information

and opinion, that the need for restructuring the trailer docket is overdue.

"Trailer docket" is the name given to the number of cases assigned for trial in a given term. A term assignment depends on whether a case requires a jury or a bench trial. One judge's trailer docket schedule is set forth below, for example.

January 2	-	February 22	Jury term
February 25	-	April 12	Bench term
April 15	-	June 7	Jury term
August 12	-	October 11	Jury term
October 15	-	December 13	Bench term

At the Rule 16 case management conference, the attorneys propose an agreeable time for trial. The court then assigns the case to a term, and it is added to the list of cases already assigned to that term, with no limit to the number of cases that can be so assigned. When a docket begins to look especially full, the case manager typically forwards a memorandum to the judge suggesting that he may wish to consider assigning future cases to a different term.

During calendar year 1991, the trailer docket for one judge looked like this:

January term	-	21 cases
February term	-	7 cases
April term	-	30 cases
August term	-	21 cases
October term	-	8 cases

The result of such scheduling is that if all the docketed cases in a term happen to settle, the court is left with a large block of time with no trials to conduct. Alternatively, if the cases do not settle, attorneys and their clients prepare for trial only to suffer the emotional letdown of rescheduling.

Anecdotal information led the Advisory Group to believe that lawyers and litigants alike find the delay and extra expense engendered by preparing for trial more than once to be frustrating and unnecessarily burdensome. Words such as bad, insensitive, unjust, and unfair were frequently used.

The system is hampered when attorneys assume--guess is perhaps a better word--their case will not go to trial because of the number of cases previously scheduled, but are suddenly faced with the possibility that the trial is imminent. They are sometimes unprepared to proceed. Adjournments are requested and often granted for this and a number of other reasons such as personal or professional conflicts and the unavailability of witnesses. Attorneys insist that conflicts and unavailabilities are the nature of the beast and that at Rule 16 conferences they are unrealistically expected to block off large amounts of time for a trial that is uncertain or could be settled in advance. The unanimous recommendation of the attorneys interviewed was that the trailer docket should be reshaped.

RECOMMENDATION SEVEN

The trailer docket should be shortened both in terms of elapsed time and the number of cases on it. Fixed dates of trial should be adhered to whenever possible. Assignment dates in a reshaped docket should reflect the characteristics of the track selected in the differentiated case management system recommended in this report, and the dates should be narrowed to specific segments of a given month.

An example of how a redesigned trailer docket system would work is described below. Complex litigation would be assigned in the first week. Next would be one or two criminal cases ranked in order from the date they were filed in accordance with the Speedy Trial Act. If these cases do not proceed to trial, the judge could spend the remainder of the week hearing a super fast track case, resolving pending motions, conducting telephone or settlement conferences, or handling other administrative matters. The second week would begin with the oldest of the standard track cases. If it were resolved prior to its assigned trial date, any other pending trial not heard in the first week would begin. Otherwise, the court's time could be spent in chambers handling dispositive motions. Adjournments should be granted only for good cause shown, upon certification by the attorney or the parties in the form of an affidavit of facts setting forth the reasons why an adjournment is necessary.

Individual judges might consider a revised trailer docket which would look like this:

Sample Revised Trailer Docket

Week Number 1:

1. Oldest complex track case ready for trial.
2. Criminal case with defendants not facing time pressure.
3. One day chambers time for research and writing on pending motions.
4. Super-fast track cases (to be tried by a back-up judge, if necessary).
5. Settlement conferences for cases scheduled for week 2.

It is recommended that a senior judge be designated as a back-up judge to take the criminal case in the event the complex case goes to trial.

Week Number 2:

1. Oldest standard track case.
2. Criminal case.
3. Standard track case.
4. A criminal case without time pressure.
5. Super-fast track case (to be tried by back-up judge, if necessary).
6. Fast track case.
7. One day chambers time for research and writing on pending motions.

Week Number 3:

1. Complex criminal case.

2. Criminal case without time pressure.
3. Standard track cases.
4. Super-fast track case (to be tried by back-up judge, if necessary).
5. Fast track case.
6. Criminal case.

Week Number 4:

1. Super-fast track case (primary judge).
2. Fast track case.
3. One day chambers time for research and writing on pending motions.
4. Standard track case.
5. Standard track case.

It is recommended that if a complex case reaches trial, attorneys for the cases below it on the trailer docket be notified that their cases will be held over.

Alternative Dispute Resolution

The Western District of Michigan has enacted local rules that provide for two primary means of alternative dispute resolution. Rule 42 provides for mediation, and Rule 43 provides for court-annexed arbitration, both procedures outlined in some detail. Rule 44 stipulates that a case may also be selected for a summary jury trial, mini-hearing, or early neutral evaluation. The summary jury trial and mini-hearing are described briefly, while early neutral evaluation

is not further discussed. The judges state their fundamental belief about alternative dispute resolution in Rule 41. They favor "initiation of alternative formulas for resolving disputes, saving costs and time, and permitting the parties to utilize creativity in fashioning non-coercive settlements."

In no other area of the report has it been more difficult to collect empirical data. There are four important reasons for this. One is that "mediation" in Rule 42 is more characteristic of the ADR category of neutral evaluation than it is of true mediation. Two is that there are many forms of ADR that are not technically understood as ADR, a Rule 16 conference, for example. Three is that ADR methods do in fact lead to settlements that are not caught in a normal statistical net. Four is that it is often impossible to measure what goes on in the human mind as a result of ADR contacts, such forces as new-found respect for one's adversary, for example, that in fact moves litigants to settle.

With these limitations in mind, the following data on arbitration and mediation are presented.

Arbitration and Mediation

Arbitration and mediation as alternative dispute resolution processes were used in 103 (12 percent) of the 848 civil cases closed in the district from January 1 through June 30, 1991. Excluding prisoner civil rights, social security, and bankruptcy cases, not generally amenable to ADR, and the other seven non-prisoner civil cases handled by magistrates with consent, the 103 cases represent 26 percent of the remaining 394 cases.

Alternative dispute resolution was used proportionately more in personal injury suits than in any other category of action because of familiarity with the procedure already extant in Michigan circuit courts. Nearly 31 percent of the personal injury cases were referred to arbitration or mediation (15 to arbitration and 16 to mediation), as were three of the six personal property cases (1 arbitration and 2 mediation). About one-third of the contract cases and one-third of the civil rights cases were also referred. These cases represent the greatest use of ADR both numerically and proportionately. Table 6 shows the distribution of arbitration and mediation usage by nature of suit with the suits listed in rank order of weighted cases.

TABLE 6

CURRENT USAGE OF ARBITRATION AND MEDIATION IN RANK ORDER OF WEIGHTED CASES*

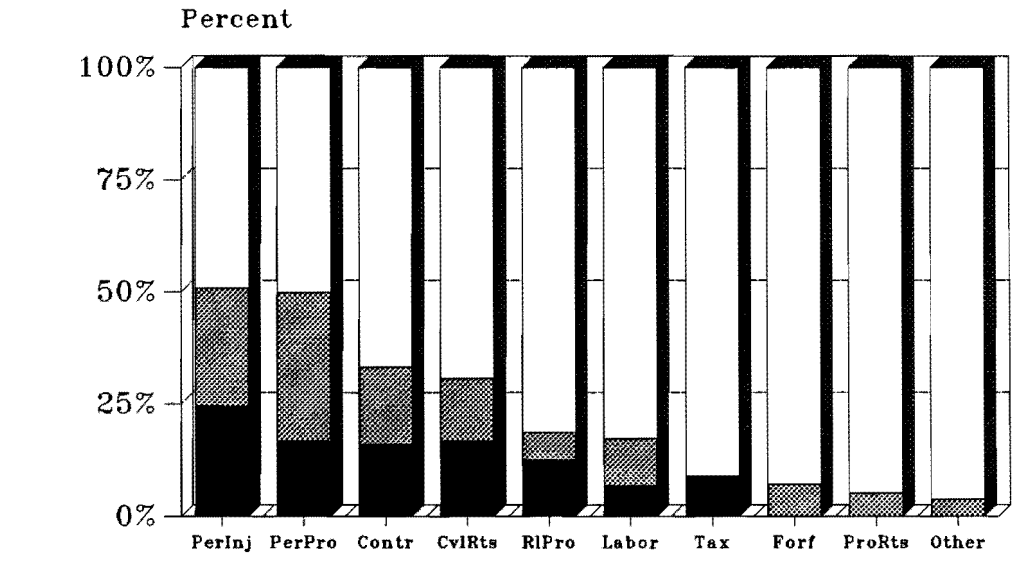
TYPE OF SUIT	ARBITRATION	MEDIATION	PERCENT ADR
Civil Rights	13 (16.7%)	11 (14.1%)	30.8
Other Statutes	0	2	4.0
Contracts	13 (16.0%)	14 (17.3%)	33.3
Personal Injury	15 (24.5%)	16 (26.2%)	50.7
Labor	4 (6.9%)	6 (10.3%)	6.9
Property Rights	0	1 (5.3%)	5.3
Real Property	2 (12.5%)	1 (6.2%)	18.7
Forfeiture/Penalty	0	1 (7.1%)	7.1
Federal Tax	1 (9.1%)	0	9.1
Personal Property	1 (16.7%)	2 (33.3%)	50.0
Total Cases	49	54	

*Total eligible cases = 394, excluding suits not currently subject to ADR and cases handled by magistrate judges with consent.

Figure 32 depicts the relative usage of ADR at the end of 1990. It suggests the areas the court deems amenable to ADR processes, and the data serve as a basis for measuring changes as a result of future ADR utilization.

Figure 32

ARBITRATION AND MEDIATION USAGE
WITHIN EACH TYPE OF SUIT



Certain types of suits stand out as being more amenable to referral to alternative dispute resolution. Their civil cover sheet number and descriptors are listed in Table 7. Analysis of specific types of suits with more than ten cases closed from January 1 through June 30, 1991, shows that 68 percent of the

personal injury product liability suits and 64 percent of the labor and management relation cases, for example, were referred.

TABLE 7

DISTRIBUTION OF ARBITRATION/MEDIATION CASES BY SPECIFIC NATURE OF SUIT IN RANK ORDER OF VOLUME OF SUITS

SPECIFIC SUIT	NUMBER OF SUITS	N AND % ARBITRATION	N AND % MEDIATION	TOTAL %
440-Other Civil Rts.	59	10 (16.9)	5 (8.5)	25.4
190-Other Contract	44	10 (22.7)	9 (20.4)	43.1
791-Empl. Ret. Inc.	36	0	1 (2.8)	2.8
110-Insurance	20	3 (15.0)	4 (20.0)	35.0
365-P.I. Product Liability	19	8 (42.1)	5 (26.3)	68.4
442-Cvl. Rts. Employment	17	3 (17.6)	6 (35.3)	52.9
350-P.I. Motor Vehicle	14	2 (14.3)	6 (42.8)	57.1
890-Other Statutory	17	0	1 (5.0)	5.9
360-Other Personal Injury	11	2 (18.2)	3 (27.3)	45.5
720-Labor/Mgt. Relations	11	2 (18.2)	5 (45.4)	63.6
870-Taxes (US Plaint/Def)	10	1 (10.0)	0	10.0
330-Fed. Employers Liablty.	5	2 (40.0)	1 (20.0)	60.0
230-Rent/Lease Ejection	2	1 (50.0)	0	50.0
290-Other Real Property	5	1 (20.0)	0	20.0
320-Assault Liable	3	1 (33.3)	0	33.3
380-Other Personal Property	4	1 (25.0)	2 (50.0)	75.0
730-Labor/Mgt. Rep-Disclo.	1	1 (100.0)	0	100.0
790-Other Labor	4	1 (25.0)	0	25.0
140-Negotiable Ins.	5	0	1 (20.0)	20.0
245-Tort Product Liability	1	0	1 (100.0)	100.0
355-Motor Veh./Prod. Liab.	3	0	1 (33.3)	33.3
830-Patent	6	0	1 (16.7)	16.7
850-Securities	8	0	1 (12.5)	12.5

With the exception of "other" cases, where only two cases out of 50 were referred, ADR is currently being utilized proportionately more in highly weighted civil rights, personal injury, and contract cases. In terms of specific suits, ADR appears to be used most often when the plaintiff is an individual litigant.

The Impact of Alternative Dispute Resolution

It has already been observed that the impact of alternative dispute resolution on cost and delay is difficult to measure. One place to attempt an evaluation, however, is a comparison of the cases which have utilized ADR against those that have not.

On the surface, arbitration and mediation cases tend to take longer to close than non-ADR cases. Table 4 gave the average number of days for termination of all cases as 309. Arbitration cases averaged 403 days, while mediation cases averaged 548 days. Utilization of these methods of ADR appears to slow down the litigation process.

The Advisory Group tried to determine how ADR affects the outcome of cases. It found that only 21 percent of arbitration cases and 30 percent of mediation cases settled following the arbitration and mediation hearings. Yet there is abundant anecdotal information that a certain number of these cases settled *before* the hearings as a function of the ADR process itself. Some arbitration and mediation evaluations are rejected, causing the case to proceed to trial. Twelve percent of arbitrated cases and 6 percent of mediated cases went to trial, while the court's overall average is 3 percent.

These findings appear to contrast with the success Michigan circuit courts have had with the court-mandated mediation set forth in Michigan Court Rule 2.403. Approximately 50 percent of all cases mediated pursuant to this rule are settled immediately. Anecdotal information from those who have studied Michigan's mediation system indicates that at least 95 percent of these mediated cases settle before trial. This is largely because Michigan court rules provide that if a party has rejected an evaluation and the action proceeds to trial, the rejecting party must pay his or her opponent's actual costs if the rejecting party does not obtain a verdict 10 percent more favorable at trial.

Former Local Rule 42 of the Western District of Michigan provided for similar fee shifting sanctions until the Sixth Circuit Court of Appeals invalidated it in Tiedel v. Northwestern Michigan College, 865 F.2d 88 (1988). The Tiedel decision held that a federal district court does not have authority to promulgate a local rule imposing attorney fees as sanctions, although the parties can agree to them without order. Thus the teeth were removed from ADR methods; the Advisory Group believes this is the primary cause of ineffectiveness in arbitration and mediation.

RECOMMENDATION EIGHT

Legislation should be enacted to strengthen alternative dispute resolution processes by allowing fee shifting as a sanction. By infusing new life into ADR processes, courts and litigants may be more willing to use them as cost efficient methods of conflict resolution.

Case Dispositions: Arbitration

Arbitration outcomes fall into three general areas: (1) disposition prior to referral; (2) disposition following referral but prior to hearing; and (3) disposition following commencement of hearing. The following case disposition numbers pertain to the period January 1 - June 30, 1991.

(1) *Prior to referral:* One case was deemed inappropriate for referral; four were dismissed by the court; four settled; and nine (19 percent) were disposed of before referral was completed.

(2) *Following referral but prior to hearing:* One case was deemed inappropriate for hearing, seven were dismissed by the court, seven settled, and 15 (31 percent) were disposed of prior to hearing.

(3) *Following commencement of hearing:* Seven cases were dismissed by the court, 16 settled, 24 (49 percent) were disposed of following commencement of hearing, six went to trial, and, in one case, the arbitration decision was entered as the final judgment.

In summary:

Inappropriate	2	(4 percent)
Dismissed	18	(37 percent)
Settled	27	(55 percent)
Arbitration Accepted	1	(2 percent)
Trial	6	(13 percent)

Case Dispositions: Mediation

Mediation case dispositions can be divided into two categories: (1) those resolved prior to commencement of hearing; and (2) those resolved following commencement of hearing.

(1) *Disposition prior to hearing:* One case was deemed inappropriate for mediation, three were dismissed (6 percent), and 10 (19 percent) settled.

(2) *Disposition after commencement of hearing:* One case was deemed inappropriate, 14 were dismissed (26 percent), 18 settled (33 percent), four accepted the mediation (8 percent), and three (6 percent) went to trial.

In summary:

Inappropriate	2	(4 percent)
Dismissed	17	(32 percent)
Settled	28	(52 percent)
Mediation Accepted	4	(8 percent)
Trial	3	(4 percent)

Case Dispositions: Non-ADR

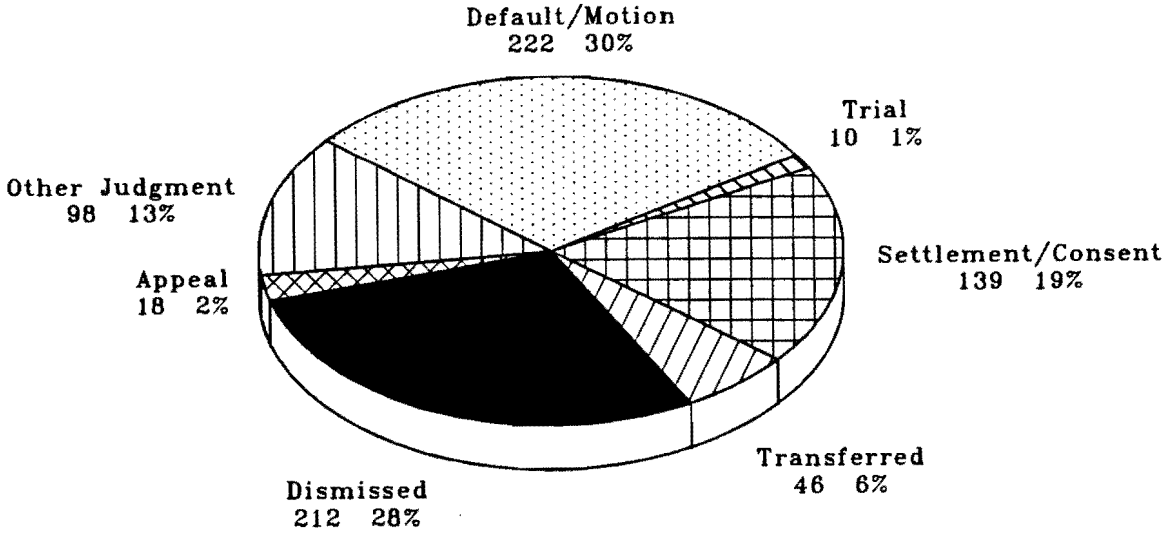
All cases can be further classified according to type of disposition. For purposes of analysis, case dispositions were coded as transferred/remanded, dismissed by the court, settled or consent judgment entered, default or dismissed on motion, trial, appeal, and other judgment. The distribution of cases not referred to ADR were disposed of as follows:

Transferred/Remanded	46	(6 percent)
Dismissed	212	(29 percent)
Settled/Consent	139	(19 percent)
Default/Motion	222	(30 percent)
Trial	10	(1 percent)
Appeal	18	(2 percent)
Other Judgment	98	(13 percent)
	745	(100 percent)

These outcomes are illustrated in Figure 33.

Figure 33

NON-ADR DISPOSITIONS



745 closed cases, January 1 - June 30, 1991

Only one percent of the cases not referred to ADR proceeded to trial, while another 2 percent were appealed. Twenty-eight percent were dismissed, and 6 percent were transferred or remanded to another court. Overall, 139 (19 percent) of the non-ADR cases settled or had a consent judgment entered, while another 30 percent had a judgment entered based on default or motion. The remaining 13 percent were recorded as reflecting some "other" judgment.

The method of recording data by the court does not allow exact comparison between non-ADR and ADR cases. The distribution of dispositions for ADR cases is shown in Figures 34 and 35.

Figure 34

ARBITRATION CASE DISPOSITIONS

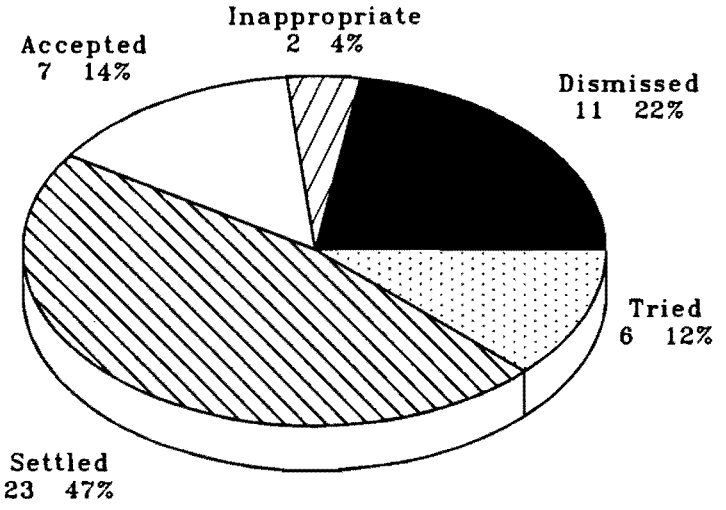
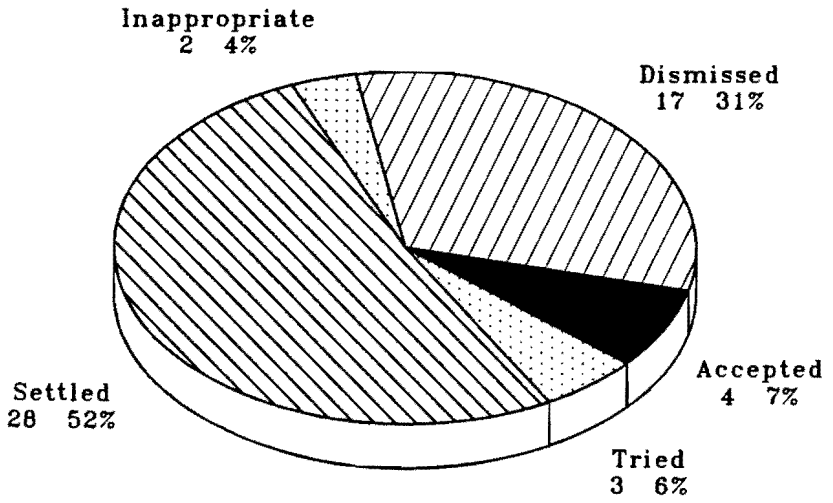


Figure 35

MEDIATION CASE DISPOSITIONS



Med=54

Case Dispositions: Comparison of ADR and Non-ADR

The outcomes are similar in ADR arbitration and mediation cases. A slightly smaller proportion of cases are dismissed by the court in arbitration than in mediation, but the court dismisses fewer than one-third of the total number of cases assigned to each category. Both categories settle around 50 percent of the time and the proportion of cases in which the evaluation of the arbitration and mediation hearing was accepted by both parties is low, 7 percent in mediation and 14 percent in arbitration. Interestingly, the proportion of arbitration cases that proceed to trial is twice that of mediation cases (12 percent versus 6 percent).

Although cases referred to ADR are more likely to settle, approximately 9 percent proceed to trial. The ones which go to trial probably have a unique characteristic such as a problem with the quality of the work of the mediators and/or arbitrators, or the possibility that the ADR process was started too soon in the litigation. These hypothetical "unique characteristics" are subject to empirical investigation, and such inquiries will be made as part of the evaluation program the Advisory Group will pursue over the next three years. Whether ADR cases go to trial or not, none of them in the Western District have been appealed. The Advisory Group strongly supports ADR methodologies. It is apparent, however, that modifications need to be made to discourage the rejection of ADR evaluations and encourage parties to reach a settlement agreement.

Time in System as Impact

Using broad categories of disposition, a comparison was made between the length of time ADR cases took to close, and suits of the same type which were not referred to ADR. Table 8 presents the conclusions and juxtaposes the variability of time to disposition.

TABLE 8

AVERAGE DAYS TO DISPOSITION FOR
ADR AND NON-ADR CASES

SUIT/DISPOSITION	NON-ADR	ARBITRATION	MEDIATION
CONTRACT			
Dismiss	178 Days	216 Days	657 Days
Settle	230	266	479
Accept	X	392	437
Tried	X	570	X
Other Judgment	546	X	X
PERSONAL INJURY			
Dismiss	263 Days	126 Days	1036 Days
Settle	289	590	576
Accept	X	X	422
Tried	X	985	404
Other Judgment	249	X	X
CIVIL RIGHTS			
Dismiss	234 Days	218 Days	522 Days
Settle	338	335	600
Accept	X	356	479
Tried	715	788	1171
Other Judgment	378	X	X
LABOR			
Dismiss	68 Days	337 Days	368 Days
Settle	240	X	499
Accept	X	201	X
Tried	630	X	X
Other Judgment	210	X	X

X = no case in this category

Alternative Dispute Resolution Conclusions:

(1) Personal injury and civil rights cases referred to arbitration are dismissed more quickly than if they are not referred, or if they are referred to mediation.

(2) Personal injury cases are settled more quickly without alternative dispute resolution.

(3) Personal injury cases take longer to resolve if they are referred to ADR, and they will take longer to resolve at trial if they are referred to arbitration rather than mediation.

(4) Civil rights cases are dismissed more quickly if they are referred to arbitration, but they settle or go to trial in about the same amount of time. Resolution through mediation in civil rights cases takes significantly longer.

(5) Contract cases are dismissed or settled more quickly without ADR; but without ADR, they also take longer to reach final judgment.

(6) In labor cases, utilization of arbitration and mediation processes take longer to dismiss or settle a case than labor cases not referred to ADR.

(7) The sample of ADR cases used in this analysis was small enough that no definitive conclusions can be reached. A more comprehensive study of ADR practices should be high on the Advisory Group agenda for 1992.

If the matter proceeds to trial, however, the case remains in the system substantially longer than settlements or dismissals reached through ADR.

The amount of time a case spends in the system may or may not represent more cost to the litigants, but it does reflect personal and emotional investment in the litigation process. Arbitration and mediation methods have varied impacts in terms of time, and it is apparent that not all types of cases are amenable to ADR intervention. This raises questions about the characteristics of cases most suitable for ADR, and at what point in the process the referral should be made. Further analysis is needed to find these answers, along with the projected outcomes of the referrals. The differentiated case management system proposed later in this report will address each of these issues.

Dispositive and Non-Dispositive Motions

Many lawyers expressed frustration at the length of time it takes from the time a motion is filed until an opinion on the motion is rendered. They most often illustrated their complaint with reference to dispositive motions. Without a timely opinion from the court, they said, they are compelled to continue expensive discovery procedures to protect the interests of their clients. Non-dispositive motions that languish tend to slow down the entire litigation process. Some of these motions have the potential for a dynamic impact on the outcome of a case, including the facilitation of earlier settlements. Anecdotal information has led the Advisory Group to recommend that no more than 60 days should elapse following the hearing or the last responsive date, whichever is later.

RECOMMENDATION NINE

As a protective device to help decrease unnecessary costs to litigants, an automatic stay on judicial proceedings should be enforced after a dispositive or non-dispositive motion has remained in the court without decision for more than 60 days, unless an exception is made for good cause.

The Civil Justice Reform Act requires the Western District to establish a time frame for the disposition of motions.[23] Recommendation nine is not meant as a deadline to be imposed on judges, but as a means of providing much needed relief to litigants. Judges themselves may wish to require monitoring devices such as the receipt by them of all responsive briefs two weeks in advance of the 60 day time limit recommended above.

Habeas Corpus and Prisoner Civil Rights Petitions, and Other Pro Se Filings

The Federal Magistrates Act contained in 28 U.S.C. 631-639 grants authority to magistrate judges further clarified in Local Rules 11-14 of the Western District of Michigan. A large part of their responsibility is to assist in processing habeas corpus and prisoner civil rights petitions. From January 1 through June 30, 1991, there were 397 prisoner civil rights cases closed in the district. Of those, a tabulation from closing cards indicates that 41 percent were closed as a result of pretrial consent or default, and an additional 32 percent were dismissed. Sixty percent of habeas corpus cases were also dismissed. On the average, these dispositions took 262 days to resolve. The

[23]Title 28, United States Code, section 473(a)(2)(D).

court's efficient use of magistrate judges, combined with effective information processing by the clerk's office, expedited the disposition of these cases.

Special attention should be given the fact that prisoner civil rights cases make up 39 percent of the total civil filings in the district. Many of these cases are dismissed as frivolous, and counsel is rarely requested to assist the court under the statutes that govern such cases. Most of them are resolved in a relatively short period of time with limited discovery. If these cases were managed less efficiently than they are now, the backlog of unresolved prisoner civil rights cases would quickly divert the court's resources from the remainder of the civil docket.

The magistrate judges have been primarily responsible for maintaining control in this demanding area. Although each has approached the disposition of prisoner civil rights cases in a slightly different way, a similar method for reviewing and acting upon such cases has evolved. The refinement, standardization, and codification of this method would be useful as a model for others. Such a summary would include the following practices.

Magistrate judges currently evaluate prisoner civil rights filings promptly to determine: (1) whether jurisdiction has been properly alleged, (2) whether the complaint states a claim, (3) whether the plaintiff should be permitted to proceed in forma pauperis, and (4) whether the court should seek the assistance of counsel for the plaintiff under 28 U.S.C. 1915.

Complaints are reviewed to determine whether causes of action pled under 42 U.S.C. 1983 because of the alleged deprivation of due process by state

officials present enough information to determine if the plaintiff availed himself or herself of such state procedures as are available, or if the complaint adequately alleges that such procedures have not been pursued but would be futile.

Files are reviewed to determine whether defendants may plead Eleventh Amendment immunity.

Prisoner civil rights cases are generally suitable for fast track disposition in the district's differentiated case management plan, with close monitoring and limitation of discovery at least until a determination has been made as to whether the claim is frivolous or whether any required exhaustion of state procedures has been accomplished. Alternative dispute resolution mechanisms have not historically been used for cases in this category of civil suit, and no general need is seen for the use of such measures. The continued utilization of magistrate judges, whenever possible, to conduct Rule 16 conferences and to resolve discovery disputes is appropriate.

In-prison methods for handling prisoner civil rights cases as discussed in recommendation three, and the use of educational video tapes and pamphlets as discussed in recommendations sixteen through eighteen, should help to reduce the technical deficiencies which regularly occur in these pro se pleadings.

The magistrate judges will be assisted in the management of these cases as they continue to be given prompt and accurate information from the clerk's office regarding previous filings in the district.

RECOMMENDATION TEN

Prisoner civil rights petitions should ordinarily be assigned to the fast track of the differentiated case management plan, without alternative dispute resolution, with limited or suspended discovery in appropriate cases, and with close supervision by a magistrate judge. After further review of the current method for disposing of these cases, and with detailed contributions from the magistrate judges, judges, and clerk's office, the Advisory Group should prepare a written procedure for the management of prisoner civil rights petitions.

Assignment of Cases

One of the three active judges and two senior judges presently serve the needs of litigants in the upper peninsula and outlying areas on a rotational assignment basis. This requires a judge to drive over 800 miles and 13 hours round trip to address a small percentage of his caseload. Because of the blind draw system of assigning cases, the procedure favored by a majority of the attorneys in the district, some southern Michigan litigants are assigned to a Grand Rapids judge, for example, even though assignment to a Kalamazoo judge would save over two hours travel time. Although some litigants have previously requested and received a reassignment of their case, many do not realize this procedure has been allowed, because it has not been codified in the local rules. An amendment permitting voluntary reassignment of a case to a more geographically convenient judge, upon written consent of all parties to the litigation, should be made with a provision that a judge may refuse such a case

if his docket would become disproportionate to that of the other judges as a result.

RECOMMENDATION ELEVEN

Because of the size and distribution of cases in the Western District of Michigan, a local rule should be adopted to permit the reassignment of a case to a more geographically convenient judge, if all parties and the court agree.

How the Practices of Attorneys and Litigants Affect the Cost and Pace of Litigation

Certain practices of attorneys and litigants affect the cost and pace of litigation in the district. Preliminary findings show a correlation between the number of motions filed, the number of adjournments and prolonged discovery requests granted, and increased cost and delay.

Most of the costs of litigation are derived from attorney fees. The table on the following page presents a sample of the 1990 net income of attorneys in selected areas of the Western District.[24]

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[24]"The Economics of Law Practice in Michigan," Michigan Bar Journal, November 1991, p. 1237.

TABLE 9

NET INCOME OF ATTORNEYS IN SELECTED AREAS OF THE WESTERN DISTRICT, 1990

	Value by Percentile			
Location	25th	50th	75th	90th
Battle Creek	$15,000	$60,000	$75,000	$76,000
Grand Rapids	42,000	58,000	100,000	189,000
Kalamazoo	42,000	68,000	90,000	128,000
Lansing	40,000	57,000	75,000	120,000
Muskegon	18,000	56,000	75,000	93,000
Upper Peninsula	29,000	40,000	90,000	92,000

The 25th percentile, for example, means that up to 25 percent of all attorneys practicing in the city indicated earn up to the amount specified in that column. Up to half of the attorneys earn the amount specified in the 50th percentile, and so forth.

The reported median hourly billing rate of all attorneys in the state of Michigan for 1991 was $105 per hour. This represents an increase of 14 percent over the 1988 rate of $92 per hour, a 40 percent increase over the 1984 rate of $75 per hour, and a 67 percent increase over the 1980 rate of $63 per hour.[25]

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[25]"The Economics of Law Practice in Michigan," Michigan Bar Journal, November 1991, p. 1238.

Obviously the amount of time an attorney spends on a task directly affects the cost of litigation. The Advisory Group does not perceive its function to be that of reducing or curtailing attorney fees. Its function is to find ways to reduce the overall costs of litigation. The Advisory Group believes this can best be accomplished by identifying those tasks and practices which are either unnecessary or unnecessarily time consuming for attorneys. The Advisory Group has developed a plan described in section VII of this report to assess the amount of time attorneys spend on discovery practices, alternative dispute resolution, motion practices, and trial preparation and trial work, as each of these practices relates to the type of case filed, the length of time allowed for discovery, the track to which the case will be assigned in a differentiated case management system, and the total length of time in adjudication until final disposition of the case.

Once the data are collected, an hourly rate will be assigned to each task to determine its average cost. A high and low range of costs will also be determined so that attorneys and their clients can be better informed as they plan their litigation strategy. The table on the following page sets forth the 1991 hourly billing rates for attorneys by office location in sample areas of the Western District.[26]

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[26]"The Economics of Law Practice in Michigan," Michigan Bar Journal, November 1991, p. 1239.

TABLE 10

HOURLY BILLING RATES FOR ATTORNEYS IN SELECTED AREAS OF THE WESTERN DISTRICT, 1991

	Value by Percentile			
Location	25th	50th	75th	90th
Battle Creek	$85	$90	$100	$110
Grand Rapids	90	110	165	185
Kalamazoo	90	100	125	140
Lansing	85	100	125	160
Muskegon	90	90	100	100
Upper Peninsula	70	75	85	90

In the case of Battle Creek, for example, up to 25 percent of the attorneys practicing in that city make up to $85 per hour, up to 50 percent of them make up to $90 per hour, and so forth across the scale.

The Advisory Group is convinced that the cost of discovery is the most expensive element of litigation, with the possible exception of preparing and trying a case. Although trial preparation and actual trials occur only in small percentages of the cases, discovery must take place in almost all cases. Some attorneys believe in flooding their opponent with discovery requests. A need exists to promote civility among attorneys by encouraging the free flow of information at the very start of litigation and to discourage the use of the court as an arena to resolve discovery disputes.

Respondents saw discovery as the most inefficient aspect of the adjudication process in terms of cost. There is no limit on the number of depositions, requests for documents, and requests for admission that one party may serve on another. One attorney commented that his client was willing to spend $20,000 to defend a $2,000 case if he had to. Such attitudes adversely affect "the little guy" and frustrate the small town practitioner to the point where a client may be effectively denied his or her day in court.

Regardless of who a client selects to represent him or her, discovery wars can significantly drive up the cost of litigation. Effective control of discovery by the court, coupled with a long-term educational process for litigants, is necessary to curb abuses in this area.

Inefficient discovery practices can be curtailed through proper case management. Some judges in the district already limit the number of interrogatories parties may exchange following the case management conference. The Advisory Group thinks it is imperative that each judge embrace the case assigned to him at the earliest possible moment to provide both direction and management to the litigants in all aspects of discovery. Good case management is the key in controlling the costs of litigation.

The Impact of Recent Criminal and Civil Legislation on the Western District of Michigan

The number of civil and criminal cases filed in the district increased dramatically over the last decade. The marked increase in the number of criminal cases was due in large part to the enactment of new statutes by

Congress. The war on drugs and other crimes has significantly increased investigations and arrests. The new mandatory minimum sentencing standards keep cases pending longer because defendants are not as willing to plea to offenses which have mandatory jail time as a punishment. The rise in civil litigation filings was discussed earlier as being a result, in part, of the increase in social security termination appeals. Other complex and lengthy litigation over claims involving the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the Employee Retirement Income Security Act (ERISA), and Racketeer Influenced and Corrupt Organizations (RICO) took up a disproportionate amount of the court's resources.

TABLE 11

SPECIAL SUITS
DAYS PENDING IN THE SYSTEM
JANUARY 1 TO JUNE 30, 1991

NATURE OF SUIT	NUMBER OF CASES	DAYS PENDING	
		Median	Maximum
Racketeer Influenced and Corrupt Organizations (RICO)	5	164	1,711
Employee Retirement Income Security Act (ERISA)	62	178.5	846
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)	28	583	1,859

TABLE 12

SPECIAL SUITS
DAYS TO TERMINATION
JANUARY 1 TO JUNE 30, 1991

NATURE OF SUIT	NUMBER OF CASES	DAYS TO TERMINATION		
		Minimum	Median	Maximum
Racketeer Influenced and Corrupt Organizations (RICO)	2	169	220	271
Employee Retirement Income Security Act (ERISA)	36	11	201.5	1,294
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)	12	54	305	1,197

The enactment of this legislation was not accompanied by additional resources to handle the influx of the litigation it initiated. Appropriations are also needed for attorneys appointed to represent prisoners in civil rights cases. Statistics show that the district has been inundated with such litigants with a correspondingly large deficit in the number of attorneys willing to represent them. The Advisory Group believes that without statutory provision for compensation of time spent representing the indigent client regardless of outcome, or for the reimbursement of expert witness fees, a disincentive exists among lawyers to accept such cases. Those who do so are often faced with expenses which must be absorbed by his or her firm or taken from his or her pocket. The result is that the court's law clerks and other staff members are

often obliged to conduct research and review of numerous documents while the community's resource of capable attorneys remains untapped. The diversion of court personnel would not occur if there were an incentive among attorneys to be involved.

RECOMMENDATION TWELVE

Legislation should be drafted and appropriations made to compensate attorneys who are willing to represent pro se litigants in civil rights cases. The compensation should include reimbursement for all expenses incurred, including expert witness fees, and be forthcoming regardless of the outcome of the case.

The Advisory Group believes that even a minimal hourly rate of reimbursement would alleviate the concerns of the sole practitioner or the attorney who works in a small or financially conservative firm, while at the same time encourage young lawyers to come forward and represent prisoner rights litigants without fear of financial hardship.

The Need to Review and Revise Federal Sentencing Guidelines and Mandatory Minimum Sentencing Statutes

When the Sentencing Guidelines Commission drafted mandatory minimum sentences as well as sentencing guidelines, its original intent was to create uniformity and eliminate prejudicial or biased jail terms. Its goals were honorable, but there have been some unintended results.

A mandatory minimum sentence removes all judicial discretion and disregards the facts surrounding a particular incident. The mandatory minimum sentence handcuffs the judge as well as the defendant. Justice is less individualized than

categorized. Even defendants who have little doubt that they will be found guilty are more likely to take a chance at trial because it is as their only hope to escape a mandated harsh sentence. This may result in a marked increase in the number of cases going to trial.

RECOMMENDATION THIRTEEN

The impact of federal minimum sentencing statutes and sentencing guidelines should be reviewed by appropriate agencies, and the statutes and guidelines revised. In their present form they create penalties perceived by some as so distorted and disproportionate to certain offenses that they hamper the adjudication and administration of justice.

Information Obtained Pursuant to the Civil Justice Reform Act Must be Protected by the Courts to Assure Complete and Accurate Data Collection

The Advisory Group met with considerable resistance from the legal community in trying to gather information about the cost of various aspects of litigation. There are no statutes specifically protecting the information obtained under the authority of the Civil Justice Reform Act, and there is underlying apprehension about divulging data which may violate the attorney-client privilege. In addition, case law provides little assistance in assuring the absolute confidentiality of the information sought by Advisory Group researchers. The interviews conducted for this report brought the following kinds of responses, for example.

"Costs are confidential. My clients would be angry if I revealed how much they paid for litigation."

"Cost data would be used by rival companies as ammunition, and my clients would take their business elsewhere."

"Stockbrokers could use the data to alert investors about business problems."

"If it appears that legal expenditures are too low, stockholders may feel that their interests are not being adequately protected."

RECOMMENDATION FOURTEEN

A statute or local rule should be adopted which provides for the confidentiality of cost information pursuant to the Civil Justice Reform Act. This would enable researchers to gather more quantitative and qualitative data from which to address the purposes of the Act, which are to find ways to reduce cost and delay in civil litigation.

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The Advisory Group reiterates that its findings about the causes of cost and delay are preliminary. Although it does not perceive significant problems with reference to delay, problems of cost are less confidently discussed. The fundamental hypothesis of the district's differentiated case management plan is that as causes of delay are further identified and addressed, unnecessary and excessive costs will be reduced.
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DIFFERENTIATED CASE MANAGEMENT

The Western District of Michigan has been designated a demonstration district in the Civil Justice Reform Act of 1990. The statute requires the district to experiment with systems of differentiated case management that provide specifically for the assignment of cases to appropriate processing tracks operating under distinct and explicit rules, procedures, and time frames for the completion of discovery and preparation for trial.[27] This chapter describes the Advisory Group's response to that mandate.

Introduction

It should be noted at the outset that judges in the district historically have taken an active role in the management of cases. The court has long utilized a variety of alternative dispute resolution mechanisms to facilitate the resolution of its cases, and these mechanisms are one of the case management tools currently in use. Early status conferences held under the authority of Federal Rule of Civil Procedure 16 have frequently been employed in the district to facilitate case management by establishing reasonable guidelines for the completion of discovery and the setting of trial dates for particular cases based on an evaluation of the complexity of the issues involved, the need for discovery, the suitability of the case for alternative dispute resolution, and other factors. The Rule 16 conference is also an opportunity to bring the parties

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[27]Title 28, United States Code, section 471, notes.

together to assess the feasibility of an early settlement. The positive psychological effects of the litigants seeing each other as human beings have been noted by various judicial officers in the district.

The court has developed a de facto system of differentiated case management. The system proposed by the Advisory Group is designed to give further definition to that system. It will provide guidelines for litigants, counsel, and the court in determining which case management options are most suitable for individual cases; it will provide reliable, empirical data on the relative effectiveness of differentiated case management or case resolution tools; it will educate users of the court about the court's processes; and it will evaluate the court's success in meeting the goal of Federal Rule of Civil Procedure 1: "to secure the just, speedy, and inexpensive determination of every action."

The Advisory Group's proposals and recommendations with respect to differentiated case management are not designed to restrict the range of options available to judicial officers in managing civil litigation, or to restrict their discretion. The current state of the court's docket indicates a history of effective case management. Empirical data show that the court historically has provided the greatest degree of case management to those cases which are complex, involve multiple parties, or otherwise require a high degree of judicial involvement in the pretrial process. The court generally has not encumbered the parties in simple cases with lengthy or burdensome procedures more suitable to difficult or complex cases. The Advisory Group's differentiated case management plan seeks to increase the degree of uniformity among judicial

officers in the district in the ways cases are managed, to increase the degree of predictability as to how cases will be managed, to make the most effective use of the input of litigants and counsel in the case management process, and to maximize the effective use of judicial resources to accomplish the inexpensive, timely, and just resolution of civil cases. All of these goals are equally important.

RECOMMENDATION FIFTEEN

> ***A plan of differentiated case management should be implemented by the court in accordance with the requirements of the Civil Justice Reform Act of 1990. The plan should be implemented initially through the use of orders in individual cases, as opposed to amendment of local court rules. As the court gains experience with its plan, and as empirical data are gathered to evaluate the effectiveness of various case management techniques, the Advisory Group may recommend revisions of the plan, including modifications of the local court rules.***

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Largely for historical and opportunistic reasons, the district has adopted local rules which permit sometimes overlapping alternative dispute resolution treatment. This is particularly true with arbitration and mediation. Other alternatives have not yet been discussed or implemented, however, including early neutral evaluation and "true" mediation.

Two concerns are apparent and paramount in the district's thinking about the ADR component of differentiated case management. The first relates to the most efficient, and least disruptive, utilization of the lawyer neutral appointed by the court. The second is to identify the most efficient alternative
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methodologies which can be employed to reduce cost and delay, while producing a just and fair result.

As investigators conduct the research described elsewhere in this plan, lawyers and litigants will be queried about the kinds of alternative dispute resolution processes the court ought to consider for the Western District of Michigan. As part of the education component of the plan, included as recommendations sixteen, seventeen, and eighteen below, the bench, the bar, and the public will be informed of the alternative dispute resolution methodologies available, but not currently being utilized, in the district.

Division of the Civil Docket Into Tracks

The Western District of Michigan is statutorily required to experiment with a variety of case management techniques geared to the needs of particular types or classes of litigation. The recommended plan will divide the civil docket of the district into six tracks defined principally in terms of the length of time it takes for the case to be resolved and the degree of judicial involvement in the case management process. The tracks span a continuum from the least complex cases, expected to resolve themselves in a relatively short time with little judicial involvement and sparing use of case management techniques, to the most complex cases: those expected to take years to resolve, requiring intensive judicial involvement in the management of discovery, the resolution of discovery disputes, and the selection and use of alternative dispute resolution processes, as well as in other aspects of case management. For research purposes, some

cases will be randomly assigned to a minimally managed track serving as a control group.

The Advisory Group specifically and emphatically recommends against a system of assignment of cases to tracks based on a rote formula. No two civil cases are ever alike. One mandamus action, for example, may present simple issues which can quickly be resolved, while a similar action may be extremely complex, involving multiple parties and requiring extensive judicial effort. Assignment of cases to tracks based on a simplistic analysis of the case by type could well defeat the purpose of differentiated case management. The tracking of cases must afford flexibility, yet be rigid enough to capture similar cases and send them down the appropriate stream of judicial activity.

The type of civil case before the court is one of many factors which will be evaluated under the plan by a judicial officer as he or she, with input from others, chooses an appropriate management track. The Advisory Group's analysis of the cases closed between January 1 and June 30, 1991, has produced a store of historical data which will be of critical use to the court in making predictions about how long a case will remain in the system. These data can be found in Table 13. They are for informational purposes only and are not the sole criteria for case assignment to tracks.

TABLE 13

DISTRIBUTION OF CASES CLOSED BETWEEN JANUARY 1 AND JUNE 30, 1991, SUGGESTIVE FOR TRACKING PURPOSES

I.	Super Fast Track	Less than 6 months
II.	Fast Track	6 months to 9 months
III.	Standard Track	>9 months to 1 year
IV.	Complex Track	>1 year to 2 years
V.	Highly Complex Track	>2 years

I.	II.	III.	IV.	V.
120	220	140	110	210
150	370	190	245	230
152	450	195	330	430
422	470	290	350	430
423	730	320	362	540
510	791	340	365	
610	830	355	380	
625	863	360	440	
710	864	442	444	
820	890	443	850	
871	891	530	893	
950		550		
		690		
		720		
		790		
		840		
		870		

NATURE OF SUIT

Contract

110 Insurance
120 Marine
130 Miller Act
140 Negotiable Instrument
150 Recovery of Overpayment & Judgment
151 Medicare Act
152 Student Loans
153 Veteran's Benefits
160 Stockholders' Suits
190 Other Contract
195 Product Liability

Real Property

210 Land Condemnation
220 Foreclosure
230 Rent Lease
240 Torts to Land
245 Tort Product Liability
290 Other Real Property

Personal Injury

310 Airplane
315 Airplane Product Liability
320 Assault, Libel, Slander
330 Federal Employer's Liability
340 Marine

Personal Injury

345 Marine Product Liability
350 Motor Vehicle
355 Motor Vehicle Product Liability
360 Other Personal Injury
362 Medical Malpractice
365 Product Liability
368 Asbestos

Personal Property

370 Other Fraud
371 Truth in Lending
380 Other Personal Property Damage
385 Product Liability

Civil Rights

441 Voting
442 Employment
443 Housing
444 Welfare
440 Other Civil Rights

Prisoner Petitions

510 Vacate Sentence
Habeas Corpus:
530 General
535 Death Penalty
540 Mandamus & Other
550 Other

Forfeiture/Penalty

610 Agriculture
620 Other Food & Drug
625 Drug Related Seizure of Property
630 Liquor Laws
640 R.R. & Truck
650 Airline Regulation
660 Occupational Safety & Health
690 Other

Labor

710 Fair Labor Standards Act
720 Labor/Mgmt. Relations
730 Labor/Mgmt. R.D.A.
740 Railway Labor Act
790 Other
791 ERISA

Bankruptcy

422 Appeal
423 Withdrawal

Property Rights

820 Copyrights
830 Patent
840 Trademark

Social Security

861 HIA
862 Black Lung
863 DIWC/DIWW
864 SSID Title XVI
865 RSI

Federal Tax Suits

870 Taxes - U.S.
871 IRS

Other Statutes

400 State Reapportionment
410 Antitrust
430 Banks and Banking
450 Commerce/ICC Rates
460 Deportation
470 RICO
810 Selective Service
850 Securities/ Commodities
875 Customer Challenge
890 Other
891 Agriculture Acts
892 ESA
893 Environmental
894 Energy Allocation
895 Freedom of Information
900 Appeal of Fee
950 Constitutionality of State Statutes
890 Other Statutory Actions

A principal recommendation of the plan is to continue the process of empirical analysis and for the Advisory Group Reporter to continue to supply the court with improved data which can be used in making judgments about which case should be assigned to which management track. The single most important element in effective case management, however, is the prudent exercise of sound judicial discretion in making an early determination in each case about how long the case should be permitted to pend, the scope and degree to which the court will be actively involved in the day-to-day management of the case, the method of alternative dispute resolution, if any, that will be employed, the limitations, if any, that will be placed on the discovery process, and the extent to which the resources of the court will assist in resolving the case. Assignment of cases to tracks without thoughtful analysis represents the principal liability in case management that the plan is designed to prevent.

Case Management Tracks

The Advisory Group recommends the adoption of six tracks, one of which will be a minimally managed control track to which approximately 10 percent of the civil cases in the district will be randomly assigned. The purpose of the control track is to serve as an analytical tool to help determine the effectiveness of the case management techniques employed in the other tracks. References in this report to case management tracks should be understood to be references to the five specifically designed tracks, and not the control track, unless expressly stated otherwise.

Within each case management track a range of options will be available to the judicial officer supervising management of the case. With few exceptions, assignment of a case to a particular track will not limit the power or authority of the judicial officer managing the case to employ whatever case management technique is most likely to result in the prompt, efficient, and fair resolution of the case. The judges of the Western District are aware that a particular system of case management well-suited for one track may be ill-suited for another. A summary jury trial may be a very effective measure in the resolution of a highly complex case, for example, but so burdensome in terms of time and expense that it would be ineffective and unfair when applied to a simple case involving a small sum in dispute. Judicial experience and expertise will play a vital role in the selection of appropriate tracks.

The plan presented here is a management matrix, providing the court with particular criterial guidelines for each track as required in the Civil Justice Reform Act.[28] Because the plan encourages the exercise of sound judicial discretion in the assignment of cases to tracks, early judicial involvement in every case is required.[29] At a minimum, it is recommended that an initial case management conference be conducted by telephone with a judicial officer. It is desirable that the conference be held within two weeks of the defendant's answer or first response to the complaint. During the initial conference, case

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[28]Title 28, United States Code, section 473(a)(1).

[29]Title 28, United States Code, section 473(a)(2).

management issues will be discussed, including the assignment of the case to a specific track, giving consideration to the opinions of the attorneys involved in the case. The parties will discuss the need for any prediscovery disclosure of basic information relevant to the case.[30] Jurisdictional or other dispositive issues will be addressed, the extent of discovery necessary to investigate the case will be discussed, and a time limit for completion of discovery will be established and enforced, except upon certification by an attorney that an extension is necessary in the interest of justice.[31] Parties will be notified that discovery motions are prohibited unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach an agreement with opposing counsel on the matters in dispute.[32] A deadline for filing all other motions will be either established or addressed.[33] The feasibility of referring the case to an appropriate alternative resolution program will be addressed and selected if all parties and the judicial officer are in agreement.[34] Finally, if a track assignment has been made, a firm trial date will be established. All trials shall be scheduled to occur within 18 months after the filing of the complaint unless a judicial officer certifies that it is not feasible.[35]

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[30]Title 28, United States Code, section 473(a)(4).

[31]Title 28, United States Code, section 473(a)(2)(C).

[32]Title 28, United States Code, section 473(a)(5).

[33]Title 28, United States Code, section 473(a)(2)(D).

[34]Title 28, United States Code, section 473(a)(6).

[35]Title 28, United States Code, section 473(a)(2)(B).

In most cases a formal case management conference will also be held under the authority of Federal Rule of Civil Procedure 16, at which time any issues not resolved at the initial conference, including the assignment of the case to a specific track, will be settled. If at any time during the proceedings the parties believe that the interests of justice are not being served by their particular track assignment, the case may be removed from that track and reassigned to another upon certification and submission of proof that reassignment is necessary.

The case management tracks are described below.

Track I - Super Fast Track

Cases assigned to the super fast track will be scheduled for trial within six months of the time the defendant or defendants first appear in the action. Assignment to this track will be *purely voluntary*, and a high degree of cooperation between counsel and litigants on procedural matters will be required. A relatively low degree of judicial involvement in these cases is expected. Because of the short time allowed for completion of the entire case and the anticipated minimal amount of judicial involvement, cases suitable for assignment to this track will generally involve few parties, few disputed factual or legal issues, and relatively low monetary sums at issue. Cases presenting ideological issues, legal issues of first impression, or other complications likely to increase the need for extensive discovery, motions, or briefing, will generally not be suitable for assignment to this track.

When the parties or their counsel agree that moving the case swiftly towards trial will be the most expeditious, cost effective, and fair way of resolving it, the

case should be assigned to this track upon consent from the judge assigned to it. Parties agreeing to assignment to the super fast track must understand that any discovery necessary must be conducted promptly, that postponement of the trial date or extension of discovery deadlines will be unlikely, and that the originally scheduled trial date will be met. At an early stage of the proceeding, the court will assign a date certain for trial. As a condition for assignment to this track, the parties will agree to waive their right to have their trial heard by an Article III judge in the event that one is not available on their trial date. If the case is not settled, it will be tried by any judicial officer in the district who is available.

Parties to super fast track litigation will be directed to engage in prediscovery disclosure. That is, they will be directed immediately to exchange all documents and other information relating to the contested legal and factual issues, to identify by name and address key witnesses and provide a brief synopsis of their anticipated testimony, and to disclose any other pertinent information. The order requiring this mutual discovery will provide that failure to comply may result in sanctions under Federal Rule of Civil Procedure 37.

Because most cases assigned to the super fast track will involve cooperative parties with disputes over relatively small monetary sums or few legal issues, the court generally will not enter extensive or detailed case management orders or pretrial preparation orders.

Alternative dispute resolution will not normally be used for cases assigned to this track because of obvious time constraints. The court's involvement in

the discovery process will generally be reactive, by responding to any motions filed by the parties to effectuate discovery. The judicial officer may choose, after consultation with and advice from the litigants, to control discovery by imposing limits on the number of depositions that might be taken, and the number of interrogatories that can be submitted.

Status conferences under Federal Rule of Civil Procedure 16 will rarely be held in these cases unless requested by the parties. If possible, conferences concerning case management matters should be conducted by telephone.

If the parties or the court believe that a settlement conference would be appropriate, such a conference would be held within a few weeks of the scheduled trial date.

Track II - Fast Track

Cases assigned to the fast track would be scheduled for trial within six to nine months from the first appearance of the defendant or defendants in the action. The parties will be encouraged, but not required, to consider waiving their right to have their case heard by an Article III judge. This will ensure that the parties receive a date certain for trial and that the case will be tried before any judicial officer in the district who is available on the assigned trial date.

Cases considered for assignment to this track will generally be those which historically have been concluded in less than nine months. They would typically involve few litigants and relatively few disputes of legal or factual issues.

Alternative dispute resolution will be selectively utilized on this track. Summary jury trials and mini-hearings under Local Rule 44 may not be suitable for the relatively simple cases appropriate for assignment to this track. When alternative dispute resolution is used, whether by agreement of the parties or order of the court, it will generally be either arbitration under Local Rule 43, neutral evaluation (mediation) under Local Rule 42, or a settlement conference under Local Rule 45 using a judicial officer. If mutually agreed upon by the parties, an attorney or other party unrelated to the action may serve as a mediator or settlement facilitator.

Discovery in fast track cases should be limited as to the number of depositions that may be taken or interrogatories that may be propounded, except upon good cause shown. An initial case management conference will usually be held in cases assigned to this track. If at all possible, a status conference will be held within 30 days after the first appearance of the defendant or defendants in the action to resolve all remaining issues and deadlines. Alternatively, the parties may submit to the court a proposed pretrial order providing for the use of case management techniques deemed by the parties to be appropriate. If the court adopts the proposed order of the parties, the early status conference may meet the same requirements as the Rule 16 conference. The parties assigned to fast track cases will be strongly encouraged, but not required, to engage in mutual pre-discovery disclosure of important documents and witnesses. In the event the parties agree to such a disclosure, the court will enter an appropriate

order making failure to comply with the agreed upon disclosure sanctionable under Federal Rule of Civil Procedure 37.

A settlement conference under Local Rule 45 may be requested by the parties or ordered by the court if it appears that the use of such a conference may assist in resolution of the case. If a settlement conference is scheduled, representatives of the parties with authority to bind them in the discussions must be present or available by telephone.[36]

Although alternative dispute resolution mechanisms may be regularly utilized in fast track cases, generally only one effort to resolve the litigation through this method will be made. That is, the parties will not be expected to attend repeated settlement conferences or to do both arbitration and mediation.

The level of judicial involvement in managing fast track cases will be low in comparison to cases on longer tracks. Cases assigned to the fast track will be comparatively simple, and the use of extensive case management orders and pretrial preparation orders should be unnecessary.

Track III - Standard Track

Standard track cases will be scheduled for trial within nine months to one year after the first appearance of the defendant or defendants in the litigation. Cases considered for placement on the standard track will be those which historically have taken nine months to a year to resolve, or those in which the judicial officer and litigants have reason to believe that the required discovery

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[36]Title 28, United States Code, section 473(b)(5).

and resolution of legal issues can be accomplished within the time parameters established for standard track cases. Cases involving multiple parties, third party claims, multi-count complaints, or a number of disputed factual and legal issues will usually be more suited to placement on this track than on the fast track or super fast track. Neutral evaluation (mediation) under Local Rule 42 or court-annexed arbitration under Local Rule 43 will regularly be used as a method of alternative dispute resolution for standard track cases. Summary jury trials or mini-hearings under Local Rule 44 will rarely be used because of the expense attendant to them.

The parties will be encouraged, but not required, to engage in mutual pre-discovery disclosure of important documents and witnesses. In the event the parties agree to such a disclosure, the court will enter an appropriate order allowing for sanctions for non-compliance under Federal Rule of Civil Procedure 37. The parties will control the extent of discovery either by limiting the number of expert witnesses, the number of deponents, the number of interrogatories exchanged, or all of the above. The parties may move for such limitations, or the court may impose them if it appears that discovery is not focused on issues essential for resolution of the case, or that cost or delay associated with discovery has or may become disproportionate to the issue. If questions concerning the court's jurisdiction or venue, the claimed immunity of any defendant, the statute of limitations, or other dispositive issues are raised, the court should, either on its own motion after opportunity for all parties to be heard, or upon motion of any party, enter an order phasing discovery so

that depositions, interrogatories, and document production requests are first directed to these issues. This will enable them to be resolved promptly before any unnecessary expenditure of time and money on discovery issues is made.

Cases on the standard track ordinarily will be scheduled on a trailer docket, with the oldest pending case receiving priority in assignment.

An early status conference held under Federal Rule of Civil Procedure 16 will be conducted within 30 days after the first appearance of the defendant or defendants in this action so that issues related to case management can be explored. Alternatively, the parties may submit to the court a proposed pretrial order providing for the use of case management techniques deemed by them to be appropriate, such as alternative dispute resolution, discovery limitation, and the like, and also providing for a trial date within one year. If the court adopts the proposed order of the parties, the early status conference may be waived or held by telephone.

If a standard track case involves multiple claims, complex legal issues, or other factual disputes necessitating the use of a case management or pretrial preparation order, the court will ordinarily enter such an order after the first Rule 16 status conference is held.

Track IV - Complex Track

Cases assigned to the complex track should be scheduled for trial within one to two years after the first appearance by the defendant or defendants in the action. Any case scheduled for trial beyond eighteen months after the filing of the complaint shall be certified by the judicial officer involved as requiring such

a late date because of the demands and complexity of the case or because of the number of pending criminal cases.[37]

Cases considered for this track will be those which historically have taken from one to two years to resolve, which involve complicated legal or factual issues or a large number of parties, or otherwise appear to the parties and judicial officer evaluating the case to require an extended period of time to complete.

Alternative dispute resolution will almost always be used for complex track cases. Summary jury trials or mini-hearings under Rule 44 are strongly encouraged as a method of alternative dispute resolution for cases expected to take weeks or months to try. Otherwise, neutral evaluation (mediation) under Local Rule 42 or court-annexed arbitration under Local Rule 43 should be employed. The court may choose to conduct one or more settlement conferences under Local Rule 45 at stages throughout the proceedings when it appears such a conference would be beneficial.

All cases assigned to this track shall have careful and deliberate monitoring by the court or a judicial officer assigned to the case.[38] It is highly recommended that cases which are suitable for assignment to this track have an early status conference conducted under Federal Rule of Civil Procedure 16. Such a conference will ordinarily be conducted within 30 days after the first

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[37]Title 28, United States Code, section 471(a)(2)(B)(i) and (ii).

[38]Title 28, United States Code, section 473(a)(3).

appearance of the defendant or defendants in the action so that issues related to case management can be explored. Depending on the level of complexity and the need for judicial involvement and management of the case, it may be necessary to conduct periodic status conferences under Rule 16.

A judicial officer shall explore the receptivity of the parties to settlement, and identify or formulate the principal issues in contention, while providing for the staged resolution or bifurcation of issues, where appropriate, in accordance with Rule 42(b) of the Federal Rules of Civil Procedure.[39] A judicial officer will also enter a joint discovery schedule and plan consistent with the provisions set forth in the Civil Justice Reform Act[40] and will set deadlines for filing motions as well as a time frame for their disposition.[41]

After the parties have had an opportunity to inform the court of the issues involved and the areas in which case management may be needed, the court may consider entering a case management order or pretrial preparation order to give the parties guidance in the efficient preparation of the case for trial. Ordinarily, a magistrate judge, as part of the judicial management team, will be assigned to assist the district judge as needed and as requested in the handling of the case.

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[39]Title 28, United States Code, section 473(a)(3)(A) and (B).

[40]Title 28, United States Code, section 473(a)(3)(C).

[41]Title 28, United States Code, section 473(a)(3)(D).

Cases on the complex track ordinarily will be tried by the Article III judge initially assigned to the case. They will be scheduled for trial by placement on a trailer docket with the oldest unresolved case receiving priority in its trial date.

Track V - Highly Complex Track

Cases assigned to the highly complex track generally will take more than two years to resolve. Cases considered for this track will be those which historically have taken more than two years to complete. Typically they will involve a large number of parties or are class actions, and require extensive discovery or pretrial motions or proceedings. No case will be assigned to the highly complex track without certification by a judicial officer that this amount of time is necessary in the interest of justice or that it cannot reasonably be tried sooner because of the number of pending criminal cases.[42]

Cases which appear suitable for assignment to the highly complex track will almost always have an early status conference conducted under Rule 16 of the Federal Rules of Civil Procedure. Such a conference will ordinarily be conducted within 30 days after the first appearance of the defendant or defendants in the action, so that issues related to case management can be explored.

The presiding judicial officer shall determine the receptivity of the parties to settlement and identify or formulate the principal issues in contention, while

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[42]Title 28, United States Code, section 473(a)(2)(B).

providing for the staged resolution or bifurcation of issues, where appropriate, in accordance with Rule 42(b) of the Federal Rules of Civil Procedure.[43] The judicial officer will also prepare a joint discovery schedule and plan consistent with the provisions set forth in the governing statute,[44] and will set, at the earliest practical time, deadlines for filing motions and a time frame for their disposition.[45]

Case management orders or pretrial preparation orders designed to guide the parties in the efficient preparation of the case for trial will usually be used in cases on the highly complex track. Ordinarily, a particular magistrate judge will be assigned to assist the district judge as needed or requested in handling matters related to case management and resolving discovery disputes.

Alternative dispute resolution will almost always be used for cases on the highly complex track. Summary jury trials or mini-hearings under Rule 44 will be considered as a method of alternative dispute resolution for cases expected to take weeks or months to try. Otherwise, neutral evaluation (mediation) under Local Rule 42 or court-annexed arbitration under Local Rule 43 will be employed. The court may choose to conduct one or more settlement conferences under Local Rule 45 at the first stage in the proceedings at which such a conference appears likely to be beneficial. It is recommended that, upon

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[43]Title 28, United States Code, section 473(a)(3)(A) and (B).

[44]Title 28, United States Code, section 473(a)(3)(C).

[45]Title 28, United States Code, section 473(a)(3)(D).

notice by the court, representatives of the parties with authority to bind them be present or available by telephone during the pretrial or settlement conferences.

Exceptionally complex cases may be suitable for the appointment of a special master under Federal Rule of Civil Procedure 53. Although reference to a special master will be the exception and not the rule, the use of magistrate judges as special masters or the use of other persons as special masters may be appropriate in this category of cases. Special masters may facilitate early resolution of a case which otherwise might take weeks or months to try or years to conclude. It would not be appropriate to use a special master in a standard or fast track case.

Track VI - Minimally Managed Track (Control Group)

Approximately 10 percent of all civil cases except highly complex ones will be randomly drawn for assignment to a track which will be minimally managed. The minimally managed track is necessary to establish a control group for purposes of evaluating the effectiveness of differentiated case management. Judicial involvement in these cases will be minimal and reactive. Although it is envisioned that an early case management conference conducted under Federal Rule of Civil Procedure 16 will be held in these cases, it is not anticipated that the court will require the completion of extensive pretrial statements, joint case management orders, pretrial preparation orders, or other case management techniques.

The court will set guidelines for the timely disposition of these cases, but it will not be directly involved in supervising discovery or otherwise managing

preparation of the case for trial. It is suggested that a tentative trial date be established about one year from the date the plaintiff filed the first complaint. This date may be altered, however, upon request of any party demonstrating that the given trial date is incompatible with serving the goals of justice. Alternative dispute resolution will not be encouraged and will only be conducted by agreement of all parties unless one party demonstrates that it is necessary in the interest of justice. There will be no restriction on the court's power to resolve issues that arise in these cases and on matters that are called to the court's attention by motion or otherwise. Minimally managed cases will serve as an internal control mechanism managed by the attorneys rather than the court.

If at any time the parties demonstrate that they are being denied their right to a just, speedy, or inexpensive determination of their action, the entire case may be removed from the minimally managed track and placed on another more appropriate track.

Procedure for Evaluating Cases for Specific Tracks

Case management teams, comprised of an Article III judge (or a senior judge), a magistrate judge, and a case manager, will work with the attorneys assigned to a case to determine which track the case should be assigned to, unless the case was randomly selected for Track VI, the minimally managed track. The judicial officer assigned to the case shall be the one who ultimately makes the track selection. This decision shall be made in the early stages of the litigation process, since the parties are generally free to conduct discovery

and file motions unless otherwise directed by the court. Prompt involvement by a judicial officer in the management of any case is important. Without it the parties may become deeply involved in discovery disputes or motion practices before the first status conference can be held under Rule 16.

It is anticipated that the clerk's office will monitor filings through the court's automated docket system, and that upon the first responsive pleading of the defendant or defendants, the clerk will notify the district judge reviewing the case that the action is ready for an informal telephone conference or an early status conference under Rule 16. The parties shall be encouraged to take part in one or both of these conferences to assist the court in making preliminary decisions about case management.

In the early stages of implementation of the plan, it is recommended that a judicial officer conduct a telephone conference with counsel for all litigants within two weeks after the appearance of the defendant or defendants. It is advisable that the court send a letter to counsel, or to unrepresented litigants, explaining the court's differentiated case management plan and its use of telephone conferences to assist in case management. Such a letter will establish an approximate date and time for the contemplated telephone conference call.

The principal purpose of the telephone conference is to advise the attorneys of the district's differentiated case management plan and to acquire information from which a preliminary determination can be made by a judicial officer as to whether an early status conference under Federal Rule of Civil Procedure 16 is

needed. The telephone conference also provides a preparatory determination of the appropriate track assignment.

A large number of cases in the district are resolved with minimal judicial involvement. The court has developed effective procedures for dealing with particular classes of cases, such as prisoner rights, habeas petitions, social security appeals, student loan cases, and drug related forfeiture cases. The Advisory Group's recommendations do not contemplate any change in the manner or method by which the court presently handles these cases. Generally speaking, these cases tend to be resolved in less than nine months, and are therefore suitable for assignment to the fast track, with minimal judicial involvement in case management. It is not intended that informal telephone conferences be held in cases where the court is not presently conducting such conferences.

The judicial officer conducting the early telephone conference will inquire as to the number of parties likely to be involved in the case, whether amendments to the pleadings are contemplated, whether any party perceives there to be legal or factual issues--such as jurisdictional problems, immunity questions, statute of limitations questions or the like--which, if promptly resolved, could lead to disposition of the case without complete discovery or development of all other issues. Inquiry would also be made concerning the preference of the parties for assignment to a particular track, their perceptions as to the desirability of alternative dispute resolution, or the involvement of the court in the regulation

of discovery. Voluntary prediscovery disclosure of key documents and witnesses would be strongly encouraged.

Cases which appear to be candidates for assignment to the standard, complex, or highly complex track should have a status conference or case management conference scheduled within two to four weeks of the initial telephone case management conference.

Cases which appear to be likely candidates for assignment to the fast or super fast track, or which have been assigned to the minimally managed (control) track, should, within three weeks, be assigned a trial date and the parties should be required to submit proposals or an agreed-upon order for case management. Alternatively, they should be required to attend a Rule 16 conference three to four weeks from the initial telephone conference.

The court retains complete discretion at any stage of the proceedings to reassign the case to a different track, to modify any case management order, pretrial order, or similar order affecting management or disposition of the case, or to take whatever steps the court deems appropriate to manage the case more effectively. In addition, the parties may agree for good cause to change their track assignment upon certification by the party making the request that reassignment is necessary in the interest of justice.

VI

HOW THE RECOMMENDED PLAN COMPLIES WITH THE PRINCIPLES AND GUIDELINES OF LITIGATION MANAGEMENT AND COST AND DELAY REDUCTION SET FORTH IN THE CIVIL JUSTICE REFORM ACT

As previously stated, the Western District of Michigan has been statutorily designated a demonstration district. As such, it must experiment with systems of differentiated case management. In addition, the district has been designated a pilot district and must therefore include all six principles and guidelines of litigation management and cost and delay reduction identified in section 473 of the Civil Justice Reform Act. Although other districts need only *consider* each of these principles, the Western District is obliged to incorporate all of them in its plan.

We believe the differentiated case management plan as presented in section V above meets the statutory requirements. The tracking process tailors and individualizes case management.[46] It essentially defines the system which already exists in the district, with a few mandated refinements. Flexibility is its primary feature. Case assignment to a specific track will be, whenever possible, determined by the parties, with the judicial officer having final approval. If it appears that the interests of justice are not being met by their particular track assignment, the parties may elect, with the concurrence of the court, to place their case on a different track upon certification of good cause.

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[46]Title 28, United States Code, section 473(a)(1).

Early and ongoing control of the pretrial process by a judicial officer is accomplished by encouraging the parties to conduct an initial case management conference within two weeks of the defendant's first responsive pleading. All procedural matters not addressed or resolved at this time must be completed at a Rule 16 status conference.

During either of these conferences, an assessment of the lawsuit will be made and the case will be assigned to an appropriate management track. The amount of discovery necessary for a thorough investigation will be decided and a time limit for its completion established. Parties will be encouraged voluntarily to exchange information through the use of a prediscovery disclosure provision, and discovery motions will be prohibited unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel. A deadline for filing all other motions will be set, and they will be resolved within 60 days from the date of the first responsive pleading, or an automatic stay will be enforced.[47]

For all cases determined to be complex, highly complex, or similarly well suited, other intensive case management procedures should be applied.[48] In all cases where it is appropriate, the use of alternative dispute resolution will be encouraged.[49]

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[47]Title 28, United States Code, section 473(a)(2),(4),(5).

[48]Title 28, United States Code, section 473(a)(3).

[49]Title 28, United States Code, section 473(a)(6).

The Civil Justice Reform Act requires the Advisory Group to consider five additional management techniques set forth in subsections of the statute, along with other features that the court may consider appropriate upon reviewing the Advisory Group recommendations.[50]

The first provision requires counsel for each party jointly to present a discovery case management plan for the case at the initial pretrial conference or explain the reasons for its failure to do so.[51] The inclusion of this procedure in its differentiated case management plan was vigorously debated among Advisory Group members. Some felt that even minimal investigation would be inefficient and unnecessarily costly if a valid dispositive motion was pending. A compromise was reached whereby counsel would be strongly encouraged to comply with a prediscovery disclosure procedure at the initial case management conference.

Following the initial case management conference, however, and before a Rule 16 status conference, counsel will be instructed to prepare a joint status report and a joint discovery plan for submission to the court. The Advisory Group believes this requirement accomplishes the desired intent of the statutory provision without imposing it too early in the litigation process. Ultimately, the judge will decide whether, or when, a joint status report/discovery plan will be submitted to the court.

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[50]Title 28, United States Code, section 473(b).

[51]Title 28, United States Code, section 473(b)(1).

The second provision requires each party to be represented at each pretrial conference by an attorney who has authority to bind that party regarding all matters set for discussion and any other reasonably related matter.[52] The Advisory Group had reservations about this provision for several reasons. At the earliest case management conference, neither the attorneys nor the parties have yet had a chance to gain a true assessment of the case. It may be too soon, for example, to require settlement authority or utilization of alternative dispute resolution mechanisms without knowing if they will be effective. The *pre*-Rule 16 management conference was conceived by the Advisory Group to address this issue. Generally, the Western District has required that litigants and attorneys be present at each pretrial conference with authority to make binding decisions. Rather than enforcing such a blanket requirement on all cases, the Advisory Group believes this decision should be left to the discretion of the court and addressed on a case by case basis.

The third provision requires that all requests for extensions of deadlines for completion of discovery or for postponement of trial be signed by both the attorney and the party making the request.[53] After careful consideration, the Advisory Group decided this recommendation was not necessary because lawsuits in the district are generally resolved in a timely fashion even though requests for extensions are normally granted. The Advisory Group acknowledges the

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[52]Title 28, United States Code, section 473(b)(2).

[53]Title 28, United States Code, section 473(b)(3).

need to control the extent of discovery and to assure its completion as soon as practicable, however, and it discourages requests for extension as a normal practice.

The fourth provision discusses the use of a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral representative at a non-binding conference conducted early in the litigation.[54] The Western District has already incorporated several of these methods in its court rules. Mediation and court-annexed arbitration, for example, are already being utilized by the court, and the Advisory Group believes these procedures should continue to be employed when appropriate and expanded to other forms of alternative dispute resolution when possible.

The fifth provision requires that upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference.[55] This is another procedure already being utilized by the district, and the Advisory Group believes the practice should continue at the discretion of the court.

The sixth provision requires that the Advisory Group consider such other aspects of litigation management and cost and delay reduction techniques as the court believes appropriate after it reviews the recommendations presented in this

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[54]Title 28, United States Code, section 473(b)(4).

[55]Title 28, United States Code, section 473(b)(5).

report.[56] An open channel of communication exists between the Advisory Group and the court, and the former encourages the latter freely to offer suggestions to assist it in meeting its statutory responsibilities under the Civil Justice Reform Act.

The act also requires the Advisory Group and the court to explain how the recommended actions "include significant contributions to be made by the court, the litigants, and the litigant's attorneys."[57]

Contributions by the Court

The judges and magistrate judges of the district, as well as their case managers and office staff, will contribute significantly to the effective implementation of the differentiated case management plan. The case management teams will consist of a judge, a magistrate judge, and a case manager who together will monitor the progress of every piece of civil litigation filed in the district after January 1, 1992. The plan contemplates an early case management conference, attended by the parties in person or conducted through a telephone conferencing procedure. Depending upon the nature of the lawsuit, this early conference will be conducted by either a judge or a magistrate judge. Until litigants and their attorneys gain familiarity with the district's differentiated case management plan, an important function of this *pre*-Rule 16 conference is to educate users about the court's services and to share basic information about

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[56]Title 28, United States Code, section 473(b)(6).

[57]Title 28, United States Code, section 472(c)(3).

the case, its prospects for resolution by settlement, the requirements for discovery, and matters related to preparation for trial. Assignment of the case to a track and its management thereafter heavily depends on the thoroughness and promptness of this early conference.

The plan provides for intensive involvement by judicial officers in highly complex or complex cases or those standard track cases which have characteristics making the direct and timely involvement of a judicial officer desirable. It contemplates a modest revision in the court's method for scheduling cases for trial. Super fast and fast track cases may be reassigned for trial on short notice to any judicial officer in the district who has time available to try the case scheduled on a particular day. The central assignment system monitoring this commitment by the court will require a high level of coordination among judicial officers and the clerk's office.

The plan anticipates automation of the court's criminal docket and modification of the clerk's management information system. In order for the tracking system to be effective, forms will have to be created or revised and the clerk's office staff trained in recording the new information essential for evaluating the progress of the plan.

RECOMMENDATION SIXTEEN

> ***The court should arrange for the production of a series of videotapes on subjects including, but not limited to, general court and trial procedures, discovery, alternative dispute resolution, differentiated case management and tracking, and the responsibilities and expectations of plaintiffs and defendants. The content of the tapes should be understandable to lay persons, and should be produced***

under the auspices of the judges of the Western District, taking into account the practices and procedures unique to the district. One or more of the judges should appear on the tapes as providers of information, thus offering a tangible sign of their support of the continuing education program.

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RECOMMENDATION SEVENTEEN

A written and illustrated document or brochure should be produced to explain in detail the court's differentiated case management plan and its connection to the Civil Justice Reform Act. This publication should be aimed at both practitioners and lay persons, and should include a description of conferencing procedures, how track assignment decisions are made, and other relevant practices and procedures.

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RECOMMENDATION EIGHTEEN

The court should task the Advisory Group staff to coordinate the production of the tapes and written materials recommended above, and it should request the State Bar of Michigan and Bar Associations throughout the district to disseminate the information contained therein.

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Contributions by Litigants

The plan seeks the involvement of litigants at an early stage of the proceedings in a way not customary for most civil litigation. Litigants will frequently be requested to attend case management conferences in person. They will regularly be required to attend settlement conferences and alternative dispute resolution hearings. The Advisory Group and the court believe that in most instances the involvement of the litigants will help bring about the prompt and
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fair resolution of the case. This participation must be balanced, however, against the increased costs associated with attendance by the litigants at conferences sometimes held at great distances from their homes.

The plan contemplates that litigants will be advised of, and to some degree will be involved in, the process of recommending to the court placement of their case on a particular track, selection of an alternative dispute resolution procedure, and other aspects of case management.

The plan encourages litigants to agree to accelerated prediscovery disclosure of key documents and witnesses. This aspect of the plan can only be implemented through the agreement of the parties to quicken the pace of discovery beyond that required by the Federal Rules of Civil Procedure.

The plan also encourages litigants to waive trial by an Article III judge for relatively simple cases in order to permit the reassignment of the case on its scheduled trial date to any judicial officer of the district available to try the case.

An essential feature of the plan is the gathering and evaluation of case-specific information relating to cost. Much of this information can only be obtained through the voluntary cooperation of litigants. To the fullest extent possible, the plan asks for the submission of this documentation on a confidential basis. The effectiveness of the entire civil justice reform effort depends in large measure upon the cooperation of litigants in providing information they cannot be *required* to provide so that the court can evaluate the cost-effectiveness of its case management techniques. The plan also provides

for a post-litigation interview process to determine the level of satisfaction with the court and its procedures. The voluntary cooperation of litigants in this area, as well as cost control, is yet another essential ingredient for meaningful evaluation. Because the principal goal of the court is to achieve justice, the contributions of litigants in the post-litigation interview process are absolutely necessary to determine the extent to which justice was served.

Contributions by the Attorneys

Many demands will be made upon attorneys to accomplish the purposes of the differentiated case management plan. The court's alternative dispute resolution mechanisms require the involvement of lawyers who are not otherwise connected with the case. Arbitrators and mediators are selected from lists of members of the Bar kept by the court, and they serve for only nominal compensation, unless appropriate remuneration is agreed to by the parties in arbitration.

Attorneys will be required to undertake an immediate and thorough evaluation of their cases to enable the court to conduct a meaningful early status conference and assign the case to an appropriate track. Complete candor with respect to the case's prospects for settlement, complexity, and need for judicial intervention will be essential for effective case management.

The process of gathering accurate cost information is a key element of the plan. The assistance of counsel in educating litigants about the importance of contributing this information for study and evaluation will be necessary for the

assessment of statistical data on the cost effectiveness of differentiated case management.

The plan has a large educational component. Preparation of videotapes and written materials describing the court's processes and its case tracking system will be done with the advice and assistance of the Bar, and the Bar will be the principal means of disseminating the information. The plan's super fast track will be useful and meaningful only if a large number of attorneys throughout the district agree to spend the additional effort needed to make immediate discovery of key documents and witnesses, and begin settlement discussions promptly and candidly, as well as prepare their cases for trial without delay. The additional effort required of counsel to prepare a case and resolve it in less than six months is a significant contribution to the goals of the Civil Justice Reform Act.

The district's plan for differentiated case management involves a lot of teamwork among actors who often prefer to work alone. It can be effective only if the court, litigants, and counsel work together to resolve the differences between and among litigants as efficiently as possible without doing violence to the rights of the litigants themselves.

VII

EVALUATION OF THE WESTERN DISTRICT'S EXPENSE AND DELAY REDUCTION PLAN

The court and the Advisory Group are strongly committed to a comprehensive and systematic evaluation of the Western District's Expense and Delay Reduction Plan. A detailed description of our evaluation methodology follows.

Variables Defined

The evaluation will focus on three major variables: cost, time, and justice. Each is defined below.

The terms cost and expense are used interchangeably in the Civil Justice Reform Act. For our purposes, the term "cost" will mean the monetary amount spent by litigants in a civil suit in the United States District Court. Typical costs may include attorney fees and other legal expenses such as expert witness fees, court fees, and travel expenses.

Time is the number of hours or minutes expended by the court, attorneys, and litigants to perform the tasks and procedures necessary in civil litigation suits. Delay is when the tasks and procedures performed by the court, attorneys, and litigants, and the resolution of actions brought, exceeds a reasonable time period.

Justice is defined as the extent to which the litigants and attorneys believe that the litigation process, including the outcome of their cases, was fair and equitable.

Relationships Between Variables

The primary objective of the evaluation is to determine if there are changes in cost, time, and perceived justice as a result of the application of the Western District's Expense and Delay Reduction Plan. These variables can be expressed as a series of relationships formulated into hypotheses for testing. Once the relationships are established, the Advisory Group will be in a position to reevaluate and reformulate its plan, if necessary. Thus an open and self-correcting system is created through the use of a dynamic feedback loop. The elements of the system are input, throughput, output, and feedback to input. The relationships between and among the variables are discussed below.

Time and Cost

Although time is related to cost, it is not known how these variables are specifically related. It is believed that the relationship between time and cost is asymmetrical in that time affects cost, but cost does not affect time. Therefore, time is the independent variable and cost is the dependent variable in this relationship.

How does time affect cost? For attorneys, time is usually positively related to cost. An increase in time spent on a case results in an increase in cost to litigants, and, conversely, a decrease in time results in a decrease of cost to litigants. The more time an attorney devotes to a suit, the higher the costs of litigation. An exception to this common perception is the instance of an attorney working on a contingency basis or a fixed salary arrangement.

When are an attorney's time and a litigant's cost inversely related? This occurs when increased activity in specific stages of litigation accelerates the disposition without negatively affecting the outcome of a case. Similarly, a decrease in an attorney's time may increase the litigant's costs. When inadequate time is spent on specific stages of litigation, for example, the result may be an unnecessary prolongation of the suit.

The possible relationships between attorney time and litigant cost, expressed as testable hypotheses, are:

H 1. Increased attorney time causes increased litigant cost.

H 2. Decreased attorney time causes decreased litigant cost.

H 3. Increased attorney time causes decreased litigant cost.

H 4. Decreased attorney time causes increased litigant cost.

H 5. There is no relationship between attorney time and litigant cost. (Null)

The second set of time and cost relationships involves the litigants. Although a major thrust of the Civil Justice Reform Act is decreasing legal costs to litigants, other types of costs present themselves for analysis. These costs pertain to the time a litigant devotes to such tasks as attending attorney/client conferences and attending Rule 16 conferences, for example. For some litigants, time spent on a civil suit is considered part of their professional responsibilities and workload. For others, time devoted to litigation adds to

their workload, interferes with their regular duties, and reduces productivity in their normal routine.

There are similarities between time and cost relationships for both attorneys and litigants. For non-legal costs, increased time may increase cost; decreased time may decrease cost; increased time may decrease cost; and decreased time may increase cost. These relationships are expressed in the following hypotheses:

H 6. Increased litigant time causes increased litigant cost.

H 7. Decreased litigant time causes decreased litigant cost.

H 8. Increased litigant time causes decreased litigant cost.

H 9. Decreased litigant time causes increased litigant cost.

H 10. There is no relationship between litigant time and litigant cost. (Null)

Because the court operates on a fixed budget, there is a different relationship there between time and cost variables. Court operating costs will not increase significantly, for example, even if the Expense and Delay Reduction Plan is 100 percent effective.

Greater efficiency in moving suits through the court system will benefit the court staff by allowing it to invest more time in areas that are currently short staffed. Although this is a positive outcome of the plan, it is not one that will be measured by the Advisory Group. No testable hypotheses have been formulated for the court's time/cost relationships.

Time and Justice

The maxim that justice delayed is justice denied conveys a time-honored notion of the relationship between time and justice. Unfortunately, this maxim could be an oversimplification that misleads the public. There are situations when justice should be swift, but there are other times when swift justice produces injustice.

Time and justice are asymmetrically related with time as the independent variable and justice as the dependent variable. The relationships may be positive, as when an increase in time results in increased justice, and a decrease in time results in decreased justice. An inverse relationship is also possible, as when increased time yields decreased justice, or decreased time yields increased justice. These relationships can be conceptualized in two ways.

First, time can be expressed in terms of the length of time it takes for a suit to be resolved, but only if the outcome is perceived by litigants as just. Theoretically, every suit has an optimal resolution time. Suits resolved before this time may have been disposed of too quickly, resulting in a process and outcome perceived by the litigants as unjust. Thus decreased time means decreased justice. Suits that remain in litigation beyond their optimal time period, without a more favorable outcome for litigants, can be considered excessively delayed and thus unjust. The latter case is an example of increased time equals decreased justice. A suit in which the outcome becomes more favorable the longer it remains in litigation illustrates that increased time may result in increased justice. Finally, a suit that is resolved as quickly as possible

with a favorable outcome illustrates that decreased time may also result in increased justice. These alternative relationships are expressed in the following hypotheses:

H 11. Increased disposition time causes increased justice.

H 12. Decreased disposition time causes decreased justice.

H 13. Increased disposition time causes decreased justice.

H 14. Decreased disposition time causes increased justice.

H 15. There is no relationship between disposition time and justice. (Null)

The second way to conceptualize time is to calculate the amount of time invested in a suit by the court, attorneys, and litigants. The types of relationships possible, and the logic that supports them, result in the following hypotheses:

H 16. Increased attorney time causes increased justice.

H 17. Decreased attorney time causes decreased justice.

H 18. Increased attorney time causes decreased justice.

H 19. Decreased attorney time causes increased justice.

H 20. There is no relationship between attorney time and justice. (Null)

H 21. Increased litigant time causes increased justice.

H 22. Decreased litigant time causes decreased justice.

H 23. Increased litigant time causes decreased justice.

H 24. Decreased litigant time causes increased justice.

H 25. There is no relationship between litigant time and justice. (Null)

H 26. Increased court staff time causes increased justice.

H 27. Decreased court staff time causes decreased justice.

H 28. Increased court staff time causes decreased justice.

H 29. Decreased court staff time causes increased justice.

H 30. There is no relationship between court staff time and justice. (Null)

Measurement

Cost and Time

Obtaining valid data on the costs of litigation is difficult. Most of the attorneys interviewed said that litigation costs is privileged information and clients would have to consent to the release of such information. Several attorneys said that public disclosure of costs, particularly for their corporate clients, could be used by rival corporate litigants to gauge current and future litigation strategies. In addition, this information might adversely affect relationships between corporations and stockholders.

Another problem with obtaining reliable cost figures is the time it takes to extract this information from case records. This is especially troublesome if the case has been closed for several months, and if the case record is stored in the archives of a law office.

The different ways that attorneys get reimbursed for litigation services such as contingency arrangements, fixed salaries, and billable hours also pose

difficulties for measurement. Attorneys who charge on an hourly basis generally keep a detailed record of time spent on a case. Attorneys who work on a contingency fee basis or on a fixed salary do not necessarily keep such detailed records.

Although obtaining litigation costs will be difficult, the Advisory Group is committed to acquiring these data in some form. They are crucial in the development of an empirically derived baseline for evaluating the effectiveness of the district's plan. Our strategy for determining costs is set forth below.

Delineation of Litigation Tasks

Almost all litigation costs are based on the time an attorney and/or litigant spend on specific tasks and procedures. After careful consideration of the various problems associated with obtaining costs, the Advisory Group concluded that a combination questionnaire/interview strategy has the best chance for success.

The first step in developing the questionnaire is to delineate the tasks entailed in litigation. A compilation of these tasks is:

I. Depositions

a. The total number of depositions.

b. The preparation time for each deposition.

c. The time spent obtaining depositions, including travel time.

d. Travel expenses other than travel time.

e. Costs paid to court reporters for each deposition.

II. Interrogatories

a. Total number of sets generated.

b. Amount of time spent drafting each set.

c. Amount of time spent answering each set, including client conferences.

III. Other Pleadings

a. Requests for admission

1. Total number of sets generated.

2. Time spent drafting each set.

3. Time spent answering each set, including client conferences.

b. Requests for production of documents

1. Total number of sets generated.

2. Time spent drafting each set.

3. Time spent answering each set, including client conferences.

IV. Motion Practices

a. Total number of motions filed.

b. Time spent drafting each motion and brief.

c. Time spent answering each motion, not including court time.

d. Amount of time spent attending each motion, including travel and court time.

e. Travel expenses other than travel time.

V. Alternative Dispute Resolution

a. Mediation (if used)

1. Time spent drafting the brief.
2. Time spent preparing for hearing.
3. Time spent attending the hearing, including travel time.
4. Travel expenses other than travel time.

b. Arbitration (if used)

1. Time spent drafting the brief.
2. Time spent preparing for hearing.
3. Time spent attending the hearing, including travel time.
4. Travel expenses other than travel time.

c. Summary Jury Trial (if used)

1. Time spent drafting the brief.
2. Time spent preparing for hearing.
3. Time spent attending the hearing, including travel time.
4. Travel expenses other than travel time.

d. Mini-Hearing (if used)

1. Time spent drafting the brief.
2. Time spent preparing for hearing.
3. Time spent attending the hearing, including travel time.
4. Travel expenses other than travel time.

e. Early Neutral Evaluation (if used)

1. Time spent drafting the brief.
2. Time spent preparing for hearing.
3. Time spent attending the hearing, including travel time.

4. Travel expenses other than travel time.

VI. Expert Witnesses

a. Total number of experts retained.

b. Cost to retain each witness.

c. Cost of expert's deposition testimony.

d. Cost for providing courtroom testimony.

e. Cost for expert's report.

f. Travel expenses for each expert.

g. Other costs related to expert witnesses.

VII. Trial Preparation

a. Number of times prepared for trial.

b. Amount of time spent for each preparation.

VIII. Trial

a. Time spent in trial.

b. Time spent during jury deliberations if unable to return to work.

IX. Other Costs Associated With Litigation

It would take attorneys considerable time to answer all of these questions, and many of them would not do so. Studies have shown that the more time it takes to complete a questionnaire, the lower the return rate and the more likelihood that the data collected will be adversely affected. Therefore, in order to achieve a high quality of response and a high return rate, attorneys will be asked to respond only to a specified portion of the questionnaire, such

as the section on depositions and trials, although an open invitation stands to complete the entire instrument.

In addition to answering designated portions of the questionnaire, all attorneys will be asked to disclose their hourly fee for different litigation-related tasks and travel costs such as meals, mileage, and hotels. The formula for determining average costs for different categories of suit is: *DURATION OF TASKS X FREQUENCY OF TASKS X HOURLY RATE.* All tasks in a suit will be calculated and summed, with the total litigation costs derived by adding all other expenses, such as travel, to the summed task cost figures.

Sample

A multistage sampling method will be used. First, the sample will be stratified by type of suit, such as product liability and civil rights, for example. Then tasks within each suit will be divided by such categories as depositions and interrogatories. The questionnaires will be paired so that the plaintiff and defense attorneys involved in a specific suit will be asked to respond to the same sections of the questionnaire. The obvious limitation of having attorneys complete only a portion of the questionnaire is that data will not be obtained for the total cost and time each attorney spends litigating a specific case, unless the information is volunteered. The limitation is minimized by increasing the sample size for each type of suit, thus giving the Advisory Group a critical mass of data. Asking attorneys to answer only a portion of the questionnaire, rather than the entire instrument, provides reasonable relief for respondents who

are concerned about client consent, and it is an acceptable tradeoff for some level of attorney participation.

The sample will include all cases terminated in the Western District between January 1, 1991, through December 31, 1991, which will be approximately 2,600 cases. Such additional cases as are necessary to achieve sample sufficiency for specific types of suits will be obtained by drawing from the June 30, 1990, to December 31, 1990, pool of approximately 1,100 cases available.

Litigant Costs

Litigants involved in suits closed between January 1, 1991, and December 31, 1991, will be surveyed to determine the non-legal costs accumulated and the amount of time spent on their civil suits. This second questionnaire will focus on such areas as attorney-client meetings; attendance at Rule 16, alternative dispute resolution, and settlement conferences; attendance at trials; and travel expenses.

Litigants will be asked if the time spent on the suit was a part of their regular duties or an additional workload requirement. They will be asked to calculate a dollar amount for the work time spent on the suit.

Measuring the Effectiveness of the Western District Plan

Measuring Cost and Delay

The questionnaires used to obtain data for the baseline analysis will also be used to measure the time and cost of suits litigated *after* the Expense and Delay Reduction Plan is implemented. Litigation time and cost will be

measured for all suits assigned to each of the tracks previously described in the report.

Measuring Justice

Justice is a highly subjective concept that is difficult to measure. The questionnaires previously described will also include items designed to obtain attorney and litigant opinions about justice as a function of fair and equitable settlement. A Likert-type scale will be used for each item, so that respondents can select from a range of possible responses.

Measuring Satisfaction

Another important consideration is whether attorneys and litigants are satisfied with court practices, procedures, and policies in the Western District. The Advisory Group is especially interested in user opinions about the strategies employed by the plan to decrease expense and delay.

Earlier interviews with attorneys and litigants found that they clearly favor personal interviews or telephone conferences over questionnaires for collecting information about satisfaction. They liked talking to a person rather than filling out a form. Interviews afford flexibility in exploring different topics, and they provide an opportunity to communicate nuances of meaning.

The Advisory Group will develop a semi-structured interview schedule for collecting data on user satisfaction, with the schedule also providing an avenue for users to make recommendations on ways to further decrease expense and delay. Since such interviews take considerable time and effort, a stratified random sample of attorney and litigant users will be selected.

Measuring Judges' Time

The court and the Advisory Group believe it important to determine how the Expense and Delay Reduction Plan affects the time judges and magistrate judges spend on different litigation tasks. An analysis of how their time was expended prior to and after implementation of the Expense and Delay Reduction Plan will be provided. These data will allow the court and the Advisory Group to determine how possible reallocation of judicial officers' time would serve the purposes of the Civil Justice Reform Act.

Measuring the Docket

It is important to conduct an ongoing assessment of the docket. This will provide information to the court and the Advisory Group about the effect of the Expense and Delay Reduction Plan on the district's court docket. Data will be obtained from the clerk's office on the number of ongoing cases and the distribution of these cases among judges and magistrate judges. A comparative analysis of the current docket to the docket before the implementation of the Expense and Delay Reduction Plan will be performed.

Utilizing the Court's Management Information System

The Advisory Group will assess the district's management information system to determine how it may be used to automatically track and retrieve the case data necessary for evaluating the Expense and Delay Reduction Plan. A study of all the management forms used in the district has been initiated. An analysis of the software and hardware used for managing this information will be conducted in the first three months of 1992.

Data Collection and Analysis

Cost and time questionnaire responses will be numerically coded and entered into a data file. Data will be analyzed using the Statistical Package for the Social Sciences (SPSS-X-V4).

Data obtained on time and cost are interval level measures. This allows the use of various descriptive and inferential statistical procedures. A descriptive analysis for each item will include frequency, raw and adjusted percentages, mean, mode, median, range, variance, standard deviation, standard error, skewness, and kurtosis. Multiple T tests will be used to compare the litigation costs and time of suits that were closed before the Expense and Reduction Plan to suits that were filed and terminated after the plan was implemented. Analysis of Variance (ANOVA) will be used to measure the differences in time and cost of suits going through different litigation tracks, including the control track. Factor analysis will be used to identify factors within each track that reduce cost and delay. Multiple correlation analysis will be used for testing the thirty hypotheses listed earlier.

The questions measuring justice are ordinal level items and require special tests for nominal-ordinal level data. The frequency of responses will be analyzed using standard descriptive statistics. Cross-tabulations will be used for identifying differences in perceived equity by former and current District Court users, and the variation between users of different litigation tracks will be measured. Chi Square, Phi, and Cramer's V procedures will determine statistical significance and strength of associations.

A content analysis of qualitative data will be conducted to identify response patterns and trends.

Comparisons With Other Districts

The methods previously described in this chapter are internal evaluations in that they focus on longitudinal and panel data within the Western District of Michigan. It is also important to conduct an external evaluation that compares the outcomes of the district's plan with other districts.

Several districts have been identified as similar to the Western District of Michigan, the similarity determined by the following variables: number of judgeships, docket size, type of suits, number of pending cases, average time of litigation, and demographic characteristics.

The next step is actually to choose districts for the comparative analysis. Two factors will be considered. First, the districts must be willing to cooperate by regularly sharing data on the size of their docket, the number of pending suits, the disposition of suits, and the average time of litigation. Their willingness to provide this information is essential since some of these data are not available in federal reports and the data that are available are not necessarily current.

The second factor is the type of expense and delay reduction plan that is being implemented in these districts. It is desirable to find districts with plans similar to that of the Western District of Michigan. Comparing data from these districts will allow the Advisory Group to identify the relative efficacy of its

plan. An additional district, one which has implemented a plan significantly different from that of the Western District, will serve as a quasi-control group.

Confidentiality

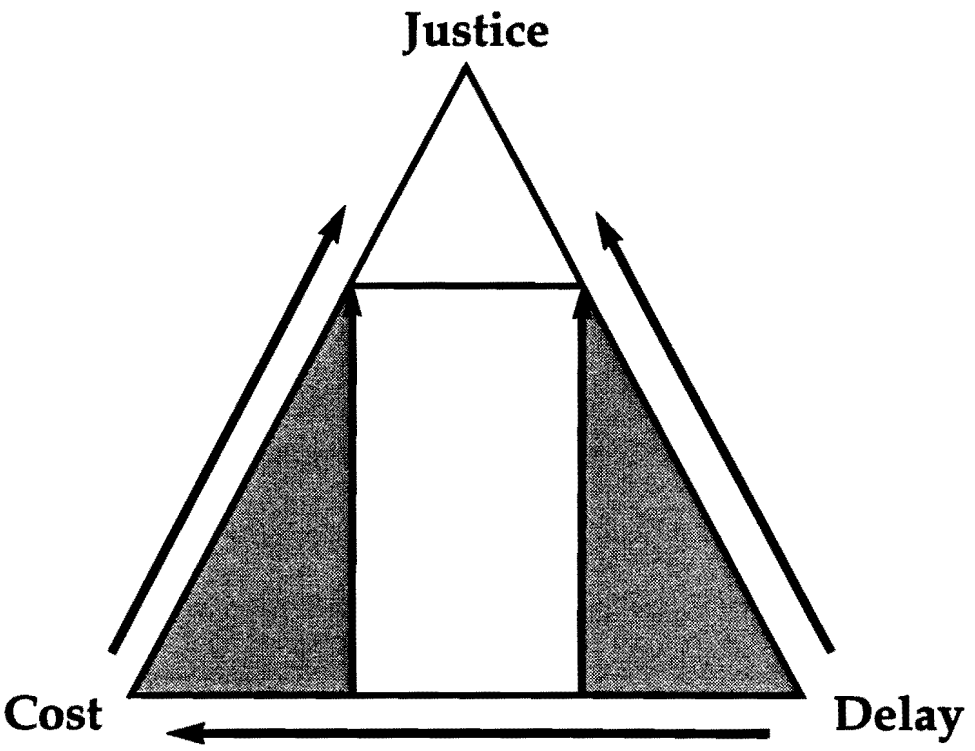
The Advisory Group's staff attorney reviewed statutes, civil procedure rules, and case law to find that no legal authority exists for ordering attorneys or litigants to disclose information on costs or time spent in civil litigation. Such information must be provided voluntarily. Procedures have been developed for eliciting the cooperation of court users and safeguarding the sensitive information they provide.

Litigants and their attorneys must be assured that the information gathered will remain confidential. Data will therefore be analyzed by a consulting firm retained by the Advisory Group for this purpose. It will be reported to the court and Advisory Group in ways that protect the identity of the persons participating in the evaluation. A letter from the court will be sent with the questionnaires explaining the goals and objectives of the Expense and Delay Reduction Plan and how it will benefit District Court users. Respondents will be urged to cooperate with the evaluation efforts by returning the questionnaires by dates specified in the letter. The letter will explain that the evaluation is being conducted by an independent professional consulting firm which will analyze the data and report it in ways that provide for the anonymity of the respondents.

The questionnaires will be returned to the consulting firm rather than the court or the Advisory Group. The consultants will track responses to assure

that there is a sufficient pool of responses for each type of suit. When sample sufficiency is achieved, all identifying information will be deleted from the questionnaires. The data will be aggregated for all reports prepared for the court and Advisory Group. The attorneys and litigants selected for interviews will receive another letter similar to the one sent with the questionnaires at least one week prior to being contacted by the consulting firm. The methods used to safeguard information will be explained at the beginning of the interviews.

The evaluation methodology explained here will generate valid and reliable data for testing the effectiveness of the Western District's Expense and Delay Reduction Plan. Its chief attribute is its comprehensiveness. The following figure illustrates our conceptual intent.



This equilateral triangle symbolizes the Expense and Delay Reduction Plan the Western District of Michigan has designed for carrying out the purposes of the Civil Justice Reform Act of 1990. The diagram is based on the Hegalian dialectic of the interaction between and among statements of thesis, antithesis, and synthesis.

A description of the actual relationships between cost and delay, and the length of time it takes to achieve justice, is the primary focus of the plan's hypotheses. All of them are testable and subject to empirical verification. By establishing a more direct route to justice through a multiple choice tracking system that cuts off the shaded areas of the diagram, the purpose of the statute will be served.

EXECUTIVE SUMMARY

The Court

The United States District Court for the Western District of Michigan comprises the western half of Michigan's lower peninsula and its entire upper peninsula. Population centers are dispersed throughout the district and much of the district is rural. The ethnic, cultural, and economic mix of the district's population varies widely. This diversity is reflected in the civil litigation filed in the district. There is no highly developed pattern in civil filings. The full range of civil cases that can be brought in federal court is found in the Western District of Michigan. There is a concentration of state prisons in the district, which results in a significant quantity of prisoner litigation, but every other type of civil litigation is filed in the district as well.

The district has four authorized judgeships and one temporary judgeship. In addition, it is served by two senior judges and four magistrate judges. There are two vacancies. A nomination has been submitted to the Senate to fill one of these two vacancies. The administrative seat of the court is in Grand Rapids, where both senior judges, two active judges, and two magistrate judges have their chambers. The court has facilities in Marquette, with a full-time resident magistrate judge; in Kalamazoo, with a district judge and a magistrate judge; and in Lansing, where there is neither a judge nor a magistrate judge permanently assigned.

The Present State of the Docket

The district's civil docket is well managed and generally current. The case load is distributed evenly among the judicial officers in the district as a result of a blind draw assignment method described in the court's local rules.

The State of Michigan does not have the death penalty, and, as a result, the federal court is not burdened with a crush of collateral challenges to death sentences. There are few industries in the district that have manufactured or used asbestos and so the court is not burdened by asbestos litigation.

The clerk's office has substantially completed the process of automating filings, and document and information retrieval systems for the civil docket are in place. The clerk's office is appropriately staffed with competent personnel, and it contributes significantly to the maintenance of the docket by efficiently handling the administrative aspects of case management, thereby permitting judicial officers to concentrate their efforts on substantive matters.

The district has been a leader in the use of alternative dispute resolution. Its rules provide for mediation (neutral evaluation), court-annexed arbitration, summary jury trials, mini-hearings, and early neutral evaluation. Each judge in the district has a case manager assigned from the clerk's office who works full time in assisting each judge with case management. The district has a long history of early judicial involvement in case management. Although the practices throughout the district are not uniform, each judge to a greater or lesser extent has made effective use of Rule 16 conferences, scheduling orders, case management orders, and other case management devices to shape the course of

litigation. Through orders in individual cases, the judges of the district have instituted a de facto system of differentiated case management. Through input by litigants and attorneys, the use of case management orders, Rule 16 conferences, and other devices, the court has controlled the length of the pretrial process, the scope of discovery, alternative dispute resolution, and other matters, depending on the needs of individual cases. As a result, complex or multi-party cases have received additional judicial attention, simple cases have been moved through the court quickly, and the docket has remained in steady flow.

The district's local rules have recently been revised. The court is in a position to implement the recommendations of the Civil Justice Advisory Group with respect to its Expense and Delay Reduction Plan through the use of orders in individual cases at this time.

The Advisory Group, with the assistance of expert quantitative analysts, thoroughly evaluated a representative slice of the court's civil docket. All cases terminated in the first six months of 1991 were reviewed, and a longitudinal analysis made of the docket for the years 1980 - 1991, to determine the mix of civil litigation, average time from filing to conclusion for various types of litigation, the degree that alternative dispute resolution was used, and so forth. Filings, case terminations, and other trends in the district were computed and compared to trends throughout the Sixth Circuit districts. The Western District of Michigan compared favorably.

Civil filings in the district have generally followed the same trends seen elsewhere throughout the Sixth Circuit districts. However, while filings in this

district and the Sixth Circuit districts have been rising, the pace of terminations in the Western District has also been rising, resulting in a gradual decline in pending cases. The ratio of pending to terminated cases, a measure of the life expectancy of cases, has shown a substantial decline over the last decade. In 1980, the ratio was 2.9, meaning it took an average of 2.9 years for a pending civil case to be disposed of, while in 1991, the ratio was down to 0.79, a 367 percent reduction. This trend contrasts sharply with the fact that other districts in the Sixth Circuit have experienced an increase in pending cases.

The criminal docket has risen sharply. The pending/termination ratio for criminal cases has more than doubled in the last decade, going from a life expectancy of almost four months in 1980 to nine months in 1991. The clerk's office has not automated filings and document and information retrieval for the criminal docket. The demands placed upon the court by the increasing prominence of the criminal docket have detracted somewhat from the court's ability to manage its civil docket by decreasing the number of trial and hearing days available for civil proceedings.

The court's history of good management of its civil docket has led the Advisory Group to recommend a plan that seeks to identify and build on the court's strengths without radical alteration of the way in which the court manages its civil litigation. The Advisory Group's proposals and recommendations are ***not*** designed to restrict the range of options available to judicial officers in managing civil litigation or to restrict their discretion. The court's history of effective case management demonstrates that judicial officers

throughout the district have effectively used the case management tools available to them and have appropriately exercised their discretion.

The Advisory Group's recommendations and proposed plan are designed to give definition to the de facto system of differentiated case management that already exists in the district, to provide guidelines for litigants, counsel, and the court in determining which case management options are most suitable for individual cases, to provide reliable, empirical data on the relative effectiveness of different case management or case resolution tools, to educate users of the court about the court's processes, and to evaluate the court's success or lack of success in meeting the goal of Federal Rule of Civil Procedure 1, "to secure the just, speedy, and inexpensive determination of every action."

Cost and Delay

With notable exceptions, delay has not been a significant problem in the district. Well over half of the civil filings are disposed of within six months. Less than 3 percent of the cases pending in the district have been pending for more than three years. While it is desirable to eliminate any unnecessary delay, there is clearly a point of diminishing returns beyond which further delay reduction serves no valuable purpose and may actually increase the cost of litigation or the level of dissatisfaction with the court by its users.

To the extent unnecessary delay has been experienced in the district, it is a product of the delay in filling judicial vacancies, the press of the criminal docket, and failure to act promptly on discovery motions, Rule 12 motions, and Rule 56 motions. To a lesser extent, delay has occasionally been caused

by cases that wander through the pretrial process without sufficient judicial attention to case management.

Cost is perceived to be a problem in the district. Surveys conducted by the Advisory Group's consultants have shown that litigants or their lawyers have repeatedly complained about the economic burdens imposed on litigants by some of the very processes that have enabled the court to dispose of its docket in a timely fashion.

The chief target of complaints with respect to cost has been the court's practice of using lengthy trailer dockets to set trial dates for civil cases. Placing many civil cases on a trailer docket, when the court can be certain that only one or two of them will be reached, requires trial preparation by many litigants and their attorneys, with attendant expense and without resolution of the litigation.

The practice of requiring the attendance of litigants at all or most pretrial conferences, often with the requirement that the litigants travel great distances to the court, has been perceived as increasing the cost of litigation. The Advisory Group's recommendations seek to retain the substantial benefits achieved by the involvement of the litigants at an early stage of the litigation, while avoiding unnecessary cost.

The cost of excessive discovery is perceived by many litigants and attorneys as a significant source of unnecessary cost in civil litigation. Judicial involvement in focusing the scope of discovery and in resolving discovery

disputes promptly is seen as the most effective way of eliminating discovery abuse and unnecessary discovery expense.

The court's blind draw system of assigning cases to individual judges has also been seen as a source of increased cost. On occasion all the lawyers and litigants in a case will be from the same locality and will be required to drive past an open courtroom with a sitting judge to travel to a location an hour or more distant for hearings and trial. Modification of the court's case assignment system to permit reassignment of cases such as these by agreement of the parties is seen as a simple method of reducing this unnecessary expense. Increased use of telephone and video conferences, and resolution of at least some motions through the use of telephone or video hearings, are seen as additional ways of reducing the cost of litigation created by the district's geography and the fact that many litigants must travel many miles to reach court.

The Advisory Group believes that the presence of a resident Article III judge in the upper peninsula is desirable and would enhance the court's ability to deliver timely, inexpensive, and complete justice to litigants there. The absence of a resident Article III judge in Marquette is not seen as a factor dramatically increasing the cost of litigation, since other judges of the district periodically travel to Marquette to hear cases. The Advisory Group supports the establishment of a fifth permanent judgeship, instead of the temporary position now authorized, and upon designation of such permanent status, the Advisory Group recommends that the court give serious consideration to locating an Article III judge in Marquette. This would reaffirm the court's commitment to

a high level of service to the upper peninsula and assist the court in monitoring the status of its docket throughout the district.

The principal observation of the Advisory Group is that, despite this anecdotal information, no empirical data exist to determine the actual costs of litigation, or specific tasks of litigation, in the district. Neither the Advisory Group nor the court is presently in a position to say with any degree of assurance whether the court's case management techniques have increased, decreased, or had any effect at all on the cost of litigating in the district. It is unknown whether the use of alternative dispute resolution has resulted in any cost savings. While it is relatively easy to quantify the effect of case management techniques and the court's other management practices on the time spent in litigating, no method for quantifying the effect of case management techniques on the cost of litigation exists.

The Advisory Group believes that with the cooperation of litigants and attorneys, it can develop reliable, empirical information on the cost of litigation in the district, including the impact on cost of various case management techniques, alternative dispute resolution methodologies, and other factors. A principal purpose of the recommendations and plan is to determine which case management techniques are most effective in reducing costs. A primary feature of the plan is a three-year study of both the cost and the time factors associated with civil litigation in the Western District of Michigan, with annual reports submitted to the court. It is hoped that by supplying judicial officers with accurate and reliable information, they will be able to rely on those

techniques most effective in reducing costs and delay, and avoid those which increase the cost of litigation without materially improving the quality of justice delivered. To this end the Advisory Group has established a comprehensive statistical baseline.

While not directly related to either cost or delay, the level of satisfaction of litigants with the court's processes is also important. As already noted, Federal Rule of Civil Procedure 1 states that the rules are to be interpreted to achieve the just, speedy, and inexpensive determination of litigation. It should not be the court's goal to focus only on delay reduction or only on cost reduction, without regard for the effect that cost or delay reduction might have on the quality of justice delivered. The court's goal is to decide cases fairly, not simply to decide them cheaply or quickly. A principal feature of the Advisory Group's recommendations and plan is an ongoing study to measure, through an interview process, the level of satisfaction or dissatisfaction of litigants and their attorneys with the court and its processes. By focusing on the opinions of the court's actual users, it is hoped that the court can further shape the methods by which civil litigation is managed.

Recommendations and Their Basis

The Western District of Michigan is a statutorily designated demonstration district. The Civil Justice Reform Act instructs it to demonstrate differentiated case management, that is, the use of a variety of case management techniques geared to the needs of particular types or classes of litigation. The Advisory Group opposes a pigeon hole approach to case management or tracking, and

instead favors a methodology known in the jargon of court management as designer tracking.

The single most important element in effective case management under the proposed plan will be the prudent exercise of sound judicial discretion in making an early determination in each case about how long the case should be permitted to pend, the scope and degree to which the court will be actively involved in the day-to-day management of the case, the method of alternative dispute resolution, if any, that will be employed, the limitations, if any, that will be placed on the discovery process, and the extent to which the resources of the court will be devoted to assist in resolving the case.

The ongoing empirical analysis recommended is intended to assist the court by providing concrete information upon which future decisions regarding case management can be based. The plan contemplates early and meaningful involvement by the litigants and their attorneys in decisions related to case management, and it anticipates the greatest possible use of magistrate judges and senior judges.

It is the Advisory Group's recommendation that the court adopt a tracking system with five tracks defined generally in terms of the time anticipated for case resolution, and a control track with minimal judicial involvement. Within each track a range of options will be available with respect to alternative dispute resolution, limitation of the discovery process, and so forth.

As part of the implementation of the tracking system, the trailer docket system will be modified slightly to permit the reassignment of some relatively

simple cases to judicial officers other than the one to whom the case was originally assigned, if that is the only way to bring the case to trial on its assigned trial date. The same suggested modifications of the trailer docket should make additional time available to judges for the resolution of discovery motions, Rule 12 motions, and Rule 56 motions.

The six recommended tracks are:

I. Super fast track--less than six months;

II. Fast track--six months to nine months;

III. Standard track--nine months to one year;

IV. Complex track--one year to two years;

V. Highly complex track--two years or more;

VI. Minimally managed track (control group)--approximately one year.

These tracks and the cases assigned to them are based on a combination of empirical analysis of immediate past case experience and the professional judgment of judicial officers and attorneys as they make decisions about which track is appropriate for each case.

Super Fast Track---The super fast track will be voluntary. Cases involving relatively few legal issues and relatively few parties and in which all the litigants agree to waive trial by an Article III judge, will be considered for placement on the super fast track. Litigants will be expected to forego alternative dispute resolution, participate in speedy, voluntary prediscovery disclosure of important documents and witnesses, and cooperate fully in the prompt resolution of the

dispute. Whenever possible, these cases will expeditiously be given a date certain for trial, with the understanding that the case will be tried by any judicial officer in the district who may be available at the time specified.

Fast Track---Cases considered for the fast track will be those which have historically been concluded in less than nine months, those in which the number of litigants and legal issues are relatively few, or those in which the parties have good reason to believe that resolution of the case on the fast track will be reasonable. Alternative dispute resolution will rarely be used for fast track cases, discovery will be limited by the number of depositions that may be taken or interrogatories that may be propounded, except upon good cause shown, and the case may be reassigned for trial to an Article III judge other than the one to whom it was initially assigned if necessary to avoid postponement of the first scheduled trial date.

Standard Track---Cases to be considered for the standard track will be those which have historically taken nine months to a year, or slightly more, to resolve, or those in which the judicial officer and litigants reasonably believe that the required discovery and resolution of legal issues can be accomplished within the time guidelines established for standard track cases. Mediation and arbitration will frequently be used for standard track cases, while summary trials will rarely be used. Discovery will be limited in accordance with the parameters of the case.

Complex Track---Cases considered for the complex track will be those which have historically taken up to two years to resolve, which involve complicated

legal issues or a large number of parties, or otherwise appear to the parties and judicial officer evaluating the case to require an extended period of time to complete. Alternative dispute resolution will almost always be used for these cases, and discovery will be limited accordingly.

Highly Complex Track---Cases considered for the highly complex track will be those which have historically taken more than two years to complete, which are exceptionally complex, involve a large number of parties or are class actions, and require extensive discovery or pretrial motions or proceedings. Alternatively, or concurrently, a magistrate judge would be assigned to make reports and recommendations and resolve all procedural and pretrial disputes or matters referable to a magistrate judge. When highly complex track cases are assigned for trial, they will be placed first on the trailer docket. It is anticipated that very few cases will be placed on the highly complex track.

Minimally Managed Track---Approximately 10 percent of all civil cases other than those appearing to be likely candidates for the highly complex track will be minimally managed. The purpose of this track is to establish a control group for purposes of evaluating the effectiveness of differentiated case management. Judicial involvement in these cases will be minimal and reactive. Although it is envisioned that an early case management conference conducted under Rule 16 will be held in these cases, it is not contemplated that the court will require the completion of extensive pretrial statements, joint case management orders, or other documentation in the minimally managed track cases. The court will set guidelines for the timely disposition of these cases, but

it will not be directly involved in supervising discovery or otherwise managing preparation of the case for trial. Alternative dispute resolution will be used in these cases only upon motion of one of the parties or by agreement of all the parties. There will be no restriction of the court's power to resolve issues that arise in these cases and on matters that are called to the court's attention by motion or otherwise. This category of cases will serve as an internal control mechanism which is attorney versus court managed. The time, cost, and satisfaction measures for these cases will be compared to the other five tracks.

The quantitative analysts assigned to the Advisory Group have compiled historical data on the average time of resolution of different classes of cases. It is ***not*** anticipated that cases will be assigned to tracks based only on this historical data. Rather, the typical time for resolution of various classes of cases in the past will be used as one of many factors in the exercise of the judicial officer's discretion at an early Rule 16 conference. Other factors, such as the number of legal issues or parties involved, the competence of counsel, the geographic distance from the court of the parties or their lawyers, the number of potential witnesses or documents to be discovered, and all other relevant factors will be considered before cases are assigned to any particular track. The judicial officer managing a case will at all times have full discretion to revise or amend decisions made about tracking, alternative dispute resolution, involvement in discovery, or any other matter related to case management.

In every case it is anticipated that the court will communicate with the parties at a very early stage concerning assignment to a track. Frequently, the

first communication with the court will be by a short telephone conference initiated by a magistrate judge in which the views and input of the parties and their counsel will be sought related to tracking, alternative dispute resolution, discovery, and other case management matters. Cases that appear to be likely candidates for the super fast and fast tracks will almost always have an early telephone conference.

It is contemplated that in all other cases there will also be an early case management conference conducted under Rule 16 in which case management issues will be discussed. An appropriate track will be decided upon with orders made pertaining to discovery, alternative dispute resolution, the filing of dispositive motions, and other preparations for trial. Representatives of parties with full authority to settle may be required to attend the early case management conference if it is reasonable to believe that the attendance of the parties will be useful in facilitating resolution of the case or assignment of the case to an appropriate track.

Analysis

A principal and distinctive feature of the plan is a recommendation for the ongoing measurement and analysis of the cost of litigation, the delay experienced in resolving civil litigation, and the perception of litigants and their attorneys regarding how, and whether, justice is being done.

The plan contains recommendations for an interview process for gathering specific and detailed information on a confidential basis related to the costs associated with various aspects of civil litigation and the perceptions of litigants

regarding the court's management system. A continuing analysis of information compiled in the clerk's office concerning the timeliness of dispositions will be made.

The purpose of the ongoing measurement and analysis is to provide the court with reliable empirical data as the foundation of cost/benefit analyses. The Advisory Group hopes to be able to determine the relative costs of cases that are concluded without resort to alternative dispute resolution and those that are concluded through the use of alternative dispute resolution, for example. It expects to develop information regarding the effect of discovery limitation orders on the cost of litigation, the effect of intensive judicial involvement in case management, and the resolution of discovery and procedural disputes. Information will be compiled on all aspects of the management of civil litigation.

The program of ongoing measurement and analysis is also designed to assess the relative satisfaction of the court's users with the different tools employed by the court in effectively managing civil litigation. By December 31, 1994, there will be a substantial body of data upon which to gauge the effectiveness of various civil case management techniques, including various methods of alternative dispute resolution, discovery limitations, and methods of settling various motions. The court will then be in a position to modify the plan to make the most effective use of case management tools which reduce the cost without detracting from the timely and just resolution of cases, and to reduce or eliminate those case management techniques which are not effective or are disproportionately expensive or time-consuming.

be the exception and not the rule of court management practice.

7. *The trailer docket should be shortened both in terms of elapsed time and the number of cases on it. Fixed dates of trial should be adhered to whenever possible. Assignment dates in a reshaped docket should reflect the characteristics of the track selected in the differentiated case management system recommended in this report, and should be narrowed to specific segments of a given month.*

8. *Legislation should be enacted to strengthen alternative dispute resolution processes by allowing fee shifting as a sanction. By infusing new life into ADR processes, courts and litigants may be more willing to use them as cost efficient methods of conflict resolution.*

9. *As a protective device to help decrease unnecessary costs to litigants, an automatic stay on judicial proceedings should be enforced after a dispositive or non-dispositive motion has remained in the court without decision for more than 60 days, unless an exception is made for good cause.*

10. Prisoner civil rights petitions should ordinarily be assigned to the fast track of the differentiated case management plan, without alternative dispute resolution, with limited or suspended discovery in appropriate cases, and with close supervision by a magistrate judge. After further review of the current method for disposing of these cases, and with detailed contributions from the magistrate judges, judges, and clerk's office, the Advisory Group should prepare a written procedure for the management of prisoner civil rights petitions.

11. Because of the size and distribution of cases in the Western District of Michigan, a local rule should be adopted to permit the reassignment of a case to a more geographically convenient judge, if all parties and the court agree.

12. Legislation should be drafted and appropriations made to compensate attorneys who are willing to represent pro se litigants in civil rights cases. The compensation should include reimbursement for all expenses incurred, including expert witness fees, and be forthcoming regardless of the outcome of the case.

13. *The impact of federal minimum sentencing statutes and sentencing guidelines should be reviewed by appropriate agencies, and the statutes and guidelines revised. In their present form they create penalties perceived by some as so distorted and disproportionate to certain offenses that they hamper the adjudication and administration of justice.*

14. *A statute or local rule should be adopted which provides for the confidentiality of cost information pursuant to the Civil Justice Reform Act. This would enable researchers to gather more quantitative and qualitative data from which to address the purposes of the Act, which is to find ways to reduce cost and delay in civil litigation.*

15. *A plan of differentiated case management should be implemented by the court in accordance with the requirements of the Civil Justice Reform Act of 1990. The plan should be implemented initially through the use of orders in individual cases, as opposed to amendment of local court rules. As the court gains experience with its plan, and as empirical data are gathered to evaluate the effectiveness of various case management techniques, the*

Advisory Group may recommend revisions of the plan, including modifications of the local court rules.

16. *The court should arrange for the production of a series of videotapes on subjects including, but not limited to, general court and trial procedures, discovery, alternative dispute resolution, differentiated case management and tracking, and the responsibilities and expectations of plaintiffs and defendants. The content of the tapes should be understandable to lay persons, and should be produced under the auspices of the judges of the Western District, taking into account the practices and procedures unique to the district. One or more of the judges should appear on the tapes as providers of information, thus offering a tangible sign of their support of the continuing education program.*

17. *A written and illustrated document or brochure should be produced to explain in detail the court's differentiated case management plan and its connection to the Civil Justice Reform Act. This publication should be aimed at both practitioners and lay persons, and should include a description of conferencing procedures, how track assignment*

decisions are made, and other relevant practices and procedures.

18. The court should task the Advisory Group staff to coordinate the production of the tapes and written materials recommended above, and it should request the State Bar of Michigan and Bar Associations throughout the district to disseminate the information contained therein.

Unique Features

This report is thought to be unique in the following respects.

1. Its extensive use of quantitative research, allowing for in-depth empirical analysis of case dispositions over time.

2. Its inclusion of anecdotal material from litigant and attorney interviews, as well as interviews with judicial officers and staff.

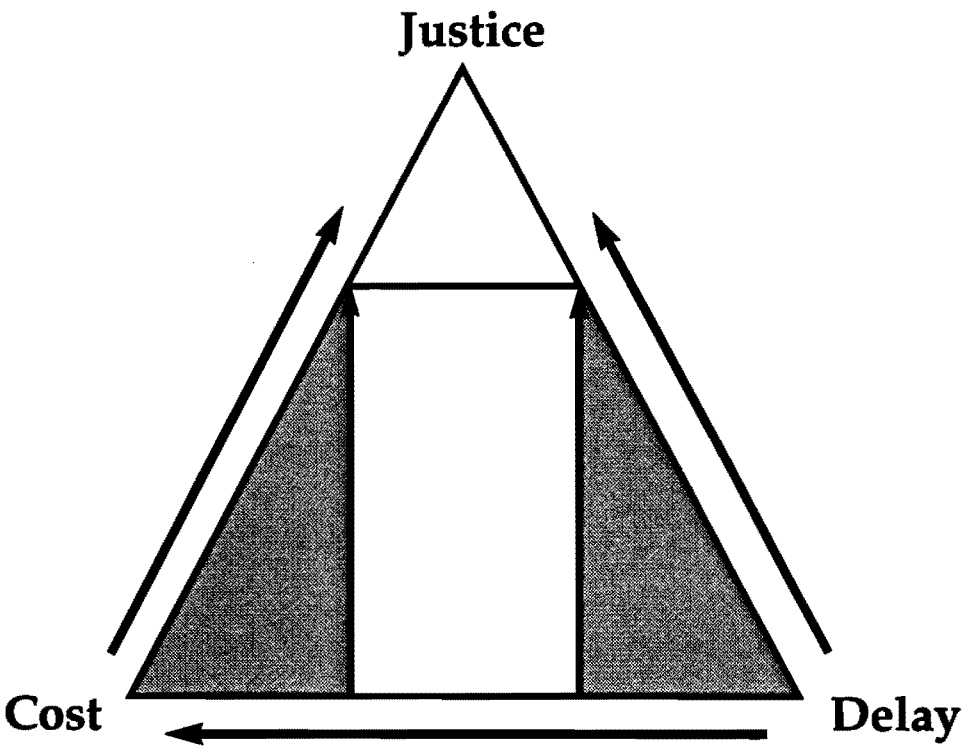
3. Its dialectic exploration of justice as a dependent variable of concern equal to cost and delay in pursuing the purposes of the Civil Justice Reform Act.

4. Its emphasis on the team concept of judicial management, the team including an Article III judge, a magistrate judge, a case manager, and two law clerks.

5. Its concerns for educating the users of its tracking plan, the users identified as judicial management teams, administrative staff personnel, lawyers, litigants, and the public.

6. Its special attention to the management of prisoner civil rights cases because of the unique geographical situation of the Western District of Michigan.

7. Its comprehensive plan for the future assessment of the court and the replicability of its data gathering and analysis plan for other federal districts. The following diagram illustrates the conceptual intent of the plan.



This equilateral triangle symbolizes the Expense and Delay Reduction Plan the Western District of Michigan has designed for carrying out the purposes of the Civil Justice Reform Act of 1990. The diagram is based on the Hegalian dialectic of the interaction between and among statements of thesis, antithesis, and synthesis.

A description of the actual relationships between cost and delay, and the length of time it takes to achieve justice, is the primary focus of the plan's hypotheses. All of them are testable and subject to empirical verification. By establishing a more direct route to justice through a multiple choice tracking system that cuts off the shaded areas of the diagram, the purpose of the statute will be served.

EPILOGUE

Justice As Art

Knowing and doing justice is very much a human enterprise. It is the continuing effort of civilized man to prove Thrasymachus wrong when he told Socrates in Plato's *Republic* that justice is merely the interest of the stronger party. Weaker parties have suspected for centuries that Thrasymachus was right, especially when stronger party is translated into litigants with the financial resources to hire good lawyers and absorb both cost and delay. Pascal reflected Plato's concern two millennia later when he wrote in the *Pensees*, "Unable to make what is just strong, we have made what is strong just."

American ideas about justice are less Greek and French, however, than they are Roman and English. When we read, "Ius est ars boni et arqui" (Justice is the art of the good and the fair), we recognize our own legal temperament, and when we read from Clause 40 of *Magna Carta* (1215), "To none will we sell, to none deny or delay, right or justice," we are not far away from the motivations behind the Civil Justice Reform Act of 1990.

The administration of justice in America has evolved through the development of an American common law. Judge Learned Hand expressed the consensus clearly in 1946: "Justice is the tolerable accommodation of the conflicting interests of society." In reaching accommodation, courts not only find the law, they create it. In the artful human search for the good and the fair, often with the help of lawyers and litigants, judicial officers define approximate justice.

The life of the law in America has not been logic, said Justice Oliver Wendell Holmes, Jr. It has been experience. In a compendium of lectures entitled *The Common Law*, he wrote in 1881:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

The truth of Holmes' observations has a good deal to do with Rule 16 conferences, alternative dispute resolution methodologies, and how judicial officers manage cases. They will often recognize justice as art. Seldom is it the rigid application of formal rules or laws. Most court cases in the United States, criminal and civil, are settled not by trial but by negotiation. And there may be "romantic" elements in negotitation. The word romantic stems from Rome, and refers to the non-classical, the spontaneous, the original, the intuitive, the ecstatic, the exhilarating, the exuberant, the emotional, the individual, and, above all, the unique. The romantic reflects the non-rational, the personal, and that which is diverse. Can there be any argument that lawsuits are often non-rational, personal, and diverse?

The question is how well equipped judicial officers, lawyers, and litigants are to handle justice as romance, adventure, and the most human of enterprises. There is a rich literature on litigation as sublimated combat. A person who

feels he or she has been grievously wronged wants relief from injured feelings in the form of some signal vindication. He or she wants to win a fight. Often the psychological factors run deeper than simple vindication of one's cause by valor or might, with the help of a paid champion. There may be a primitive need to assail, or a persecution complex might be at work. The first time an attorney recognizes dysfunctional paranoia in a client can be a deeply disturbing moment. The ceremonial of the courtroom contest, with its vestiges of the ancient ordeal, have immense emotional value for some litigants.

But the rituals of justice can be accomplished outside the courtroom as well as inside it, once judicial officers understand the ways that ritualized behaviors are indeed involved. When the rituals are successfully negotiated, something sacred happens: peace is restored, selves are bound to others, and voluntary change is agreed to. As any psychotherapist or minister can tell us, this is art in its highest form. But there can be few shortcuts to absolution. Denial, acceptance, sacrifice, leaps of faith, and renewal are all parts of a process presided over by a ritual leader with special knowledge, special powers, and set apart by special dress, demeanor, and rules of professional ethics. Like it or not, in American society a judicial officer is understood unconsciously by many as a secular priest.

What can secular priests study to make them more expert in the art of healing bruised relationships in case management or settlement conferences, for example? They can understand more about the human dimension of litigation. They can admit that clients are not always treated properly. They can try to

put themselves in the litigant's shoes and empathize with the emotional stress and raw fear that often distorts his or her perception of the facts of the case, as well as the motivations of others.

In the course of preparing this report, the Reporter heard many interesting stories from judicial officers, lawyers, and litigants. One of the most moving of them was that of a Rule 16 conference in which two strong-willed chief executive officers met each other for the first time. The judge telling the story said each took the measure of the other, and, to the surprise of everyone, they seemed actually to like one another. Mr. X decided that Mr. Y was not quite the ogre his attorneys had described, and Mr. Y decided that Mr. X really did have a legitimate complaint, which could easily be accommodated. The case was settled forthwith.

A condition, an atmosphere, and a philosophy of case management had to exist and be felt for such an event to transpire. Permission for human interaction in a controlled environment of mutual respect had to be given so that the good and the fair had a chance to emerge. It was an example of justice as art.

Ultimately such art in reducing cost and delay is the purpose of the Civil Justice Reform Act of 1990, and it is toward this end that our efforts have been, and will be, directed. We want the tracks described in our differentiated case management plan to become superhighways of justice.

Ralph Clark Chandler
Reporter

APPENDIX A

CIVIL JUSTICE STUDY
DATA GATHERING INSTRUMENT AND
LITIGANT AND ATTORNEY INTERVIEW SCHEDULES

CIVIL JUSTICE STUDY V7/ 8-20-91

_____ (1-6) DOCKET #

_____ (7) On Appeal? 0 = NO 1 = YES

_____ Case:_____

_____ (8) Judge: 1. Miles 2. Hillman 3. Gibson 4. Enslen 5. Bell
Magistrate: 6. Brenneman 7. Rowland 8. Scoville 9. Greeley

_____ (9-16) Demand in $

_____ (17) Number of joined dockets 0 = None; 9 = 9+

____/____/_____ (18-23) File Date

_____ (24) Jury Demand 0. No demand 1. Defendant 2. Plaintiff 3. Both

_____ (25-27) Nature of suit (Insert number)

_____ (28) Jurisdiction 1. Gov't Plaintiff 2. Gov't Defendant 3. Federal Question 4. Diversity

____:_____ (29-34) Cause

_____ (35) Number of Plaintiffs

_____ (36) Number of Defendants

_____ (37) Number of Attorneys (9 = 9 or more)

_____ (38) Corporation involvement:
0. Not involved 1. Plaintiff 2. Defendant 3. Both

_____ (39) Insurance Involvement:
0. Not involved 1. Plaintiff 2. Defendant

_____(40) Soverign involved? (Local, county, state, Fed govt.)
0. Not involved 1. Plaintiff 2. Defendant 3. Both

_____ (41) Counter claims? 0. NO 1. YES

_____ (42) Office:
1. Grand Rapids 4. Kalamazoo
2. Marquette 5. Lansing
3.

_____/_____/_____ (43-48) Date of ORDER scheduling Status Conference

____/____/_____ (49-54) Date of PROCEEDING of Status Conference (Rule 16 Conference)

00/00/00 if scheduling of events not held

---/---/---- (55-60) Date of Order scheduling events
00/00/00 if pending dismissal/settlement

_____ (61) Was scheduling conference actually held?
0 NO 1 YES

ORIGINAL DATES SET FOR:

_____ (62) DISCOVERY Cutoff Date 0. NO 1. YES

---/---/---- (63-68) Discovery cutoff date

_____ (69) Pre-trial Conference Date 0.NO 1 YES

_____ (70) PT Conf.rescheduled 0.NO 1. YES

_____ (71) Trial 0. NO 1. YES

____/___/_____ (72-77) Trial Date set for:

_____ (78) Arbitration case? 0. NO 1. YES

____/____/_____ (79-84) Arbitration DISCOVERY deadline

_____ (85) Arbitration rejected 0. NO 1. YES

_____ (86) Mediation Case? 0. NO 1. YES

_____ (87) Mediation rejected 0. NO 1. YES

_____ (88-89) Total number of MOTIONS (pre-judgment)

_____ (90-91) Total Number of RESCHEDULING of events

____/____/____ (92-97) Last DISCOVERY deadline
(Whether rescheduled or not)

____/_____/____ (98-103) ACTUAL Trial Date (Proceeding)

____/_____/____ (104-109) Date of JUDGMENT/dismissal

_____ (110) Judgment type:
0. Dismissal on Court's judgment/Remand
1. To VOLUNTARY DISMISSAL
2. To Dismiss or stipulate based on SETTLEMENT (Consent Judgment to Dismiss)
3. Summary Judgment of finding/fact
4. Sealed/unsealed arbitration
5. Summary judgment/trial
6. Default
7. Consent Judgment

_____ (111) Judgement For
0 Neither
1 - Plaintiff
2 - Defendant
3 - Both

_____._____ (112-116) Case weight
_____ (117-118) Disposition

00 - Transfer to Other District
10 - MDL Transfer
01 - Remanded to State court
11 - Remanded to U.S. Agency

Dismissed
02 - Want of Prosecution
03 - Lack of Jurisdiction
12 - Voluntarily
13 - Settled
14 - Other

Appeals
19 - Affirmed
20 - Reversed

Judgment on
04 - Default
05 - Consent
06 - Motion Before Trial
15 - Judgment of Arbitrator
07 - Jury Verdict
08 - Directed Verdict
09 - Court Trial
17 - Other
18 - Statistical Closing

_____ (119) Nature of Judgment

0 - No Monetary
1 - $_____ Only
2 - $_____ and Other
3 - Injunction
4 - Forfeiture, Fore, F Condemnation, Etc.
5 - Costs Only
6 - Costs and Attorney Fees

**********IF ARBITRATION **********

_____ (120-121) Disposition on Arbitration PRIOR to referral:

1. (g) W/drawn as inappropriate for arb.
2. (h) Settled or dismissed by parties
3. (i) Dismissed by court or remanded to State

FOLLOWING referral/ PRIOR to Hearing:

4. (j) w/drawn as inappropriate for arb.
5. (k) settled or dismissed by parties
6. (l) dismissed by court/remanded to State Court

Following Arbitration HEARING

7. (m) Arbitration decision entered as judgment
8. (n) Settled or dismissed by parties prior to exp. of 30 day period
9. (o) Settled or dismissed by parties after exp of 30 day period
10. (p) Tried to completion

**********IF MEDIATION**********

_____(122-123) Disposition

PRIOR TO HEARING

1. (g) w/drawn as inappropriate
2. (h) not timely completed
3. (i) dismissed by court or remanded to State
4. (k) SETTLED or dismissed by parties

FOLLOWING HEARING

5. (l) inappropriate for Mediation
6. (m) evaluation Accepted
7. (n) settled prior to exp. of 20 day pd
8. (o) settled after exp. of 20 day pd.
9. (p) DISMISSED BY COURT
10. (q) TRIED to completion

_____(124) NUMBER of MOTIONS (Post-Judgment)

____/___/_____ (125-130) LAST Docket activity

CIVIL JUSTICE STUDY

Interview Schedule - Litigant V3//8-28-91

Auspice: U.S. District Court - Western District of Michigan

Act: Civil Justice Reform Act of 1990 (PL101-650)

Docket # _ _ _ _ _ _ _ _ _

Case: _____

File Date __/__/__

Closed Date __/__/__

Interview Date __/__/__

Interviewer: _____

Plaintiff _____ or Defendant _____

Disposition: _____

Litigant's Name: _____

Litigant's Address: _____

_____

Litigant's Phone #: _____

Litigant's Job Title: _____

What is the litigant's proximity to the case (e.g., CEO, V.P.)?

_____

_____

Determine litigant's past contact with U.S. District Court (include dates and nature of contact if possible):

_____

_____

Did litigant seek approval to be absent from Rule 16 Conference?

Yes No If yes, what was reason given for absence?

_____

Was litigant present at Rule 16 Conference? Yes No

If no, why not? _____

_____

If yes, discuss litigant's satisfaction with Rule 16 Conference.

_____

Was litigant satisfied with the steps taken by the court to resolve the case?

Was litigant satisfied with the steps taken by his or her attorney to resolve the case?

Was litigant satisfied that appropriate measures were taken by the court to curtail legal expenses? (includes fees, time invested)

Was litigant satisfied that appropriate measures were taken by the litigant's attorney to curtail legal expenses?

Was litigant satisfied that appropriate measures were taken by the court to minimize the time involvement of the litigant?

Was litigant satisfied that appropriate measures were taken by the litigant's attorney to court to minimize his/her time involvement?

What recommendations does litigant have regarding ways to increase a litigant's satisfaction with the practices of the District Court?

In litigants opinion, what would be the best way and best time to determine a litigant's satisfaction with court and attorney practices.

Other comments:

CIVIL JUSTICE STUDY

Interview Schedule - Attorney V3//8-28-91

Auspice: U.S.District Court - Western District of Michigan

Act: Civil Justice Reform Act of 1990 (PL101-650)

Docket # _ _ _ _ _ _ _ _ _

Case: _____

File Date __/__/__ Closed Date __/__/__

Interview Date __/__/__

Interviewer: _____

Plaintiff _____ or Defendant _____

Disposition: _____

Attorney's Name: _____

Attorney's Address: _____

_____

Attorney's Phone #: _____

Determine attorney's past contact with U.S. District Court (include dates and nature of contact if possible):

_____

_____

Was attorney satisfied with the steps taken by the court to resolve the case?

Probe for points of satisfaction and dissatisfaction.

_____

_____

_____

_____

_____

_____

_____

Was attorney satisfied with measures taken by the court to curtail legal expenses?

In what ways has district court practices contributed to the costs of litigation (i.e., ADR, Differentiated Case Management)?

Try to get a breakdown of the actual costs (ranked) including discovery, disposition, motions.

Was attorney satisfied that appropriate measures were taken by the court to minimize the time involvement of the litigant?

Was attorney satisfied that appropriate measures were taken by the court to minimize the time involvement of the attorney?

What recommendations does attorney have regarding ways to increase a litigant's satisfaction with the practices of the District Court?

What recommendations does the attorney have regarding ways to increase an attorney's satisfaction with the practices of the District Court?

In attorney's opinion, what would be the best way and best time to determine a litigant's satisfaction with court and attorney practices.

In attorney's opinion, what would be the best way and best time to determine an attorney's satisfaction with court and attorney practices.

Other comments:

APPENDIX B

MEMBERSHIP OF THE ADVISORY GROUP

BIOGRAPHICAL SKETCHES OF THE ADVISORY GROUP

Honorable Benjamin F. Gibson, Chief Judge, United States District Court for the Western District of Michigan,

B.A. Wayne State University, 1955; J.D., with distinction, Detroit College of Law, 1960. Judge Gibson was appointed by President Carter as a United States District Judge in 1979. He became Chief Judge in 1991. Prior to his judicial appointment, Judge Gibson's legal career included serving as Assistant Prosecutor for Ingham County and as Assistant Attorney General for the State of Michigan. He was in private practice for 14 years in Lansing, Michigan. Judge Gibson has taken post-graduate labor law courses from both Wayne State University and Michigan State University. He was full-time professor at Thomas Cooley Law School from 1978 to 1979, and has been an adjunct professor there since then. Judge Gibson serves on the boards of Thomas Cooley Law School, the Grand Rapids Foundation, and the YMCA. He is a member of the Sixth Circuit Judicial Council and the Automation And Technology Committee of the United States Judicial Conference.

James H. Geary, Howard & Howard,

B.A. University of Michigan, 1968; J.D. University of Michigan, 1972. Mr. Geary served as law clerk to the Honorable W. Wallace Kent, Judge of the U.S. Court of Appeals, Sixth Circuit in 1972. He has served as director of the Kalamazoo County Bar Association, and currently serves as director of the West Michigan Chapter of the Federal Bar Association. He is also a member of the American Bar Association. Mr. Geary was chairman of the State Bar of Michigan Committee on Federal Courts from 1986 to 1988. He was a faculty member of the Western District's Trial Skills Workshop in 1988 and 1989. He has served on the Selective Service System's Western Judicial District Appeal Board since 1983. He was president of the Kalamazoo County Trial Lawyers Association from 1983 to 1985. He specializes in products liability, litigation, and appeals law.

Frederick D. Dilley, Dilley & Dilley,

B.A. Michigan State University, 1972; J.D. Detroit College of Law, 1975. Mr. Dilley is a member of the firm of Dilley & Dilley in Grand Rapids specializing in plaintiffs' personal injury litigation, including medical malpractice, products liability and environmental law. He is past chairman of the State Bar Environmental Law Section Council and immediate past chairman of the Hillman Advocacy Program.

Stephen R. Drew, Drew, Cooper & Anding,

B.A. University of Michigan, 1971; J.D. University of Michigan, 1974. Mr. Drew specializes in litigation, with emphasis on tort, civil rights, and commercial litigation. He began his legal practice with Reamon, Williams, Klukowski and Craft, P.C., and was a partner in Williams, Klukowski, Drew and Fotieo, P.C., for three years before establishing his own firm. He is president-elect of the Grand Rapids Bar Association and past president of Floyd Skinner Bar Association. He is also a member of the National Bar Association, the American Trial Lawyers Association, the American Bar Association, and the Michigan Trial Lawyers Association. In 1989 he received the Civil Libertarian of the Year award from the Sixth Circuit.

David G. Edick, Assistant Attorney General for the State of Michigan,

B.S. Michigan State University, 1976; J.D. Detroit College of Law, 1979. Mr. Edick began his legal career in the Wayne County Prosecutor's office serving three years as Assistant Prosecutor. He has been with the Michigan Attorney General's office for the past nine years and is currently First Assistant for the Corrections Division specializing in complex litigation and constitutional claims. He is a member of the California State Bar - Litigation Section, and the National Association of Medicaid Fraud Units. Mr. Edick is admitted to practice in all state courts in Michigan and California, federal court in both the Eastern and Western District of Michigan, and the Sixth Circuit Court of Appeals. He has completed coursework in labor law at Wayne State University.

Thomas N. Edmonds, Sheriff, County of Kalamazoo,

B.A. Western Michigan University, 1969; J.D. Wayne State University, 1975; Michigan Law Enforcement Officers Training Police Academy, 1981; Jail Management Operations, U.S. Department of Justice, 1982. Mr. Edmonds served as Assistant Prosecutor for Kalamazoo County from 1975 to 1981. During this time he held the position of Chief of the Special Prosecution's Unit with responsibility for the supervision of the Consumer and Commercial Fraud Unit and the Career Criminal Unit. In 1981 he became Undersheriff for Kalamazoo County and in 1984 became Sheriff. He is an adjunct professor at Western Michigan University and an instructor for the Kalamazoo Valley Regional Police Academy. Mr. Edmonds has authored training materials for the Michigan Law Enforcement Training Council and co-authored the Michigan Law Enforcement Manual.

Roger H. Gardner, Vice President, Claims, Citizens Insurance Company of America,

B.A. Michigan State University, 1955. Mr. Gardner joined Citizens Insurance Company of America in 1985. Prior to joining Citizens, he worked for Hanover Insurance Company as Casualty Claim Manager for four years. From 1961 to 1981, he was a division manager for Safeco Insurance, and prior to that, spent five years as a claim adjuster for State Farm Insurance Company.

C. Duke Hynek, Clerk, U.S. District Court for the Western District of Michigan,

B.A. Marian College, 1968; M.P.A. Western Michigan University, 1978. Mr. Hynek served as circuit court administrator of the 9th Judicial Circuit Court for eight years before becoming Clerk of the U.S. District Court for the Western District of Michigan, a position he has held for five years. He is a Fellow of the Institute for Court Management, and a member of the Federal Court Clerks' Association and the National Center for State Courts. He was a charter member and Director of the Region III Michigan Crime Commission. From 1970-1974 he was Vice President and General Manager of the Reinhardt Petroleum Corporation in Oneonta, New York.

Steven C. Kohl, Landman, Latimer, Clink & Robb,

A.B. Washington University (St. Louis, Missouri), 1973; J.D. Washington University, 1977. Mr. Kohl has been with the firm of Landman, Latimer, Clink & Robb for the past 11 years where he specializes in environmental litigation. He was a former prosecuting attorney for Muskegon, County. He is a member of the American Bar Association - Tort and Insurance Law Section, and the Michigan Bar Association - Negligence and Environmental Law Section.

Daniel M. LaVille, Assistant United States Attorney for the Western District of Michigan,

B.S. Ohio State University, 1973; J.D. University of Notre Dame Law School, 1978. Mr. LaVille has served as Assistant United States Attorney for the Western District of Michigan since 1982. He has been supervisor of the Civil Division of that office since 1985. He worked as an Adult Probation and Parole Officer for the State of Ohio for two years prior to entering law school. From 1978 to 1982, Mr. LaVille was a private practitioner in Cass County, Michigan. He is a member of the Michigan Bar. He is past president of the Ohio State Alumni Club of West Michigan and currently serves as president of the St. Stephen Parish Council in Grand Rapids.

Jon G. March, Miller, Johnson, Snell & Cummiskey,

B.A. University of Michigan, 1966; J.D., *cum laude*, Harvard University, 1969. Mr. March joined the law firm of Miller, Johnson, Snell & Cummiskey in 1973 and has been a partner of the firm since 1977. Prior to 1973, he worked for the United States Air Force, Judge Advocate General Corp. He is a Fellow of the International Society of Barristers. He is also a member of the American Bar Association, the Federal Bar Association - West Michigan Chapter of which he was elected president in 1990, and the Grand Rapids Bar Association of which he was a member of the board of trustees from 1985-1988. He is a faculty member of the Hillman Advocacy Programs, and is a contributor and seminar presenter for the Institute of Continuing Legal Education.

Roger L. Martin, Vice President, Community Relations, Steelcase, Inc.,

B.S. University of Wisconsin, 1952. Mr. Martin is Vice President of Community Relations for Steelcase, Inc., a designer and manufacturer of office furniture. Prior to joining Steelcase, Mr. Martin held sales and marketing positions at IBM for 16 years. He currently sits on the boards of directors of the United Way of Kent County, the Michigan Research Council, and the Michigan Colleges Foundation. He is chairman of the advisory board of the Minority Business Education Center of Grand Valley State University, and a member of the Governor's Task Force - Health Care Group and the Grand Rapids Area Chamber of Commerce. He has served as past president of the Public Education Fund and the American Cancer Society - Kent County Unit.

Matthew E. McLogan, Vice President for University Relations, Grand Valley State University,

B.A. Western Michigan University, 1970; M.A. Western Michigan University, 1974. Mr. McLogan is Vice President for University Relations at Grand Valley State University. He is also a member of the University's Executive Cabinet and Budget Committee. Prior to joining Grand Valley State University in September, 1987, Mr. McLogan spent six years as Public Service Commissioner for the State of Michigan. At the time of his appointment to the Public Service Commission in 1981, he was a journalist and news executive at Grand Rapids television station WOTV, which he joined in 1972. He was a radio station news director in Battle Creek, Michigan, from 1971 - 1972.

H. Rhett Pinsky, Pinsky, Smith, Fayette & Hulswit,

B.A. Princeton University, 1959; J.D. Harvard Law School, 1962. Mr. Pinsky is currently a partner with the firm of Pinsky, Smith, Fayette & Hulswit. He was appointed by the Michigan Supreme Court to the Michigan Attorney Grievance Commission and served from 1978 to 1985. He was also a member of the Board of Education of the Grand Rapids Public Schools from 1978 to 1984. Mr. Pinsky is a member of both the Grand Rapids Bar Association of which he is currently vice president and the West Virginia Bar Association. From 1963 to 1969, Mr. Pinsky was on active duty and on active reserve as a Captain with the United States Marine Corps.

Valerie Pierre Simmons, Warner, Norcross & Judd,

B.S. Texas Woman's University, 1976; J.D., *cum laude*, University of Houston Law Center, 1986. From 1987 to 1988, Ms. Simmons served as law clerk to the Honorable Benjamin F. Gibson, United States District Court for the Western District of Michigan. In 1988, she accepted an associate position with Warner, Norcross & Judd, specializing in litigation. She has co-authored "Rule 11 - A Word to the Wise" for the Michigan Institute for Continuing Legal Education Federal Courts Workshop. She is an active member of the American Bar Association, National Bar Association, Michigan Bar Association, Floyd Skinner Bar Association, and the Federal Bar Association. Before practicing law, Ms. Simmons obtained a nursing degree and was pursuing a master's degree in nursing education.

John A. Smietanka, United States Attorney for the Western District of Michigan,

B.A. Oblate Fathers' Scholasticate (Pass Christian, Mississippi), 1964; J.D. John Marshall Law School, 1968. Prior to 1981, Mr. Smietanka spent 11 years with the Berrien County, Michigan, Prosecutor's office as Assistant Prosecuting Attorney, Chief Assistant, and Prosecuting Attorney. From 1973 to 1974, he studied the work of the English Court System in London, at the invitation of the General Council for the Bar of England and Wales. He was appointed United States Attorney for the Western District of Michigan in 1981, and is currently on temporary assignment as Principal Associate Deputy Attorney General in the Office of the Deputy Attorney General. He has served as a member of the Michigan State Bar's Special Committee to Revise the Michigan Criminal Code and is currently a member of the State Bar Ethics Committee.

Patricia A. Streeter, Attorney,

B.S. Wayne State University, 1973; J.D. Detroit College of Law, 1979. Ms. Streeter has been a private practitioner in Detroit for 12 years. Her practice emphasizes prisoner civil rights issues and criminal defense. She has held the position of Legal Director of the ACLU Fund of Michigan, and has taught in the Paralegal Program at the Jackson Community College. In 1978, Ms. Streeter represented Detroit College of Law in the Regional National Moot Court Competition, and she was the recipient of the Sara Kilgore Award by the Women Lawyers Association of Michigan in 1988. Before practicing law, Ms. Streeter was an art teacher in the city of Detroit.

John R. Weber, Weber, Swanson & Dettman,

B.A. Michigan State University/University of Detroit, 1958; LL.B. Wayne State University, 1961. Mr. Weber has been in private practice with several firms in Marquette, Michigan since 1965, but has been with the firm of Weber, Swanson & Dettman for the past 18 years. He specializes in defense litigation in both state and federal court. From 1975 to 1988, he was appointed to serve as part-time United States Magistrate Judge for the Northern Division of the Western District of Michigan. Mr. Weber is a member of the American Bar Association, the Federal Bar Association, and the Michigan Defense Trial Counsel Association. He is current vice president of the board of directors of First of America, and a member of the Unified Trust Committee for that institution.

Honorable Richard A. Enslen, United States District Judge for the Western District of Michigan,

Kalamazoo College, 1949-51; Western Michigan University, 1954-55; LL.B. Wayne State University, 1958; LL.M. University of Virginia, 1986. He was appointed by President Carter as a United States District Judge in November 1979. Judge Enslen was in private practice from 1958 to 1965. He was Peace Corps Director in Costa Rica from 1965 to 1967, Michigan District Judge from 1968 to 1970, and in private practice again from 1970 to 1979. He is an adjunct professor in the Political Science Department at Western Michigan University. He is a co-author of The Constitutional Law Dictionary: Volume One, Individual Rights: Volume Two, Governmental Powers. He is also a co-author of The Constitutional Deskbook. Judge Enslen is a member of the Standing Committee on Dispute Resolution of the American Bar Association. He is the recipient of the Center for Public Resources' 1984 Outstanding Practical Achievement Award, and has received distinguished alumni awards from both Western Michigan University and Wayne State University.

Honorable Douglas W. Hillman, United States District Judge for the Western District of Michigan,

B.A. University of Michigan, 1946; J.D. University of Michigan, 1948. Judge Hillman was appointed by President Carter as a United States District Judge on September 28, 1979. He became Chief Judge on April 17, 1986 and Senior Judge on February 15, 1991. He is a member of the Federal Bar Association, the Michigan Bar Association, and the Grand Rapids Bar Association, of which he was president from 1965 to 1966. He is recipient of the Honorable Raymond W. Fox Advocacy Achievement Award; the Distinguished Alumni Award from Central High School, Grand Rapids, Michigan; named as one of "Michigan's 25 Most Respected Judges" in Michigan Lawyers Weekly, and in 1990 received the Champion of Justice Award from the State Bar of Michigan. In addition to his established legal career, Judge Hillman was a pilot in the United States Army Air Force and was decorated with the Distinguished Flying Cross.

Ralph Clark Chandler, Professor of Public Affairs and Political Science, Western Michigan University,

B.A. Stetson University, 1956; M.A. Rutgers University, 1962; B.D. Union Theological Seminary, 1965; Th.M. Princeton Theological Seminary, 1966; Ph.D. in Public Law and Government, Columbia University, 1970. Dr. Chandler teaches courses in Constitutional Law, Political Theory, and Public Administration at Western Michigan University, where he has won the University's teaching excellence award as well as the teaching excellence award bestowed by the Michigan Legislature. He has authored or co-authored some sixteen books and 57 articles in his fields of expertise, and he has received the Liberty Bell Award from the State Bar of Michigan for his contributions to constitutional interpretation. He is a frequent lecturer at the Michigan Judicial Institute, the Institute for Court Management of the National Center for State Courts, and in the training programs of individual state courts around the nation.

Susan K. Rigan, Staff Attorney, Civil Justice Advisory Group,

B.A. Western Michigan University, 1981; J.D. Thomas M. Cooley, 1984. Upon graduation from law school, Ms. Rigan began her legal career as Assistant Counsel for the Waterfront Commission of New York Harbor in New York City, New York. From 1987 through 1988 she established a private practice in New Jersey before beginning to serve as Assistant Director of the New Jersey Commission on Sex Discrimination in the Statutes. Ms. Rigan returned to Michigan in 1989 and focused her legal practice in insurance defense litigation. She is past president of the Kalamazoo County Bar Association - Young Lawyer's Division. She is a member of the American Bar Association, the Michigan Bar Association, the New Jersey Bar Association, and the Kalamazoo County Bar Association.

Janet T. Lawing, Administrative Analyst, Civil Justice Advisory Group,

B.A. Albion College (Music Education), 1972; M.A. Western Michigan University, 1986. Ms. Lawing was a teacher in the Marshall Public School system for two years, graduate assistant for Western Michigan University's School of Public Affairs and Administration from 1984 to 1986, and Fine Arts Coordinator at Kalamazoo College from 1987 through 1990. She also owned and operated a private catering business during this time. Ms. Lawing was on the board of directors of Common Cause in Michigan from 1984 to 1986. She is currently vice-president of Kalamazoo Singers and a vocal instructor at Kalamazoo College - Music Center. She will be awarded her M.P.A. from Western Michigan University in 1992.

Georgann Parker, Administrative Analyst, Civil Justice Advisory Group,

B.A. Otterbein College (Westerville, Ohio), 1985: J.D. University of Toledo Law School, 1988. Ms. Parker was a certified legal intern for the Toledo Municipal Court and other various Ohio Municipal courts for three years. She was a member of the Appellate Advocacy Moot Court Team and competed in regional competition. In 1990, Ms. Parker worked full-time as Campaign Logistics Manager on Michigan's Third District United States Congressional race. She is a current member of the Battle Creek Jaycees and was on the board of directors as well as past training director for the Jaycees from 1990 to 1991. She was also chairperson for a special events division of the 1991 Special Olympics.

Paul C. Friday, Consultant, Civil Justice Advisory Group,

B.A. Drew University (Madison, New Jersey), 1964; M.A. University of Wisconsin, 1966; Ph.D University of Wisconsin, 1970. Dr. Friday is Director of Criminal Justice and Professor of Sociology at Western Michigan University. He is a senior partner in Research and Training Specialists, a consulting firm specializing in research, data analysis, and evaluation of social and legal programs. He has been a visiting professor in Germany, Sweden, and Greece, and a visiting scholar at the University of Cambridge, England. He has published works in criminological theory, juvenile delinquency, victimology, and social policy. He is past chair of the Kalamazoo Criminal Justice Commission and chair of Grants and Standards for the Michigan Community Corrections Board.

Richard J. Liles, Consultant, Civil Justice Advisory Group,

B.S. Central Michigan University, 1969; M.S. Michigan State University, 1981; D.P.A. Western Michigan University, 1987. Dr. Liles is currently a management consultant within the Office of Management and Information Systems, Michigan Department of Management and Budget. In this capacity, he has had responsibility for over 25 major management improvement efforts for state government. Dr. Liles has served as Director of the Michigan Office of Criminal Justice, and assisted in founding the National Criminal Justice Association. His efforts to improve criminal justice practices were recognized by the Michigan Legislature in a 1984 tribute. Dr. Liles also teaches graduate courses for Western Michigan University, School of Public Affairs and Administration in corrections administration. He has served as a Corrections Specialist Master for the United States District Court for the Eastern District of Michigan.

Robert A. Wertkin, Consultant, Civil Justice Advisory Group,

B.A. Washburn University (Topeka, Kansas), 1970; M.S.W. University of Kansas, 1974; D.S.W. University of Utah, 1981. Dr. Wertkin is Associate Director of the Western Michigan University School of Social Work and a senior partner in the consulting firm Research and Training Specialists. Dr. Wertkin recently completed an 18 month leave of absence from academia to serve as a Special Assistant to the Director of the Michigan Department of Social Services and Executive Advisor to the Office of Children and Youth Services. He has conducted more than 20 research studies in criminal justice, child welfare, job satisfaction, organizational structure, job stress, public welfare, and mental health. He has published numerous scholarly articles and monographs and has consulted with organizations at every governmental level.

Martha R. Strong, Secretary, Civil Justice Advisory Group,

B.S. Wayne State University, 1976; M.A. University of Detroit, 1986. Ms. Strong has taught secondary education in the Detroit Public School system, the Archdiocese of Detroit School system, and the Kalamazoo Public School system. From 1981 to 1987 she was office manager for the Director of Polymer Technologies at the University of Detroit, and in 1989, she was the administrative assistant for the Honorable Frances Pitts, Presiding Judge of Wayne County Probate Court - Juvenile Division. She is presently on the board of directors for the Roy C. Barnes, Jr. Scholarship Fund. Ms. Strong expects to receive her Ph.D in 1996...slow and steady.

APPENDIX C

OPERATING PROCEDURES OF THE ADVISORY GROUP

OPERATING PROCEDURES

As required by the Civil Justice Reform Act of 1990, an Advisory Group for the Western District of Michigan was convened by then-Chief Judge Douglas W. Hillman on February 14, 1991. The Honorable Benjamin F. Gibson subsequently became Chief Judge for the Western District.

The chairperson and members of the Civil Justice Advisory Group were nominated and requested to serve by the judges of the district. A concerted and deliberate effort was made to appoint members who collectively represented the entire range of civil litigation in the district. Since prisoner petitions comprise a high percentage of civil filings, the Advisory Group's membership included an Assistant Attorney General for the State of Michigan who regularly defends these claims, as well as attorneys who frequently represent prisoners. A vice president of a major manufacturer in the district, an officer of an insurance company, a county sheriff, plaintiff's counsel, defense counsel, business lawyers, and others were represented on the Advisory Group. The membership included an attorney from the Eastern District of Michigan who regularly practices in the Western District.

The Advisory Group first met informally in January, before a final copy of the Civil Justice Reform Act of 1990 was available for review. Working from a late draft of the bill, the Advisory Group reviewed statistics compiled by the Clerk of the Court, who was the group's initial Reporter. The Group reviewed the legislation's requirement that the Western District act as a demonstration

district implementing a plan of differentiated case management, as well as the stipulation that if a plan were developed and implemented by December 31, 1991, the district would be designated by the Judicial Conference as an early implementation district. A consensus was reached about the general nature of the differentiated case management plan to be proposed.

Subsequently, the Advisory Group divided itself into five subcommittees, each concentrating on a major focal point of the intended plan. They were subcommittees on (1) tracking (differentiated case management), (2) discovery, (3) alternative dispute resolution, (4) cost control and client involvement, and (5) education and publicity. Each subcommittee met at its convenience at various locations throughout the district. The arrangement was beneficial to the Advisory Group because it allowed each subcommittee to contribute specific information to the report in its area of concentration. It also provided a free exchange of information both inside and outside the group's meetings, which were held at various locations in Grand Rapids and Kalamazoo, Michigan.

In April, 1991, the Advisory Group determined that it lacked the expertise to design and implement a system for monitoring either the cost effectiveness of various differentiated case management techniques or the degree to which these techniques affected the perception of justice on the part of litigants. Social scientists from Western Michigan University and from the Michigan Department of Management and Budget with backgrounds in court management and statistical analysis were asked to consult, at first on a voluntary basis, with the Advisory Group to provide this expertise. After Congress authorized funds for

the development and implementation of a plan and the Advisory Group made appropriate recommendations, the scientists were appointed by Chief Judge Gibson as paid consultants. At the request and recommendation of the Clerk of the Court, and with the concurrence of the Advisory Group, Dr. Ralph Clark Chandler was appointed by Chief Judge Gibson to replace Clerk C. Duke Hynek as Reporter for the Advisory Group. The court's liaison judge, the Honorable Richard A. Enslen, attended most of the Advisory Group's meetings. Chief Judge Gibson attended meetings in the absence of Judge Enslen. The Honorable Douglas W. Hillman was an ex-officio member of the Advisory Group.

The Advisory Group analyzed the conditions of the Western District's civil and criminal dockets along with identifying the trends in case filings. Analysis in filing trends included particular emphasis on the identification of the categories of cases that create special burdens. The most numerous of these in the Western District are prisoner civil rights cases and cases involving complex litigation.

With the assistance of its consultants, the Advisory Group gathered cost and delay information through statistical analysis and extensive personal interviews. Twenty interviews with litigants and attorneys served by the district were conducted. The fourteen attorneys and six litigants in the sample were involved in a wide range of suits, including contract and insurance, motor vehicle-personal injury, product liability-personal injury, banks and banking, prisoner complaints, property rights, and environmental matters. The interviews

were designed with state-of-the-art techniques to generate the most reliable data possible to obtain.

Interviews were also conducted with twenty-seven members of the federal court system, including the federal district judges themselves, their case managers, the magistrate judges, and representatives of the clerk's office, the U.S. Attorney's office, the U.S. Marshal's office, the Federal Probation office, and the Clerk of the Bankruptcy Court. The consultants' use of individual interviews was a particularly effective method for providing information on the court, its processes, and the perceptions of it around the district.

The Advisory Group met twelve times. The draft plan was submitted in rough form to all judicial officers of the district approximately one week before publication of the draft for public comment. The Advisory Group arranged eight public comment sessions in the four principle cities in the district: Grand Rapids, Lansing, Kalamazoo, and Marquette. Copies of the plan's executive summary were mailed in early November to approximately sixty bar associations, newspapers, public libraries, and other contact sources interested in the operation of the court. The draft of the plan intended for public comment was also made available for review at the clerk's offices in Grand Rapids, Lansing, Marquette, and Kalamazoo, as well as the Thomas M. Cooley Law School and other locations in the district.

The Advisory Group extends sincere appreciation to the Administrative Office of the U.S. Courts and the Federal Judicial Center for providing very helpful information on matters relevant to the report. We also gratefully acknowledge

the production assistance of Diana L. Megee of Howard & Howard, Kalamazoo, Michigan, and Kim J. Greer, systems administrator of the United States District Court for the Western District of Michigan. Ms. Greer's expertise provided the Advisory Group with the high quality graphics contained in the report.

APPENDIX D

SAMPLE ORDER SCHEDULING EVENTS

ORDER SCHEDULING EVENTS

Several reasons support the initial use of an order scheduling events as the implementation mechanism of the differentiated case management plan. First it provides the court with the flexibility to create a plan tailored to the individualized needs of the case. Second, there will be a greater likelihood of acceptance among practitioners if the procedural devices retain some familiarity, and scheduling orders are regularly used in this court. Third, it is the most expeditious manner to effectuate the recommendations set forth in the plan.

It is important for the reader to recognize that the attached order is merely a representative sample of the variety of case management techniques available for the court to utilize. The precise combination to be developed for each case will be left to the discretion of the judicial officer assigned to the case.

SAMPLE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

PLAINTIFF,

v. File No.

DEFENDANT.

_____/

ORDER SCHEDULING EVENTS[58]

To initiate early disposition by settlement, dismissal, or other means, and to facilitate the timely and efficient completion of discovery.

IT IS HEREBY ORDERED:

I. INITIAL CASE MANAGEMENT CONFERENCE

Within 10 working days of the filing of an answer or first responsive pleading and before any party may initiate discovery, a telephone conference must be mutually arranged by the parties and the Court. The parties are

[58] An asterisk preceding a provision indicates that the subcommittee was not in full agreement.

strongly encouraged to voluntarily discuss and exchange the information listed in the prediscovery disclosure provision (Section II of this Order) prior to the date arranged for the telephone conference.

A judicial officer of the court will preside over the telephone conference. The matters to be addressed during the telephone conference include discussion of any jurisdictional issues or other dispositive issues, the time frame for filing dispositive motions not dependent upon discovery, the need for prediscovery disclosure or a phased discovery plan, and the desirability of ADR options, or settlement discussions in resolving some or all issues. An order will issue setting forth the deadlines for filing any dispositive motions, completing any prediscovery disclosure or phased discovery, and scheduling the next case management conference, if necessary.

Prediscovery disclosure or phased discovery will be ordered unless a party articulates grounds for excuse relating to either the unnecessary burden or expense of making disclosures.

II. PREDISCOVERY DISCLOSURE

A. When prediscovery disclosure is ordered, no other discovery requests may be served until each party to the action has served upon all other parties of record a statement containing the following:

(1) The names and addresses of all persons known to have knowledge or information pertinent to the events, transactions, or occurrences that gave rise to the action, and the nature of

the knowledge or information each such individual is believed to possess;

(2) An identification of those issues which the party intends to be the subject of expert witness testimony at the trial of the action, and the identity of any person whom the party presently intends to call as an expert witness at trial, and the issue(s) as to which that person will testify;

(3) A list of the documents or, in the case of voluminous documentary information, a list of the categories of documents, which are in the party's possession, custody, or control and which that party believes are pertinent to the events, transactions, or occurrences that gave rise to the action, and the date(s) upon which those documents will be made available for inspection and copying or provided; and,

*(4) A list of the documents or, in the case of voluminous documentary information, a list of the categories of documents, which that party believes are pertinent to the events, transactions, or occurrences that gave rise to the action, and which that party believes are in the possession, custody, or control of any other party to the action.

*B. No discovery shall be necessary to secure the information of matters required to be disclosed, and a party shall be protected against such discovery as provided in Rule 26 subdivisions (c) and (g) of the Federal Rules of Civil

Procedure, except that an opposing party shall be entitled pursuant to Rule 30 to depose prior to trial any witness identified by the disclosing party.

C. Failure to provide discovery, or providing misleading disclosures, will subject the offending party to sanctions as provides by Rule 37 of the Federal Rules of Civil Procedure.

This disclosure obligation is reciprocal and continues throughout the case.

III. CASE MANAGEMENT STATUS CONFERENCE

This case is set for case management status conference on _____, [a date 90 days from the first answer or first responsive pleading].

All individual parties, an executive officer of any corporate party and/or any executive officer of any insurance carrier of any party, who has been given complete and unrestricted authority to negotiate a settlement are required to appear personally.

A. Preparation by Counsel of Joint Status Report

Prior to the scheduled conference, trial counsel shall confer and prepare a joint case management status report.

The joint case management status report is to be filed with the Court no later than _____ [at 45 days into the litigation, which provides 45 days before the conference]. Counsel for the Plaintiff(s) shall arrange this conference and it is the duty of all counsel to jointly participate in and facilitate it.

The report shall contain, to the extent then known:

1. Joint Discovery Plan. [See Section IV of this Order.]
2. Stipulations.
3. The contentions of each party and the issues of fact and law.
4. A statement indicating whether pendent state claims are involved.
5. Identification of all dispositive issues not dependent upon discovery.
6. A list of all exhibits, witness and discovery material, including:
   (a) Estimates of time needed to complete discovery; and
   (b) Estimates of the cost of discovery, including attorney fees.
7. The parties will specify which method of ADR is preferred.

*IV. JOINT DISCOVERY PLAN

Counsel shall as part of their case management conference report or case management plan prepare and submit a joint discovery plan, scheduling the time and length for all discovery events. The plan shall conform to the obligations to limit discovery under Rule 26(b) of the Federal Rules of Civil Procedure.

Counsel's plan shall consider the desirability of conducting phased discovery, if not already the subject of an order entered at the initial case management conference, limiting the first phase to developing information needed for a realistic assessment of the case. That assessment shall include the identification of dispositive issues not dependent upon discovery, such as jurisdiction and immunity. Dispositive motions not dependent upon discovery shall be filed

within sixty (60) days of the filing of the first answer or first responsive pleading. If the case does not terminate at the conclusion of the first phase, the second phase shall be directed at information needed to prepare the case for trial.

V. AGENDA AT THE STATUS CONFERENCE

1. Counsel shall be prepared to discuss:
   (a) Possibility of settlement by use of extrajudicial procedures;
   (b) Disposition of pendent claims;
   (c) Need for adopting special procedures for managing difficult or protracted litigation that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
   (d) Use of alternative dispute resolution methods;
   (e) The extent of discovery necessary; and
   (f) All other appropriate matters.
2. The Court will establish, insofar as applicable, the time for:
   (a) Joining other parties and amending the pleadings;
   (b) Filing of additional motions;
   (c) ADR method and deadlines;
   (d) Pendent state claim hearing; and
   (e) Completion of discovery.

VI. SCHEDULING ORDER

A Scheduling Order will be entered at the conclusion of the conference that provides for an early, firm trial date, such that the trial is scheduled to occur within eighteen months of the filing of the complaint, unless a judicial officer certifies that:

1. The demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or
2. The trial cannot reasonably be held within such time because of the complexity of the case or the number of pending criminal cases.

VII. DEFAULT

Failure to prepare and file a required status report, or pretrial order; failure to appear at a conference; appearance at a conference substantially unprepared; or failure to participate in good faith may result in any of the following sanctions:

1. The striking of a pleading.
2. A preclusion order.
3. Staying the proceedings.
4. Default judgment.
5. Assessment of expenses and fees (either against a party or the attorney individually).
6. Or any other such order as the Court may deem appropriate.

VIII. PRETRIAL SETTLEMENT CONFERENCES BY A MAGISTRATE JUDGE OR JUDGE

In addition to the Case Management Status Conference, the court may upon its own motion or at the request of any party order a pretrial or settlement conference at a time and place set by the court. A magistrate judge may officiate.

The attorney who will try the case for each party shall appear, accompanied by parties, interested parties and/or representatives who have full settlement authority. No settlement authority provision of this order [or rule] shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, or any delegation of the Attorney General. Only the judge may excuse attendance by any attorney, party, interested party or representative. The court may order that representatives of the parties with authority to bind them in settlement discussions be available by telephone during any settlement conference, including the case management status conference.

The parties, their representatives, and attorneys are required to be completely candid with the judicial officer conducting the conference so that settlement negotiations may be properly guided. The failure to attend a settlement conference or the refusal to cooperate fully within the spirit of the discussions may result in imposition of the sanctions mentioned in paragraph VII of this order [or rule]. The judicial officer presiding over the conference may make such other and additional requirements of the parties and/or persons having an interest in the outcome considered necessary to expedite an amicable resolution

of the case. The magistrate will not discuss the merits of the case with the judge, but shall have the right to meet jointly or individually with parties or persons or representatives interested in the outcome of the case without the presence of counsel. No statements, admissions, or conversations will, in any form, be used in the event of subsequent trial.

*IX. RESOLUTION OF DISCOVERY DISPUTES

Before filing discovery motions, counsel shall make a reasonable effort to confer to resolve discovery disputes. Any dispute not so resolved may be presented informally by telephone conference between the contesting parties and the magistrate. Counsel seeking discovery shall arrange the telephonic conference. In advance of the conference, counsel shall provide the court with a brief statement describing the discovery sought and the response at issue. See Proposed Local Rule __ [that would spell out the telephone conferencing procedures]. No motion may be filed without leave of court. Any such application shall be accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion.

X. TIME EXTENSIONS

Time extensions for discovery, joinder, or pleading deadlines will rarely be granted unless filed within 60 days of this Order. It is the policy of this court to discourage extensions. Discovery extensions are granted only for good cause

shown and the failure to promptly file a discovery motion presumptively negates subsequent assertions of good cause because of delay. All such requests for extension therefore must be made by written motion signed by the attorney making the request and may be set for hearing by the Court. All counsel and parties may be required to be personally present at any hearing.

Dated: _____ _____

U.S. District Judge

APPENDIX E

SAMPLE ORDER FOR IMPLEMENTATION OF THE DIFFERENTIATED CASE MANAGEMENT AND COST AND DELAY REDUCTION PLANS

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

The District Court, after considering (1) the recommendations of the Civil Justice Advisory Group appointed pursuant to Title 28, United States Code, section 478; (2) the principles and guidelines of litigation management and cost and delay reduction techniques listed in Title 28, United States Code, section 473(a); and (3) the litigation management and cost and delay reduction techniques listed in Title 28, United States Code, section 473(b),

and

after consulting with the Civil Justice Advisory Group in reference to Title 28, United States Code, section 473(a) and (b),

adopts and implements this Civil Justice Expense and Delay Reduction Plan, pursuant to Title 28, United States Code, section 471, et seq.

1. *Findings.* Based on this court's review of the Report of the Civil Justice Advisory Group and this court's independent assessment of the condition of its docket, we find:

a. That the court is generally meeting its responsibility to litigants and the public to provide a "just, speedy, and inexpensive determination of every [civil] action."

b. That opportunities for improving and enhancing the ability of the court to provide a "just, speedy and, inexpensive determination of every [civil] action" exist and that monitoring and shaping the "ways in which litigants and their attorneys

approach and conduct litigation" (Title 28, United States Code, section 472(c)(1)(C)), may serve to reduce excessive civil litigation costs and delay, to the degree they exist in this district.

c. "Court procedures" (Title 28, United States Code, section 472(c)(1)(C)), especially those related to case management, have been used in a generally effective way to reduce cost and delay; and that the clarification, codification, and well-considered systematic application of these court procedures may serve to improve the rendition of just, timely, and efficient civil justice in the district.

It appears clearly to the court that there exists no valid method for quantifying the cost effectiveness of the court's procedures, or for determining precisely whether litigation in the district is excessively costly, or what aspects of the court's procedures may contribute to excessive costs. The court is aware that litigants and their attorneys have expressed the subjective view that the court's trailer docket system and method for resolution of motions in civil cases, particularly discovery motions, contributes to increased and unnecessary cost in litigation.

The court believes that the methods for alternative dispute resolutions set forth in its existing local court rules have been helpful, but their success has been hampered by the

unavailability of limited sanctions, given the decision in Tiedel v. Northwestern Michigan College, 865 F.2d 88 (1988).

2. *Actions.* The court hereby ORDERS:

That the recommendations and proposed plan of the Civil Justice Advisory Group be adopted and that the court implement, through orders in individual cases, a system of differentiated case management involving the assignment of all civil litigation in the district to one of six case management tracks, as defined in the Advisory Group's plan. Assignment of civil litigation to tracks will be done by a judicial officer following an early status conference conducted pursuant to Federal Rule of Civil Procedure 16, either by attendance of the parties in person, or through telephone conferencing. Alternatively, cases may be assigned to tracks following informal telephone conversations among the parties and a judicial officer.

The Advisory Group's recommendation and plan for detailed monitoring of the cost of litigation, the timeliness of resolution, and the level of satisfaction of litigants with the court's processes is approved. The court will urge the cooperation of litigants and their attorneys in providing, on a confidential basis when necessary, detailed and pertinent data relating to attorneys' fees, and other costs associated with particular aspects of litigation in the district.

3. *Disposition of the Plan.*

a. Pending further action by the court, this plan will be in effect for the longest period of time permitted by the Civil Justice Reform Act of 1990. The court may revise the plan from time

to time, as it sees fit, subject to statutory requirements, and will provide due notice of any such revision. In the event the court's experience with implementation of the plan leads to the conclusion that amendment of the court's local rules is appropriate, the court will request the Civil Justice Advisory Group to make recommendations for changes in the rules to the court or such committees as the court may appoint to consider the revision or adoption of local court rules.

The court directs the Civil Justice Advisory Group to report periodically to the court, no less frequently than twice per calendar year, so as to advise the court regarding the cost effectiveness of its civil case management practices, revisions that may be required in the plan or local rules, and other matters pertinent to the court's plan of differentiated case management. The reports of the Civil Justice Advisory Group shall be made available to the public.

Educational material such as video tapes, pamphlets, or other materials contemplated by the plan shall be submitted to the court for approval before dissemination.

b. Pursuant to Title 28, United States Code, section 472(d) and section 474(a), the court hereby ORDERS that this plan, and the Report of the Civil Justice Advisory Group, be submitted to the Chief Judge of this district for distribution to (1) the

Director of the Administrative Office of the United States Courts; (2) the Judicial Council of the United States Sixth Circuit Court; (3) the chief judge of all other United States district courts located within the Sixth Circuit; (4) the chief judge of the United States Court of Appeals for the Sixth Circuit; and (5) the Judicial Conference of the United States.

Adopted and Implemented by the Court,

December _____, 1991