REPORT

of the

ADVISORY GROUP ON LITIGATION COST AND DELAY

for the

UNITED STATES DISTRICT COURT

for the

EASTERN DISTRICT OF TENNESSEE

December 18, 1992

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The Civil Justice Reform Act Advisory Group for the United States District Court for the Eastern District of Tennessee is pleased to submit the following report in accordance with 28 U.S.C. § 472.

Respectfully submitted this 18th day of December 1992.

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TABLE OF CONTENTS

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INTRODUCTION

Pursuant to the Civil Justice Reform Act of 1990, then Chief Judge Thomas G. Hull in 1991 appointed an Advisory Group on Litigation Cost and Delay for the United States District Court for the Eastern District of Tennessee. This Group consists of 21 individuals from the Eastern District of Tennessee; brief biographies of the Group's members are set forth in Appendix A to this report.

The Advisory Group met throughout 1991 and 1992, both as a Group and as seven separate committees composed of Group members. In addition, the Group conducted an intensive two-day weekend conference on May 8 and 9, 1992.

Pursuant to its statutory mandate, the Advisory Group, as a first step, assessed the civil and criminal dockets of the District Court. This assessment of the docket included a consideration of statistical data from the Administrative Office of the United States Courts, the Federal Judicial Center, and the Office of Clerk for the United States District Court for the Eastern District of Tennessee. The assessment also included an analysis of random civil and criminal cases filed within the district, surveys of attorneys and litigants involved in litigation within the district, and interviews with district judges, magistrate judges, and court personnel. More detailed information concerning the case assessment, attorney and litigant surveys, judicial interviews, and other operations of the Advisory Group is contained in Appendix B to this report.

Group members were appointed to committees concerning alternative dispute resolution, complex litigation and judicial management, the criminal docket, differential case management, discovery, education and credentialing, and motion practice. As members of these committees, Group members reviewed relevant literature, including portions of the reports of other advisory groups, studies concerning litigation delay and expense, and expense and delay reduction plans and local rules from other districts.

Based upon the information gleaned in this fashion and on the views and experience of the Group's members, the Advisory Group offers this report concerning litigation cost and delay within the United States District Court for the Eastern District of Tennessee. Section I of the report is a description of the United States District Court for the Eastern District of Tennessee. Section II is the Advisory Group's assessment of the Court's civil and criminal dockets. Section II(A) describes the condition of the Court's dockets, while Section II(B) analyzes trends in case filings and in the demands being placed upon the Court's resources. Section II(C) presents the Group's findings concerning the principal causes of cost and delay in civil litigation within the district, and Section II(D) is an examination of the extent to which cost and delay could be reduced by a better assessment of the impact of new legislation on the courts. Section III of the report contains the Advisory Group's recommendations for reducing cost and delay in civil litigation within the Eastern District of Tennessee. Included within this final major section is an explanation of the manner in which the Advisory Group's recommendations will help reduce the principal causes of cost and delay identified in Section II. Appendix C to the report is a draft Civil Justice Expense and Delay Reduction Plan which is respectfully proposed by the Advisory Group to reduce litigation cost and delay within the United States District Court for

the Eastern District of Tennessee.

I. A DESCRIPTION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

The United States District Court for the Eastern District of Tennessee handles federal cases in a geographic area running from near the center of Tennessee to the state's eastern boundary. The district encompasses 41 of Tennessee's 95 counties, with a 1990 population of approximately 2,000,000. Although many of these counties are rural, major urban areas in the district include Knoxville (in a metropolitan statistical area of 604,816), Chattanooga (with 433,210 in its metropolitan statistical area), and the Tri-Cities area of Johnson City, Kingsport, and Bristol (forming a metropolitan statistical area of 436,047).

The district is divided into four divisions. Cases within the Northeastern Division, composed of 10 counties with an aggregate population of 504,509, are heard in Greeneville. Cases filed in the Northern Division, composed of 14 counties with an aggregate population of 810,713, are heard in Knoxville. Cases filed in the Southern Division, composed of 9 counties with an aggregate population of 491,043, are heard in Chattanooga. Civil, but not criminal, cases filed within the Winchester Division, composed of 8 counties with an aggregate population of 189,553, are heard in Winchester.

Criminal cases are not given a separate Winchester designation; instead, criminal cases from that division's geographic area are assigned to the Southern Division and heard in Chattanooga. Therefore, for the purposes of the assignment of criminal cases, the relative populations in each division are: 504,509 (Northeastern), 810,713 (Northern), and 680,596

(Southern).

There are two district judges and two magistrate judges in Knoxville. One district judge and one magistrate judge sit in Greeneville. In Chattanooga, there is another district judge and one additional magistrate judge. A fifth district judgeship was authorized for the district in 1990, and that appointee, once nominated and confirmed, will sit in Chattanooga.

In addition to their duties in Knoxville and Greeneville, Magistrate Judges Murrian, Phillips, or Tilson hold court in Sevierville on the second and fourth Wednesdays of each month. These sessions are to handle petty criminal offenses occurring within the Great Smoky Mountains National Park and Cherokee National Forest. On the second Thursday of each month, either Magistrate Judge Murrian or Magistrate Judge Phillips hold court in Huntsville to conduct petty criminal offense hearings arising from the Big South Fork National River and Recreation Area.

Each district judge has a staff consisting of one secretary and two full-time law clerks. The Chief Judge, currently domiciled in Knoxville, has a third law clerk, a position allocated to chief judges in districts in which there are at least five authorized judgeships. Each magistrate judge has a staff consisting of one secretary and one full-time law clerk.

The Clerk's Office has three staffed offices, in Knoxville, Chattanooga, and Greeneville. The Clerk, Mr. Murry Hawkins, is located in Knoxville, which is the administrative headquarters of the Clerk of Court. There are 42 employee positions authorized for the Clerk's Office, which is an increase of 26 positions from that office's complement of 16 in 1980. The majority of the employees, 23, are in Knoxville, where several district-wide functions are handled as well as the business of the Northern (Knoxville) Division. The Southern

(Chattanooga) Division has 11 employees, and the Northeastern (Greeneville) Division has eight employees. Another office in the district, in Winchester, is unstaffed except on the approximately four occasions each year when civil cases are heard in Winchester. At those times, Clerk's Office staff from one of the other divisions travel to Winchester and staff the office. The civil case files for Winchester are maintained in the Knoxville office.

The district acquired its first computers in 1986. By 1989, it had acquired several more computers and was deeply involved in automation. An automation unit, headed by a systems manager, was established in the Clerk's Office in 1989. That unit now has a staff of four, with responsibility for all computer systems in the district, including those in chambers. The unit has its offices in Knoxville but automation unit personnel travel frequently to the other divisions. All of the judge's chambers now have computer systems, although not all of the judges and law clerks have availed themselves of this technology. By the end of 1992, the district's civil docket is expected to be on-line with the Integrated Case Management System. Under this system of electronic docketing, the Clerk's Office will be able to track cases more accurately and generate internal case management reports.

The district's workload grew somewhat gradually until the 1980's, when litigation began to increase, an increase due in part to a number of bank failures within the district. These increased case filings have led to increases in the numbers of personnel authorized for the Clerk's Office and in authorized district judgeships and magistrate judge positions. In 1984, a new district judgeship was authorized for the Court, the first in 22 years. On December 1, 1990, a fifth district judgeship was authorized. This judgeship has never been filled. The number of full-time magistrate judges within the district increased from two to three in 1985 and

from three to four in 1991.

Because of increased pro se filings, in 1988 a pro se unit was established in the district. This unit is staffed by two pro se law clerks and one pro se writ clerk. One of the pro se law clerks and the pro se writ clerk are located in Knoxville, and the second pro se law clerk is in Greeneville.

At present, the caseload within the district is distributed so that Judge Jarvis handles all Winchester civil cases (only civil cases being given a Winchester designation) and Judge Hull handles all cases in Greeneville. Until recently, the Knoxville and Chattanooga dockets were divided as follows:

	Knoxville Civil	Knoxville Criminal	Chattanooga Civil	Chattanooga Criminal
Jarvis	40%	33%	8.5%	12.5%
Hull	20%	33%	-	12.5%
Edgar	-	-	83%	75%
Jordan	40%	33%	8.5%	-

As a result of recent increases in case filings in the Northeastern Division, the Knoxville and Chattanooga dockets are now divided as follows:

	Knoxville Civil	Knoxville Criminal	Chattanooga Civil	Chattanooga Criminal
Jarvis	40%	50%	8.5%	16.5%
Hull	20%	-	-	-
Edgar	-	-	83%	83.5%
Jordan	40%	50%	8.5%	-

This apportionment of the docket is illustrative of efforts to share the workload within the district. In addition to bimonthly meetings, the district judges are in regular communication and cooperate with each other and with other court personnel. Similarly, the magistrate judges

hold quarterly meetings and share both the Court's workload and new ideas and judicial techniques. The Clerk's Office publishes a newsletter, which furthers cooperation within the district, and Clerk's Office and Probation Office personnel travel to different divisions of the district when cases demand such travel. This sharing of the Court's workload has been particularly important as the district continues to operate without its full complement of district judges. When the fifth district judge takes office, the necessity for some of the travel within the district should be reduced.

II. ASSESSMENT OF THE CIVIL AND CRIMINAL DOCKETS

Section 472(c)(1) of Title 28 of the United States Code requires the Advisory Group to "complete a thorough assessment of the state of the court's civil and criminal dockets." This assessment is to include:

a determination of the "condition of the civil and criminal dockets," 28 U.S.C. § 472(c)(1)(A);

an identification of "trends in case filings and in the demands being placed on the court's resources," 28 U.S.C. § 472(c)(1)(B);

an identification of "the principal causes of cost and delay in civil litigation," 28 U.S.C. § 472(c)(1)(C); and

an examination of "the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts." 28 U.S.C. § 472(c)(1)(D).

This section of the report presents the Advisory Group's assessment of the District Court's civil and criminal dockets.

A. The Condition of the Civil and Criminal Dockets. Statistical data from the Clerk of Court, the Administrative Office of the United States Courts, and the Federal Judicial Center provide a picture of the condition of the civil and criminal dockets of the United States District Court for the Eastern District of Tennessee.

1. The Civil Docket. There were 2031 civil filings in the district during the twelve month period ended June 30, 1992, an increase of 378 filings (23%) over the 1653 civil cases filed in the district for the year ended June 30, 1991. However, the statistical year 1991 filings were down significantly from the 2245 civil filings in the year ended June 30, 1990, as well as from the record 2687 civil filings in the twelve month period ended June 30, 1985.

The drop in civil cases since 1985 is attributable in large part to greatly reduced filings in two categories of cases, neither of which place heavy demands upon judicial officers. First, there were 165 fewer social security cases (193 rather than 358), and second, 472 fewer student loan and veteran's cases (57 rather than 529) were filed in statistical year 1992 than in statistical year 1985. These changes within the district parallel national filing trends. As the Director of the Administrative Office of the United States Courts noted in his 1990 Annual Report, "Throughout most of the past decade, the changes in the volume of civil filings have been determined by the number of cases involving the U.S. in two areas: actions by the U.S. to recover overpayment of veterans' benefits (VA cases) and actions against the U.S. regarding

social security disability insurance benefits." However, there also were 205 fewer contract cases filed within the district in statistical year 1992 than in statistical year 1985, with contract filings dropping by 48 percent from 431 to 226. Contract cases generally make relatively greater demands upon the district's judicial officers than do social security, student loan, or veteran's cases.

Civil case filings within the district are generally reflective of nationwide trends. For the statistical year ended June 30, 1992, nationwide civil filings rose by 9 percent, as compared to the 23 percent increase in civil filings within the district. For the statistical year ended June 30, 1991, nationwide civil filings decreased 4.7 percent from the previous statistical year, representing the third consecutive annual nationwide decline in civil case filings. During this three year period, nationwide civil filings declined by 13.3 percent, while there was a 20.1 percent decline in civil filings within the Eastern District of Tennessee.

Over the latest three year reporting period (for the year ended June 30, 1990, through the year ended June 30, 1992), five categories of cases comprised almost three-quarters of the total civil filings within the Eastern District of Tennessee. These case categories and the percentage of total civil filings that each category comprised over the three year period are: prisoner cases (24%), personal injury (18%), contract (12%), civil rights (10%), and social security (7%).

Not all categories of civil cases impose a comparable burden upon a court system. The Federal Judicial Center has developed a system of "case weights" to estimate the burden that an average case of a particular type imposes upon a district court. Under this case weighting system, a greater case weight is assigned to a civil rights or ERISA case than to a prisoner or

student loan case because of the differing amounts of judicial time that these cases typically demand. When case weights are assigned, the five largest categories of civil cases in the district over the last three statistical years and the approximate percentage of the civil docket that they comprise are: civil rights (24%), personal injury (19%), contract (13%), prisoner (10%), and social security (6%).

The district is fortunate in having four magistrate judges who handle many pretrial matters and, with the consent of the parties, civil trials. Apart from pretrial matters in civil and criminal cases pending before the district judges, as of June 30, 1992, the four magistrate judges in this district had on their own dockets 131 civil cases in which counsel had consented to adjudication by a magistrate judge. Magistrate judges presided over 31 civil trials (7 non-jury and 24 jury) in the year ended June 30, 1992. These 31 trials represented 27 percent of the civil trials within the district for that year. For the year ended June 30, 1991, magistrate judges tried 17 non-jury and 25 jury cases, which represented 21 percent of the civil trials within the district. In statistical year 1991, a total of 186 cases that were assigned to magistrate judges by consent were terminated; in statistical year 1992, this number rose to 194.

2. The Criminal Docket. While the number of civil filings declined in statistical years 1990 and 1991 before rising in statistical year 1992, criminal felony filings within the district have risen every year since 1987. According to statistics provided by the Clerk's Office, there were 423 criminal felony filings in the district during the twelve month period ended June 30, 1992. This is an 11 percent increase from the 380 felony filings for the year ended June 30, 1991, a 29 percent increase from the 327 felony filings in statistical year 1990, and a 123

percent increase from the 190 felony filings for the year ended June 30, 1989.

In both statistical years 1991 and 1992, the Administrative Office of the United States Courts ranked the district first in the Sixth Circuit and 15th in the nation in the number of felony filings per judgeship. For the year ended June 30, 1992, Administrative Office statistics show that there were 81 criminal felony filings per judgeship within the district, which was more than 50 percent higher than the national average of 53 felony filings per judgeship for that year. For statistical year 1991, the 78 criminal felony filings per judgeship were 50 percent more than the national average of 52 felony filings per judgeship.

The record number of felony cases within the district is accompanied by much more moderate nationwide increases in criminal felony filings. National felony filings increased by 3.2 percent from statistical year 1991 to statistical year 1992 and by 14.9 percent for the three year period from statistical year 1989 to statistical year 1992. These national increases pale by comparison with the 11 percent increase in the district's felony filings from statistical year 1991 to statistical year 1992 and the 123 percent increase from statistical year 1989 to statistical year 1992. Thus, over the last three statistical years, felony filings within the district increased by more than eight times as much as did felony filings nationwide.

Interestingly, the record number of felony filings within the district has come during a period when state criminal filings have declined. During the statistical year 1989, 24,039 criminal prosecutions were filed in the state criminal courts in the 41 counties within the geographic area encompassed by the Eastern District of Tennessee. State prosecutions in these courts declined slightly to 23,897 in statistical year 1990 and more dramatically to 22,280 in statistical year 1991. Thus, over the last three statistical years for which both state and federal

data are available, state criminal prosecutions have declined by 7 percent, while federal felony prosecutions within the same geographic area have increased by 100 percent. See Figure 1.

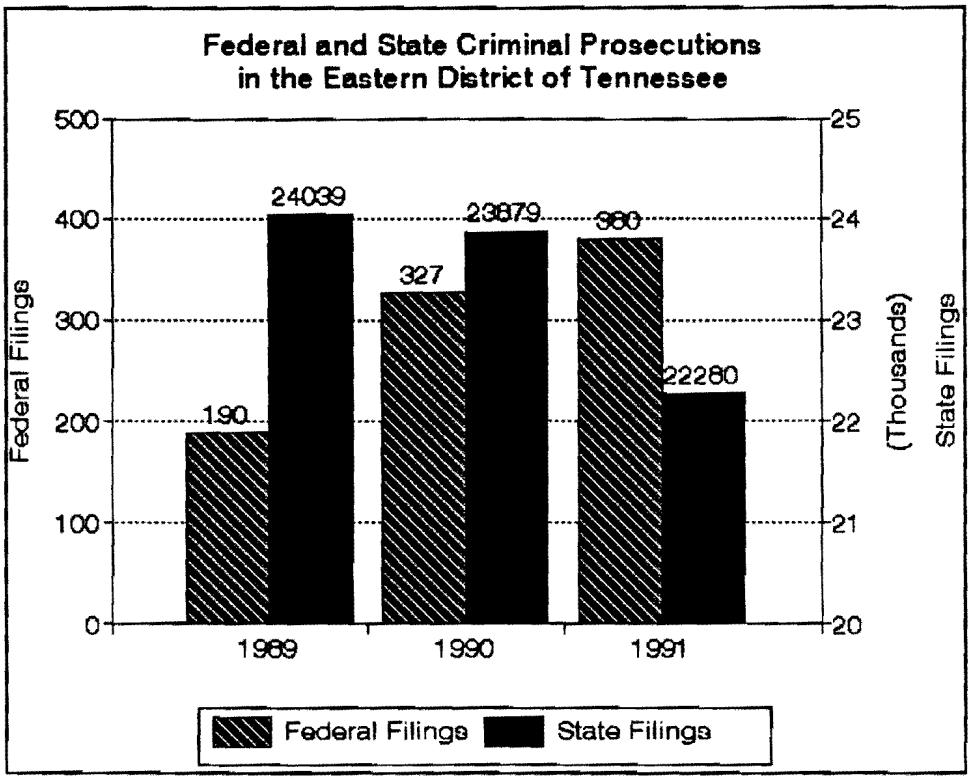

Figure 1

Criminal felony filings constitute an increasingly large percentage of combined civil and criminal felony filings. In the statistical year ended June 30, 1985, criminal felony filings comprised only 5 percent of the combined civil and criminal felony filings within the district. This percentage remained at about 8 percent in statistical years 1986 through 1989. It then rose in 1990 to 13 percent and rose again in statistical year 1991 to 19 percent. Because both civil and criminal felony filings increased substantially in the year ended June 30, 1992, the percentage of filings comprised by felonies dropped in that year to slightly more than 17 percent. Thus one out of six cases filed within the district is now a federal felony prosecution, as opposed

to one out of twenty in 1985. Although the great majority of criminal cases end in guilty pleas, the district judges stated in their interviews with Advisory Group members that the Sentencing Reform Act of 1984 and the Sentencing Guidelines promulgated under that Act have imposed additional burdens upon them in sentencing criminal defendants. The relative growth in felony filings within the district is illustrated in Figure 2.

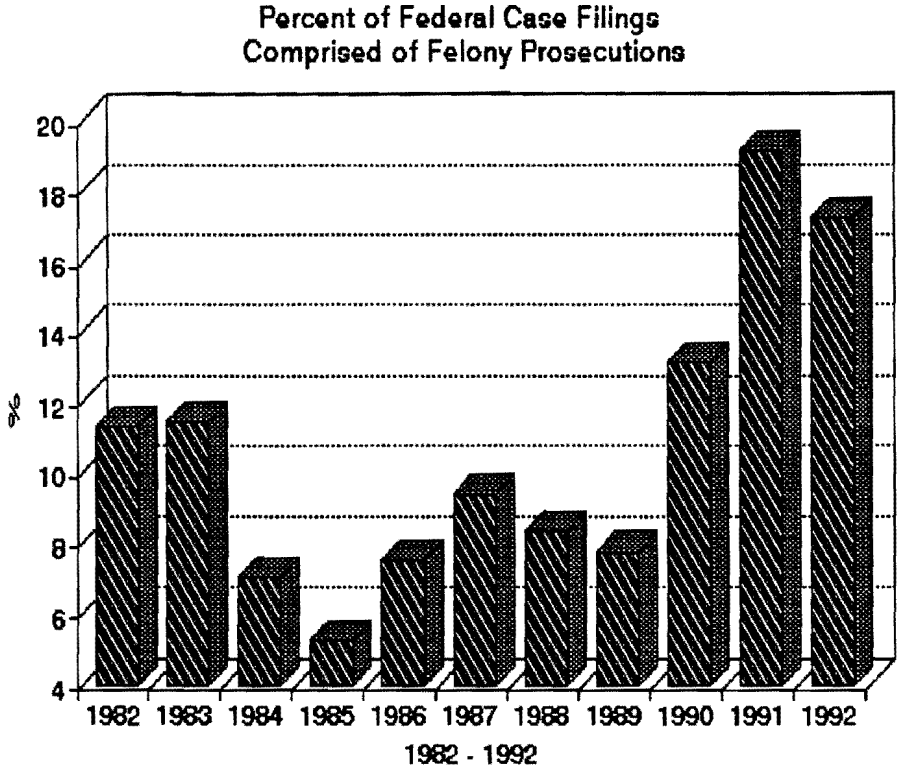

Figure 2

One of the major reasons for the large increase in criminal prosecutions within the district is the increasingly large number of federal criminal defendants who are charged with drug and weapons offenses. For the statistical year ended June 30, 1992, three categories of cases accounted for 48 percent of the criminal felony filings within the district: weapons and firearms

(20% of criminal felony cases), marijuana and controlled substances (10% of criminal felony cases), and narcotics (18% of criminal felony cases). These three categories of cases comprised 46 percent of federal felony filings nationally, with weapons and firearms accounting for 12 percent of the nationwide filings, marijuana and controlled substances accounting for 13 percent of the nationwide filings, and narcotics comprising 21 percent of the filings in the nation.

Drug cases thus comprised a smaller portion of the district's docket than was true nationwide (28% within the district as compared to 34% nationwide), but weapons and firearms accounted for almost twice as large a percentage of the felony docket within the district as nationwide (20% within the district as compared to 12% nationwide). Moreover, the filing of weapons and firearms cases has jumped dramatically within the district in recent years, from 14 cases in the statistical year ended June 30, 1988, to 25 in statistical year 1989, to 40 in statistical year 1990, to 71 in statistical year 1991, to 80 in the statistical year ended June 30, 1992. During this same period, federal drug felony cases filed within the district increased from 36 in statistical year 1988, to 55 in statistical year 1989, to 111 in statistical year 1990, dropped to 103 in statistical year 1991, and then rose to 108 in statistical year 1992. This growth in drug and weapons cases within the nation and the district is shown in Figure 3.

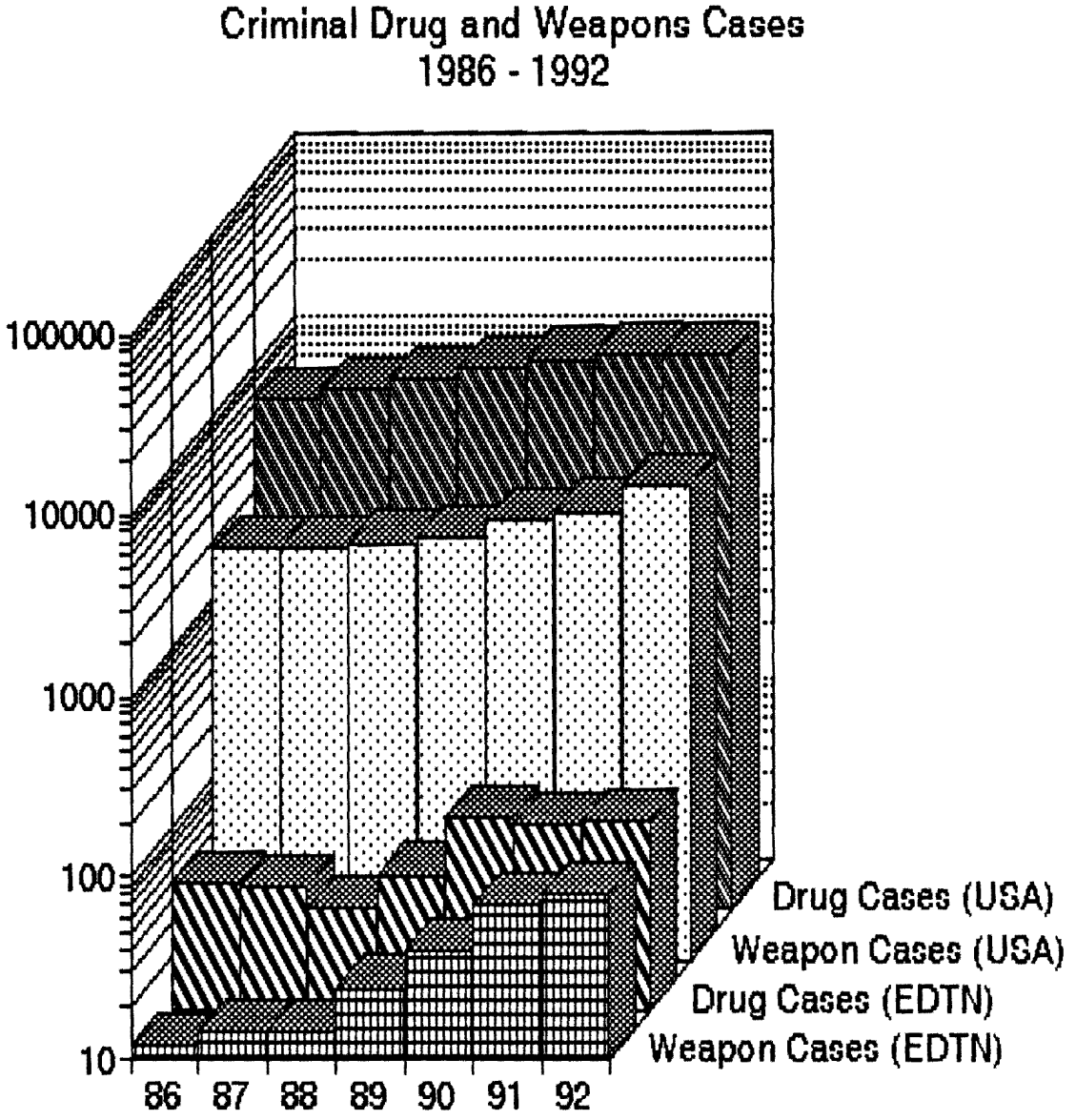

Figure 3

Available statistics do not indicate a comparable increase in state drug and weapons cases during the period of this rapid growth in federal drug and weapons filings. There were 2696 state drug cases filed in the counties comprising the Eastern District of Tennessee in statistical year 1991, down from the 2907 state drug cases in statistical year 1989. Thus state drug cases

fell by 7 percent over this three year period, during which time federal drug cases rose by 87 percent. During this same period, state weapons cases dropped from 216 to 189. Combined state drug and weapons cases constituted 13.0 percent of the state criminal cases within the counties comprising the Eastern District of Tennessee during statistical year 1991. This state percentage has stayed relatively stable over the last several years, while the percentage of the district's federal felony docket represented by drug and firearms cases climbed to 46 percent in statistical year 1991 and to 48 percent in statistical year 1992. These statistics suggest a growing trend toward the federalization of drug prosecutions within the district.

The burden created by the burgeoning criminal caseload is not equally spread across the district. In contrast to civil cases, criminal cases are not heard in Winchester. Instead, criminal cases that otherwise would be filed in the Winchester Division are filed in Chattanooga. Over the last three statistical years (1990 - 1992), criminal felony cases filed in the Southern (Chattanooga) Division constituted over 37 percent of the total criminal felony filings within the district, even though only one of the four district judges and one of the four magistrate judges sit in Chattanooga.

A disproportionate percentage of the district's criminal felony trials also are held in Chattanooga. Of the 161 criminal felony trials within the district over the last three statistical years (1990 - 1992), almost one-half (79) were held in cases filed in the Southern Division. See Figure 4. These statistics may be due, at least in part, to the fact that problems associated with crack cocaine trafficking are relatively severe in Chattanooga.

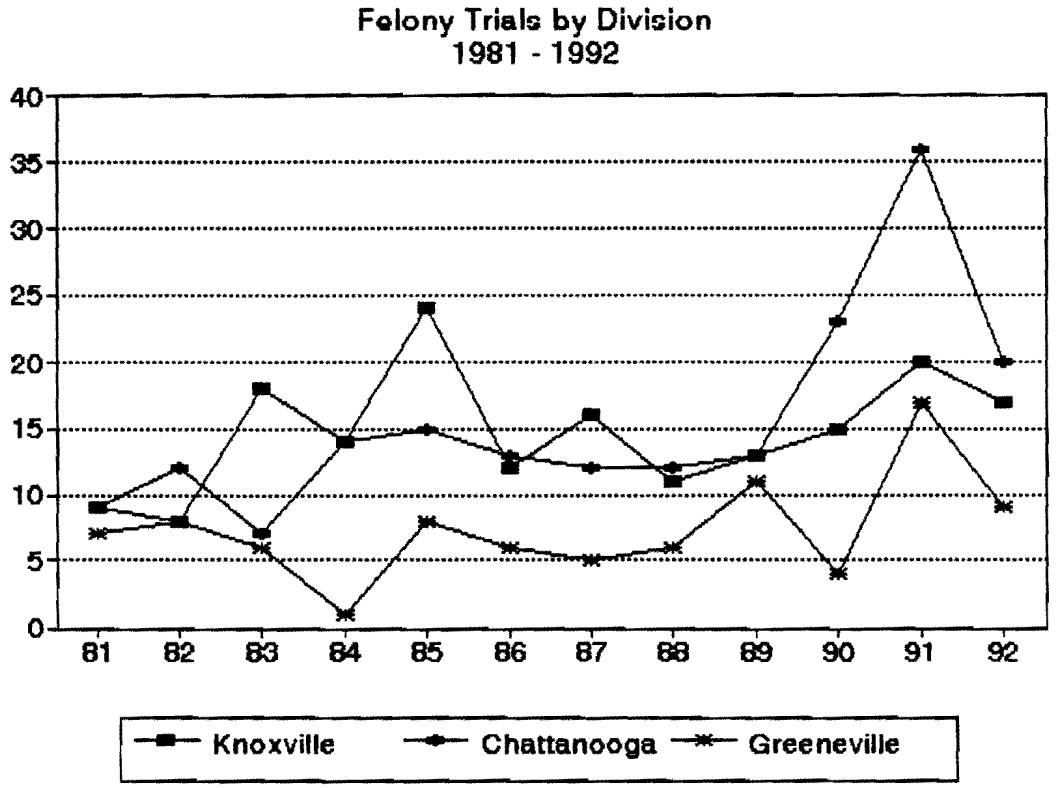

Figure 4

B. Trends in Case Filings and in the Demands Being Placed on the Court's Resources. Based upon its review of the Court's civil and criminal dockets, the Advisory Group has identified certain trends in case filings. The trends identified all have placed demands on the Court's resources and, if they persist, will continue to place demands on the Court. Nevertheless, the Advisory Group recognizes that the judicial workload is a function of not only the number of case filings (considered in the prior section) but also of the number of parties to those cases and the types of cases that those filings represent. For instance, one of the judges

in this district recently has spent 99 days in the trial of a single civil case. Despite the judicial demands created by such a "megacase," the case will count as only a single civil trial in court statistics.

1. Combined Civil and Criminal Case Filings within the District Are Increasing. The 2454 combined civil and criminal felony filings within the district during statistical year 1992 represent a 20 percent increase in combined civil and criminal filings from statistical year 1991. Although this is a dramatic increase, the 2454 filings is comparable to the 2580 combined filings in statistical year 1990 and the 2524 combined filings in statistical year 1989.

There also have been major increases in the number of criminal defendants prosecuted within the district in recent years. Clerk's Office data indicates that the number of criminal felony defendants within the district rose by 45%, from 351 to 510, between calendar years 1990 and 1991. In only two calendar years prior to 1990 (1983 and 1987) had more than 300 defendants been prosecuted within the district.

As a result of these increased filings, the number of pending civil and criminal felony cases increased during statistical year 1992 by 12.7 percent from 1839 to 2072 cases. Prior to this most recent increase, the number of pending civil and criminal felony cases within the district had dropped from 2102 as of June 30, 1990, to 1839 (a four year low) as of June 30, 1991. However, because of increasing numbers of criminal felony and more complex civil filings, even these decreases in case filings and pending cases did not mean that the judicial workload had, in reality, decreased.

The case weight statistics contained in Section II(A)(1) of this report are based on case

weights developed from a 1979 time study conducted by the Federal Judicial Center. The Federal Judicial Center is conducting a new time study, under which the case weights assigned to civil and criminal cases will change somewhat. Officials of the Federal Judicial Center believe that this new study will show that the time demand per criminal case (especially per drug case) has gone up significantly since the 1979 study, while the time demanded of district judges by the average civil case has gone down somewhat due to the increasing use of magistrate judges. Thus, as the percentage of the Court's docket consisting of criminal cases and complex civil cases continues to grow, so will the demands placed upon the judges within the district.

At this point it is too early to tell whether the rise in civil case filings in statistical year 1992 is merely an isolated one-year occurrence. The fact that the number of cases filed in 1992 was very similar to the numbers of cases filed in 1990 and 1989 suggests that 1992 may represent a return to normal filing patterns. No court can function effectively if civil case filings continue to increase at an annual rate of 23 percent. Until statistical year 1992, significant declines in civil case filings had partially offset the increasing numbers of criminal indictments within the district. If both civil and criminal case filings continue to rise simultaneously, expense and delay reduction within the district will become increasingly problematic.

2. The District's Case Filings and Terminations per Judgeship and per Judge Remain Among the Highest in the Nation. The Administrative Office of the United States Courts calculates on a district-by-district basis civil and criminal filings and terminations per judgeship. These statistics show that the judges in the Eastern District of Tennessee remain among the busier judges in the nation. For the year ended June 30, 1991, there were 408 filings

per authorized judgeship (330 civil and 78 criminal) in the Eastern District of Tennessee. For that year, the district ranked 25th out of 94 districts in the country and second out of nine districts in the circuit in the number of combined filings per judgeship. It ranked 37th in civil filings and 15th in criminal felony filings in the nation. For the year ended June 30, 1992, Administrative Office statistics indicate that there were 483 filings per authorized district judgeship (402 civil and 81 criminal). For this most recent statistical year, only one other district in the circuit and twelve other districts in the nation had a higher number of combined civil and criminal felony filings per judgeship.

These statistics are based upon the district's five authorized judgeships, even though there are only four judges who actually have been appointed for the district. Because of the existing judicial vacancy within the district, the filings per sitting judge for the year ended June 30, 1991, were actually 511 rather than 408 (413 civil and 98 criminal felony), while there were 604 filings per judge (503 civil and 101 criminal) in statistical year 1992. Nor are there any senior judges within the district to share the workload with other judicial officers. Although they are not considered in the judicial workload statistics calculated by the Administrative Office of the United States Courts, in many districts senior judges provide significant help with the civil and criminal dockets. The district's and the nation's filings per judge and authorized judgeship are illustrated in Figure 5.

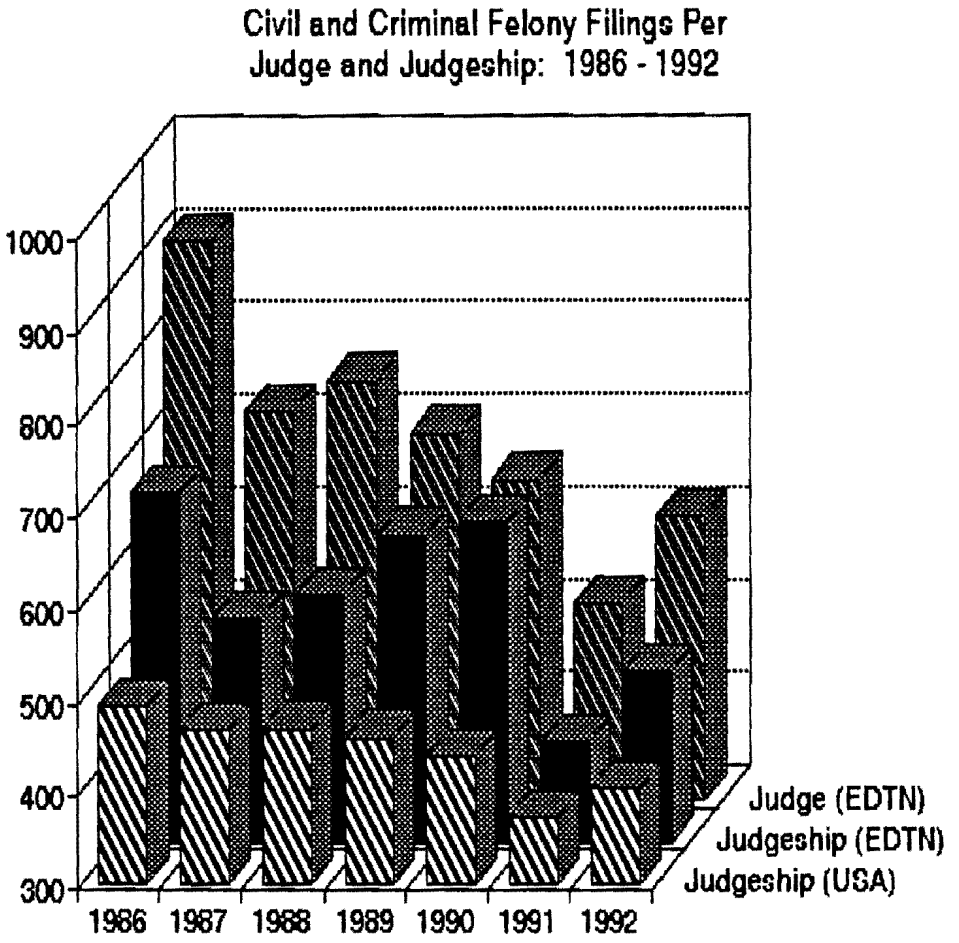

Figure 5

In addition to having among the busiest judges in the country, the Eastern District of Tennessee is one of the most efficient judicial districts. Despite the district's judicial vacancy, there were only thirteen other districts in the country that had more than the 451 combined civil and criminal terminations per judgeship that this district had for the year ended June 30, 1991. During that same year, there were 564 combined civil and criminal terminations per sitting judge. For statistical year 1992, terminations per judgeship and terminations per judge

decreased slightly to 445 and 556, respectively, while the district ranked 28th in the nation in terminations per judgeship. The district's terminations per judge and judgeship, as compared to national statistics, are shown in Figure 6.

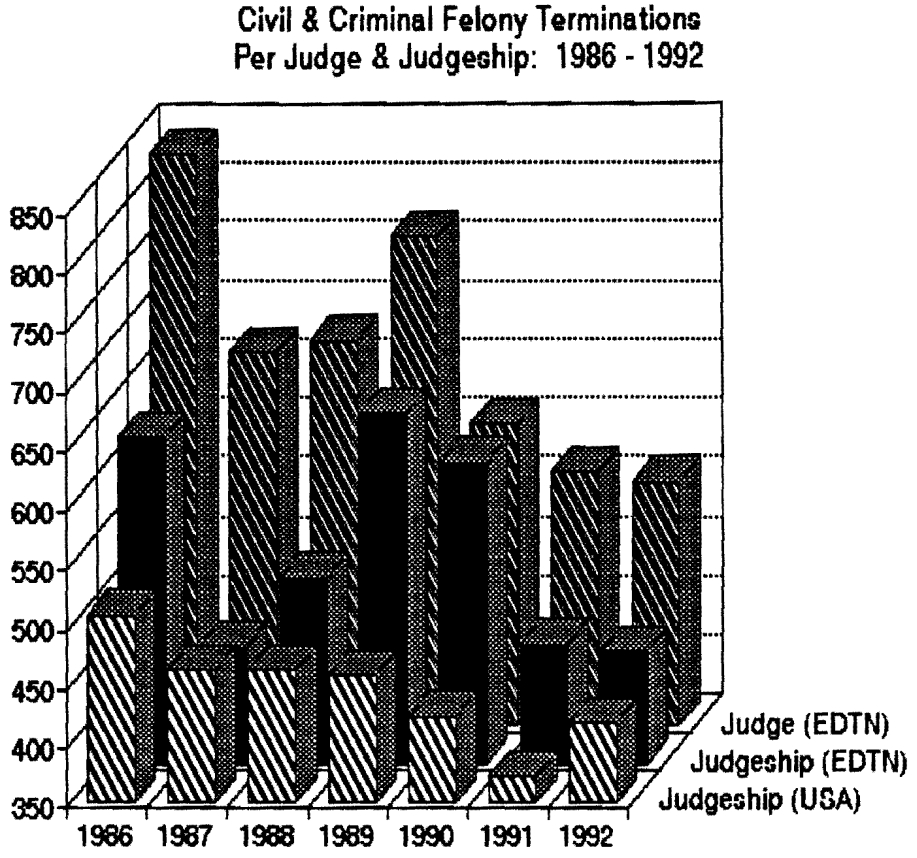

Figure 6

3. Although Median Disposition Times within the District Remain Quite Good, Some Slippage in those Disposition Times Recently Has Occurred. For the year ended June 30, 1992, the Eastern District of Tennessee was the fourth fastest of the nine district courts within the Sixth Circuit and was 35th of the 94 district courts within the nation in the median time from

filing to disposition of civil cases. The district was second in the circuit and 26th in the nation for the median time from issue to trial. This record is particularly significant in light of the fact that the fifth judgeship created by Congress on December 1, 1990, has never been filled.

Judges within the district move even faster in resolving charges brought against the criminally accused. In the year ended June 30, 1992, a median time of 4.9 months elapsed from the filing to disposition of felony cases within the district. Based upon this felony disposition time, the Court ranked first in the circuit and 22nd in the nation. This median disposition time of 4.9 months is less than the district's median disposition time for criminal felony cases of 5.7 months in statistical year 1991. However, in statistical year 1990 the Court's median disposition time for felonies had been 4.7 months, in 1989 it had been 4.2 months, and in 1988 the district's median disposition time had been 3.8 months. While the Court therefore still resolves criminal cases faster than average, its criminal dispositions have slowed somewhat in recent years.

In considering whether there is delay within a federal judicial district, the Federal Judicial Center recommends that advisory groups consider the "life expectancy" of a typical civil case and any movement in that figure over a period of several years. Calculations supplied by the Federal Judicial Center show that, for the year ended June 30, 1992, both the life expectancy and "indexed average lifespan" of civil cases within the Eastern District of Tennessee were slightly less than the national average of twelve months. As mentioned previously, the district ranked 35th out of 94 districts in median time to disposition of civil cases for the statistical year ended June 30, 1992.

Although disposition time within the district still is faster than the national average, there has been a significant rise in the average life expectancy of civil cases within the district over

the last decade. The average life expectancy was about six months for the year ended June 30, 1981, through the year ended June 30, 1985. This figure rose to about twelve months for the year ended June 30, 1987, declined in 1988 and 1989, and then rose through 1990, 1991, and 1992 to just under twelve months for the year ended June 30, 1992.

Notwithstanding the lengthening life expectancy of civil cases, attorneys practicing within the district are generally satisfied with the pace of civil litigation within the district. This is not only true of each of the members of the Advisory Group, but this is a perception shared by those who responded to the group's random and non-random attorney surveys. When attorneys in the Advisory Group's civil survey were asked about the time from filing to disposition in randomly selected civil cases, 99 of 125 respondents (79%) answered that the time from filing to disposition was reasonable. This is consistent with the fact that 17 of 20 experienced federal practitioners, in response to the Advisory Group's non-case specific attorney survey, stated that the time from filing to disposition is generally reasonable in the district. However, the 49 litigants who responded to the Advisory Group's random case survey were less satisfied with the pace of litigation, with 25 answering that the disposition time was reasonable, 9 answering that their case had taken slightly too long to resolve, and 15 answering that their case had taken much too long.

4. <u>While Still Well Below the National Average, the Number and Percentage of Civil Cases More than Three Years Old Has Risen within the District</u>. Compared with other districts in the country, a small percentage of the civil cases within the Eastern District of Tennessee are more than three years old. While 85 cases representing 4.6 percent of the

district's pending civil cases were three or more years old as of June 30, 1992, nationally 8.7 percent of pending civil cases were three or more years old as of that date.

However, both the number of the district's civil cases three or more years old and the percent of total civil cases that these older cases represent have grown steadily for the last several years, from 10 cases representing 0.6 percent of the civil caseload in 1985, to 65 cases representing 3.9 percent of the civil caseload in 1991, to 85 cases representing 4.6 percent of the civil docket in 1992. Future reductions in older cases will be difficult in light of the perception of Advisory Group members that civil cases within the district are becoming increasingly complex. See Section II(D)(2), infra.

5. While Fewer Civil Cases Are Being Resolved at Trial, A Greater Number of Felony Defendants within the District Elect to Go to Trial. Until statistical year 1992, the Eastern District of Tennessee had been a district in which an unusually large percentage of civil cases were resolved by trial. In the statistical year ended June 30, 1990, only seven other districts in the nation had a higher percentage of civil cases reach trial than the 8.2 percent of civil cases that were tried in this district. During statistical year 1991, 7.1 percent of the civil cases within the district reached trial, while only 2.4 percent of civil cases within the Sixth Circuit and 4.0 percent of federal civil cases within the nation reached trial. During that year, only nine districts in the country had a higher percentage of cases going to trial than the Eastern District of Tennessee. However, in statistical year 1992 the percent of the district's civil cases reaching trial dropped to 4.2 percent.

Despite the increase in criminal prosecutions within the district in recent years, the

percentage of federal felony defendants going to trial had remained relatively low. However, in the statistical year ended June 30, 1992, the percentage of criminal felony defendants electing to go to trial jumped from 10.2 to 15.7 percent. Many have speculated that the percentage of criminal defendants going to trial has increased due to the federal Sentencing Guidelines and mandatory minimum sentences. However, studies conducted by the United States Sentencing Commission do not support this theory, nor do the pre-1992 statistics from the Eastern District of Tennessee show any dramatic, across-the-board change. During the years in which felony prosecutions within the district have risen so dramatically, the percentage of felony defendants going to trial has been as follows: 1987 (13.2%), 1988 (18.2%), 1989 (14.8%), 1990 (9.1%), 1991 (10.2), and 1992 (15.7).

Even the pre-1992 data do not necessarily mean that a particular defendant's decision to go to trial was not influenced by sentencing law. However, while the percent of criminal defendants electing to go to trial has increased, the principal reason for the great pressure exerted by the criminal caseload on the Court's civil docket is the dramatic increase in the numbers of criminal prosecutions filed and criminal defendants indicted within the district.

As shown by the following table, during the last three years trials have become an increasingly common means to determine the innocence or guilt of criminal defendants. As the table also illustrates, during this same time period trials have been used significantly less frequently to resolve civil disputes.

Percent of Civil Cases Resolved by Trial and
Percent of Criminal Felony Defendants Who Go to Trial

	Civil Cases	Criminal Felony Defendants
SY 1990	8.2	9.1
SY 1991	7.1	10.2
SY 1992	4.2	15.7

It is too early to tell whether the trends shown in this table will continue or are merely aberrations from traditional trial patterns within the district. It will be all the more important to fill the district's existing judicial vacancy if the trends continue, because only district judges can preside over felony trials.

C. The Principal Causes of Cost and Delay in Civil Litigation within the District. As required by 28 U.S.C. § 472(c)(1)(C), the Advisory Group has considered and identified the principal causes of cost and delay in civil litigation within the district. While this is the statutory task given the Advisory Group, the group would be remiss if it did not at the outset stress that the United States District Court for the Eastern District of Tennessee is an excellent court by any measure. Not only does the statistical record bear this out, but lawyers and litigants confirm the statistical record.

Typical of the responses to the attorney surveys conducted by the Advisory Group is the following: "We practice in 7 judicial districts, [and] East Tennessee is one of the best managed." Another attorney observed: "Overall, I am very pleased with the Federal judges, the magistrates, the clerical staff, the court reporters, etc. We are very lucky in East Tennessee to have access to professionals of this ability and dedication."

The job of the Advisory Group therefore has been much less daunting than that of

advisory groups in some federal judicial districts. The Group offers its recommendations hoping to help the Court operate even better and more efficiently. By offering its recommendations, the Group does not mean to suggest that the United States District Court for the Eastern District of Tennessee is not already an outstanding court.

The Civil Justice Reform Act includes no definition of the "costs" or the "delay" that the Advisory Group is to identify. "Delay" must refer to the time it takes to resolve cases. "Costs" is a less straightforward concept. In its investigation and analysis, the Group construed "costs" broadly. In addition to the monetary and non-monetary costs to parties in a particular case that may result from unexpected delay, there can be costs to other litigants and potential litigants who cannot obtain a timely hearing of their claims. The judicial work-product and quality of dispute resolution afforded by the court can be compromised by a system that is operating beyond capacity. Nor is the quality of life of either lawyers or judges enhanced by such a system. Moreover, if courts are not available to pronounce the law, there is a cost to society. Under the circumstances, the Advisory Group regards the term "costs" as principally including the direct and indirect expenditure of money within the context of civil litigation by both litigants and the federal treasury, but also including any significant erosion of the quality of the product being rendered by the judicial system.

While cost and delay are separate concepts, they are not unrelated. Generally, costs flow from litigation delay. Thus costs usually increase along with delay, but this is not always the case. Granting an extension of time may delay a case, yet permit counsel to negotiate a settlement that saves both the parties and the court resources that otherwise would be expended. It is not, therefore, possible to say that delay always results in higher costs. It should be noted,

however, that unexpected delay will almost always entail unnecessary litigation cost.

Moreover, in considering "the principal causes of cost and delay," the Advisory Group remained mindful that the object of any procedural system should be to secure the "just, speedy, and inexpensive determination of every action." Speed and efficiency have little value if a procedural system produces unjust results. If, for instance, the judicial system were replaced by a dispute resolution system that decided cases by the flip of a coin, the new system would be remarkably "better" than the existing system if judged strictly on the basis of its relative cost and expedition. The new system would not, however, produce the just results that are, and must remain, the principal goal of any system of dispute resolution.

Similarly, procedural rules, such as a requirement for the filing of briefs, often result in increased monetary costs to the litigants and may delay disposition, but enhance the odds of a just result. The Advisory Group has therefore considered whether the cost of particular rules is justified based upon the quality of the outcomes produced by those rules as they operate, or would operate, within the Eastern District of Tennessee.

While justice is difficult to measure, attorneys and litigants surveyed generally expressed satisfaction with the District Court. Only 2 of 45 persons who responded to the litigant survey believed that they had not received a fair hearing concerning their claims and defenses. As mentioned at the outset of this section, respondents to the attorney surveys also testified to a high degree of satisfaction with the Court.

The responses of litigants and lawyers diverged, however, with regard to questions addressing cost and delay. Of the 43 litigants who responded to a survey question concerning litigation costs, 10 indicated that their litigation costs were much too high, 7 answered that their

costs were slightly too high, and 26 stated that costs were about right. One plaintiff commented in response to the Group's litigant survey, "I feel that there is something very wrong when civil suits are filed and subsequently dropped because of the cost involved with pursuing an action."

In contrast to these litigant views, 95 of the 110 attorneys responding to this same random case survey (86%) believed that litigation costs had either been about right (74%) or too low (13%), and only 15 attorneys (14%) believed their clients' costs had been too high. In response to the Advisory Group's non-random survey, 10 experienced federal practitioners stated that total litigation costs within the district are "about right," 7 said that they are too high, and 3 said that they are much too high.

Only 20 of 120 attorneys (17%) who had an opinion on the disposition time for their cases replied in response to the Advisory Group's random case survey that case resolution had taken too long. However, 11 of 51 plaintiffs' counsel, 12 of 60 attorneys in cases that took longer than average to resolve, and 5 of 18 attorneys in both civil rights and potentially complex cases gave this answer.

The results of the Advisory Group's surveys are only rough indicators of attorney and litigant perceptions and are not offered as statistically precise survey research data. The results, though, are consistent with the beliefs of most attorney members of the Advisory Group that litigation cost and delay in the district are, generally, not unreasonable given the prevailing realities of legal practice. Nevertheless, all members of the Advisory Group believe that litigation is too frequently too costly and that serious efforts should be undertaken to control litigation cost and delay in those specific situations where they are most likely to present a problem.

Based upon its surveys, interviews, case analysis, and the experience of its members, the Advisory Group has identified ten principal causes of cost and delay within this district. The first, and most significant, of these is the failure to fill the judicial vacancy within the district, while the remaining causes of litigation cost and delay fall roughly into the three categories of causes of cost and delay identified in the Civil Justice Reform Act, 28 U.S.C. § 472(c)(1)(C) and (D):

1. failure to fill the district's judicial vacancy;

2. court procedures that contribute to cost and delay include (a) inadequate case management, (b) resetting of trial dates, (c) motion practice, and (d) the manner in which magistrate judges are utilized;

3. the ways in which litigants and their attorneys approach and conduct litigation contribute to cost and delay through (a) discovery abuse, (b) problems of lawyer competence and failure to cooperate, and (c) lawyer and litigant choice for delay; and

4. the impact of new legislation upon the court causes cost and delay because of the impact of (a) criminal cases upon the civil docket and (b) newly created, substantially revised, and complex civil causes of action.

The first three of these categories are addressed in the following three sections of this

report; the fourth category (concerning the impact of new legislation on the courts) is considered in Section II(D). The causes of cost and delay are not necessarily listed in order of magnitude. One of the major causes of litigation cost and delay within the district, the increasing number and percentage of criminal cases on the Court's docket, is discussed in Section II(D)(1) and, like the failure to fill the Court's judicial vacancy, is a matter over which the district's lawyers, judges and litigants have absolutely no control.

1. Failure to Fill the District's Judicial Vacancy. In response to every inquiry the Advisory Group made concerning cost and delay, whether in group discussions, interviews with judges and court personnel, or attorney surveys, one theme recurred: the district must have the new district judge approved by Congress in 1990.

The Eastern District of Tennessee is not the only district in the nation with a longstanding judicial vacancy. Seventeen of the 34 district courts that implemented a civil justice expense and delay reduction plan by December 31, 1991, cited delays in filling judicial vacancies as a significant impediment to expeditious civil case processing. However, in a district with only five (previously four) authorized judgeships, the continuing judicial vacancy is especially problematic. Filling this vacancy would increase the number of district judges in the Eastern District of Tennessee by twenty-five percent.

During statistical year 1991, the four sitting judges in the district terminated 2257 cases. On average, the judges each terminated 564 cases during that year. Had there been a fifth judge, rather than a judicial vacancy, for the final seven months of that statistical year, many additional cases could have been resolved by the Court. Even if a fifth judge had been only one-

half as efficient as the sitting, experienced, judges, such a judge would have disposed of 165 cases during the final seven months of statistical year 1991. Had a fifth judge been in place and as productive as the sitting judges during statistical year 1992, that judge would have terminated 556 cases in that year. Thus, even had the terminations per judge dropped with the appointment of a new district judge, hundreds of additional cases could have been resolved by the filling of the judicial vacancy that now has existed for more than two years.

This is not the first long-standing judicial vacancy within the district. The statistical year ended June 30, 1990, is the only year since 1982 in which the district has not had a judicial vacancy for at least a portion of the year. In other statistical years the vacant judgeship months in the district have been 4.5 (1989), 12.0 (1988), 12.0 (1987), 12.0 (1986), 15.6 (1985), 4.8 (1984), and 18.7 (1983).

The current judicial vacancy has not only slowed civil litigation and made it more costly to litigants, but, over time, is taking its toll on court personnel. District judges, magistrate judges, and court personnel have had to travel within the district, particularly to Chattanooga, to help handle the judicial emergency that the continuing judicial vacancy has created. While such extraordinary efforts have succeeded in temporarily keeping the district afloat, it is not fair to the judges and court personnel to require that they do their difficult and important jobs indefinitely under less than optimal conditions. And yet, the long-run solution is quite simple. The President should promptly nominate and the Congress promptly confirm the fifth district judge authorized for the district.

2. Principal Causes of Cost and Delay Primarily Related to Court Procedures.

The Advisory Group has identified four principal causes of cost and delay that, in large measure, stem from court practices and procedures. In some cases unnecessary cost and delay are caused by (a) inadequate case management, (b) resetting of trial dates, (c) motion practice, and (d) the manner in which magistrate judges are utilized.

a. Inadequate case management. As noted by Congress in the Civil Justice Reform Act,

> Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including --
>
> (A) the differential treatment of cases that provides for individualized and specific management according to their needs, complexity, duration, and probable litigation careers;
>
> (B) early involvement of a judicial officer in planning the progress of a case, controlling the discovery process, and scheduling hearings, trials, and other litigation events . . . .

Pub. L. No. 101-650, § 102(5), 104 Stat. 5089, 5089 (1990). While civil case management is generally quite appropriate within the district, in some cases inadequate case management results in unnecessary litigation cost and delay.

While they categorized the level of case management employed by the judge in their cases somewhat differently, the attorneys surveyed in the both the Advisory Group's random case survey and its survey of experienced practitioners overwhelmingly agreed that the level of case management in the district is generally appropriate. Of the 125 attorneys responding to the

random case survey, 116 (93%) stated that the level of case management in their case was appropriate, while 18 of 21 of the attorney respondents to the non-case specific survey stated that the level of civil case management within the district is generally appropriate. None of the 146 attorney respondents to either the case-specific or experienced practitioner surveys responded that case management was too intensive.

Despite these general sentiments concerning case management, there is at least a suggestion in the Advisory Group's random civil case survey that case management may not be sufficiently intensive in certain types of cases. The opinion that case management had not been intensive enough was shared by 9 of 63 of the attorneys whose cases took significantly longer than average to resolve and by 5 of 19 of the attorneys handling potentially complex cases.

As part of its investigations, the Advisory Group reviewed the docket sheets of 20 cases that had taken significantly longer than average to be resolved. This review confirmed that there were good reasons for the delayed termination of many of the cases, such as stays entered due to arbitration or bankruptcy proceedings. However, while the Court may have been checking with counsel as to case status, there were long periods in some cases in which the docket sheets indicated no activity by the Court or the parties. The Advisory Group believes that if frequent formal status conferences are not routinely held by the Court, then a judicial officer, law clerk, or deputy clerk should monitor cases by means of periodic calls to confirm that a case is either moving ahead or there is a good reason for the absence of case movement. Potential problems also could be avoided by early judicial involvement in setting discovery, pretrial, and trial dates early in the case.

Only one of the four district judges in the Eastern District of Tennessee holds his own

pretrial conferences. Instead, law clerks hold the pretrial conferences in most civil cases. While the district has an experienced and capable group of law clerks, there is much to be said for "early involvement of a judicial officer in planning the progress of a case, controlling the discovery process, and scheduling hearings, trials, and other litigation events" as contemplated by the Civil Justice Reform Act. Pub. L. No. 101-650, § 102(5)(B), 104 Stat. 5089, 5089 (1990). This is why Rule 16 of the Federal Rules of Civil Procedure requires involvement by a district judge or magistrate judge in initial case scheduling and planning.

b. Resetting of trial dates. The Civil Justice Reform Act requires each district court to consider reducing cost and delay through "setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint" in most cases. 28 U.S.C. § 473(a)(2)(B). Trial dates in the district typically are set well within the eighteen month period envisioned by this statutory provision. However, because of the demands of the criminal docket, civil trial dates are not always as firm as they might be. One of the principal causes of cost and delay within the district is the resetting of civil trials.

In response to the civil case survey, there were more attorneys (42) who indicated that the judge had not held the parties to the initial trial date than indicated that he had (31). Both attorneys and litigants commented upon the cost and delay that resetting of trial dates can cause. One litigant suggested that delay could have been curtailed in his or her case as follows: "Rule on motions; stick to trial date; don't allow several continuances." Another litigant complained, "This case was set aside too many times; each start up required 'in house' review and billing for same." While there may have been good cause for these specific delays, the Advisory Group

believes that in many cases there is not.

Attorneys and litigants sometimes justifiably need a trial continuance, and some continuances can reduce litigation cost. However, when counsel and their clients have prepared to try a case on a given date and are told at the eleventh hour that the case will not go forward, the unnecessary expenses of preparing that case again must be borne by the parties. While criminal docket pressures are a major reason that civil trial dates cannot always be kept, resetting civil trials for reasons having nothing to do with the readiness of the case for trial results in delay and causes substantial increases in costs.

c. Motion practice. Motion practice within the district contributes to litigation cost and delay in several ways. Cases sometimes are put on hold while parties wait for a judicial ruling on a motion. In other cases, the parties may engage in discovery that might be rendered unnecessary depending upon the Court's ruling on a pending motion. In still other cases, a party may have to file or oppose a fully-briefed motion merely to obtain a judicial ruling upon a non-dispositive matter that might have been resolved in a less formal, and less expensive, manner.

Both "court procedures" and "the ways in which litigants and their attorneys approach and conduct litigation," 28 U.S.C. § 472(c)(1)(C), contribute to the sometimes inefficient motion practice within the district. As of the March 31, 1992, Civil Justice Reform Act reporting period, there were 52 undecided civil motions within the district that had been pending for more than six months. Data from the Clerk's Office indicates that the number of such motions had risen to 76 as of June 30, 1992.

The 52 motions reported by the district's judges as of March 31, 1992, are down from the 80 motions identified in the prior Civil Justice Reform Act reports of September 30, 1991. Although 52 motions were reported, 11 cases accounted for 29 of these motions. The reasons stated by the judges for the pendency of these motions indicate that there was generally good cause for the lengthy periods that had elapsed without a ruling. For instance, rulings had been deferred because cases had been stayed due to bankruptcy proceedings, counsel had asked to withdraw, and settlement was anticipated.

However, some of these motions could have been decided if the judges had not given counsel additional time for briefing. In connection with 22 of the 52 motions (including 11 of the 22 motions pending for over one year), the parties had been given additional time in which to file supplemental briefs. Judges were awaiting additional briefs in connection with 6 more of the 52 motions. One of the 52 motions reported had been filed on June 26, 1991, although the supporting brief was not filed until January 27, 1992, and, as of March 31, 1992, the opposing party had not filed an opposition brief.

Absent justifiable cause, six months is too long to wait for a ruling on a motion. Even though occurring in only a small percentage of cases, delay in motion rulings can be a major source of unnecessary litigation cost. Indeed, unnecessary litigation cost can be engendered by judicial rulings that are delayed by much less than six months. Delay in motion rulings must be addressed by both counsel and the Court. Judges should hold counsel to tighter briefing schedules, and counsel should adhere to those schedules and file their briefs in a timely manner.

Lack of judicial involvement in the early stages of civil cases also contributes to inefficiencies in motion practice. Early pretrial conferences can provide an occasion to explore

with counsel anticipated pretrial motions. Not only can such conferences be used to set realistic motion schedules, but discussion between counsel and the Court at such conferences may obviate the need for some motions.

The Advisory Group commends the Court for making magistrate judges available for immediate rulings on pretrial discovery motions. If a magistrate judge is available to hear a dispute arising during a deposition, the parties may not have to continue the deposition and are spared the cost of formally briefing the matter. If the magistrate judge agrees to hear the dispute over the telephone, counsel also may be spared the time and expense of travel to the courthouse. Such a system generally is not available except with respect to discovery disputes, however. As a result, parties may be required to bear the expense of briefing and arguing motions that could be resolved in a less formal, faster, and less expensive manner.

d. The manner in which magistrate judges are utilized. The four magistrate judges within the district are a unique resource and play a vital role in the administration of justice within the Eastern District of Tennessee. However, the Advisory Group believes that the magistrate judges could be used even more efficiently. To the extent that magistrate judges can, with the consent of the parties, handle more civil trials and dispositive motions, the Advisory Group believes they will be used most efficiently. To the extent that their time is consumed with tasks that must be reviewed by the district judges, inefficiencies develop.

The different magistrate judges within the district play different roles, depending upon the division in which they sit. Because Judge Hull handles his own dispositive motions, such

motions are rarely considered by Magistrate Judge Tilson. Because Judge Edgar handles his own criminal pretrial matters, criminal motions and conferences are not normally held before Magistrate Judge Powers. Magistrate Judges Murrian and Phillips handle both criminal and civil pretrial matters. The relationship between district and magistrate judges is subject to the preferences, styles, and strengths of the judges in question. The tasks undertaken by magistrate judges within the district undoubtedly will vary from location to location and from time to time, in order to make the best use of the magistrate judges in individual cases.

As a general rule, though, it does not make sense to the Advisory Group for the magistrate judges to so often serve as a lower level trial court, from which parties routinely take appeals to the district judges. Such appeals entail a second set of briefs and a second review by a second judicial officer. While the workload on a particular district judge may be lessened if a magistrate judge initially decides a motion, the overall burden upon the court system and overall cost to the parties actually is increased in those cases in which a party objects to the magistrate's report and recommendation. Every civil case which the magistrate judges handle by party consent, however, is one less case with which the district judges will have to deal. District judges then can devote their time and energy to the matters that only they have the authority to handle: trials of civil cases in which the parties have not consented to a magistrate judge and criminal felony trials.

3. Principal Causes of Cost and Delay Primarily Related to the Ways in Which Litigants and their Attorneys Approach and Conduct Litigation. The Advisory Group has identified three principal causes of cost and delay that are primarily related to the ways in which

litigants and their attorneys approach and conduct litigation. These causes are (a) discovery abuse, (b) problems of lawyer competence and failure to cooperate, and (c) lawyer and litigant choice for delay.

a. Discovery abuse. One of the major features of the Federal Rules of Civil Procedure is the provision for liberal discovery. Discovery can be instrumental both in helping counsel better prepare cases for trial and in facilitating settlements short of trial. However, discovery is costly and can delay the ultimate resolution of civil litigation without resulting in more just outcomes.

The Advisory Group did not find that discovery over-use and abuse was an across-the-board problem in civil litigation within the district. Of those attorneys responding to the civil case survey who had an opinion concerning this matter, 86% (94 of 109) believed that the time taken by discovery was reasonable in their cases. Nor do most of the district or magistrate judges believe that discovery is a problem, generally, in the district. All of the judges, though, told the Advisory Group that discovery is a problem in certain cases, particularly in more complex civil actions. One of the magistrate judges estimated that discovery may needlessly contribute to litigation cost and delay in one-quarter of civil cases.

Despite the fact that attorneys and judges do not believe that discovery is a general problem, in specific cases discovery does add significantly to litigation cost and delay. Attorney survey respondents handling particular types of cases were not uniformly in agreement that the length of discovery had been reasonable in their cases. Four of 17 attorneys in civil rights cases and 6 of 15 attorneys in potentially complex cases who had an opinion stated that the time taken

by discovery was too long in their cases.

In their semi-annual report filed under the Civil Justice Reform Act, district and magistrate judges within the district identified 66 civil cases pending more than three years as of March 31, 1992. The judges listed extensive discovery as a reason for the fact that 14 of these cases were still pending. While this is a small number of cases, discovery in only a single complex case can be extremely expensive.

Even in a simple automobile accident case, each side may retain two or three separate expert witnesses. The Advisory Group estimates that a relatively routine expert witness deposition may cost the deposing party $1500, for attorney's fees (including preparation time), the expert's fee, and the cost of the court reporter. This same deposition may cost the party defending the deposition $1000, for a total cost to the parties of $2500. If there is travel involved, the deposition is taken by videotape, or the expert has not been retained to testify on a routine matter, deposition costs can be significantly more.

Problems of discovery abuse and overuse are largely of attorneys' own making. However, clients directly or indirectly pay the bills for discovery, and failure on the part of the Court to limit or control discovery creates the potential for discovery abuse. When asked in the Advisory Group's civil case survey whether the judge presiding over their cases set and enforced limits on allowable discovery, 53 attorneys indicated that the judge had taken such action while 25 attorneys indicated that he had not. Seven of 19 attorneys responding to the non-random survey stated that judges in this district generally did not set and enforce limits on allowable discovery.

It may seem strange that attorneys, who are the ones who initiate discovery, complain

when discovery gets out of control. However, if there is no joint discovery planning in a case, a single party can subject all other parties to extensive and non-productive discovery. While a party can seek a protective order from the Court, this procedure takes time, costs money, and often results in unseemly finger-pointing by lawyers at a hearing that the judge may regard as a waste of time.

A better approach is to limit discovery at the very outset of a case. Local Rule 33.1 attempts to control discovery by establishing a presumptive limitation on interrogatories in any given case. However, the rule merely limits the number of interrogatories that can be included in any particular set of interrogatories rather than explicitly limiting the total number of interrogatories that can be asked without leave of court. Although the Advisory Group believes that Local Rule 33.1 should be redrafted to limit explicitly the total number of interrogatories permitted without leave of court, it endorses such presumptive discovery limitations. The goal of such local rules or judicial practices should be to assure that discovery is not, in the words of Federal Rule of Civil Procedure 26(b)(1), "unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."

b. Problems of lawyer competence and failure to cooperate. In their interviews with the Advisory Group, all of the district and magistrate judges praised the quality of the District Court's bar. Nevertheless, the Advisory Group believes that, in specific instances, problems of lawyer competence can generate unnecessary litigation cost and delay. As one judge told the Advisory Group, his worst nightmare is a trial in which both attorneys are

inexperienced.

In raising the issue of lawyer competence, the Advisory Group does not suggest that attorneys within the district are committing legal malpractice or are in violation of governing legal or ethical standards or that the standard of practice in this district is not generally excellent. Instead, the Advisory Group's concern is focused on attorneys who may be acting well within the Federal Rules of Civil Procedure, but who make litigation choices that lead to unnecessary cost and delay.

For instance, the inexperienced practitioner may take two or three times as long to take a deposition as a more seasoned attorney. This may stem, at least in part, from a concern on the part of the newer attorney that he or she will "miss something" if the same basic question is not asked in several different ways. There is nothing legally improper or sanctionable about such an approach, and some delay may be inevitable as younger attorneys perfect their deposition skills. However, discovery costs for all parties are increased and cases may be delayed as a result of such discovery practices. Even more experienced lawyers may fail to organize their thinking in advance of depositions. The rambling, aimless questioning that may result costs everyone time and costs litigants money without contributing to the quality of the case outcome.

Closely tied to the problem of lawyer competence is the problem caused by an unwillingness of lawyers to cooperate in certain situations. Indeed, a major reason why attorneys may fail to cooperate is because of their inexperience. While the more experienced and self-confident attorney may be willing to stipulate to certain aspects of a case, newer counsel may insist on presenting unnecessary issues to the Court for formal judicial resolution.

Local Rule 37.1, the district's "meet and confer" rule, is helpful in requiring counsel to do what they should do in any event; attorneys should talk with one another and attempt to work things out informally before invoking the assistance of the Court. Unfortunately, rules can only do so much in this area. In the long run, basic attorney practices and attitudes need to change.

c. Lawyer and litigant choice for delay. Simply stated, one party or the other often gains an advantage from litigation cost and delay. While discovery requests can provide information essential to the fair adjudication of a party's claim, they also can delay a case, wear down an opposing party, and force a settlement on terms different than those that would have obtained had all parties had the resources to take the case to trial. Regardless of the governing rules or judicial practices, as long as there is an advantage to be gained from delay some lawyers will opt for delay.

The trial calendars of the district judges are generally more crowded than those of the magistrate judges. Therefore, one of the ways in which lawyers sometimes opt for delay is by withholding consent for trial before a magistrate judge. While lawyers have no control over the district judge who will hear a case, they can make a choice between the magistrate judge and district judge randomly assigned to the case.

To consent to trial before a magistrate judge requires an affirmative act on the part of an attorney. Some attorneys may fail to select a magistrate judge simply out of inadvertence. Others may do so out of concern that the affirmative act of consent may become a decision that later can be criticized by a client. Still others may simply wish to delay the resolution of the case. In any event, under the present procedural system, the norm is adjudication before a

district, rather than magistrate, judge. A consequence of the failure of counsel to consent to more trials before magistrate judges is delay in the Court's civil docket.

D. The Extent to which Costs and Delays Could be Reduced by a Better Assessment of the Impact of New Legislation on the Courts. Both congressional action and inaction have been a principal cause of costs and delays within the district. Civil litigation has been slowed and made more expensive due to the impact of (1) criminal cases upon the civil docket and (2) newly created, substantially revised, and complex civil causes of action.

1. The Impact of Criminal Cases upon the Civil Docket. The congressional findings accompanying the Civil Justice Reform Act provide: "The courts, the litigants, the litigants' attorneys, and the Congress and the executive branch, share responsibility for cost and delay." Pub. L. No. 101-650, § 102(2), 104 Stat. 5089, 5089 (1990). A major contribution of the Congress and the Executive to cost and delay stems from the increasing federalization of crime that has resulted from initiatives of these two branches of government. As in most other districts in the nation, the district's criminal docket increasingly impinges upon the civil caseload. The federal war on drugs and specific programs such as Operation Triggerlock have dramatically increased the number of criminal prosecutions filed in this district, as well as the number of complex prosecutions involving multiple defendants.

The increases in criminal prosecutions within the district described in Section II(A)(2) are to be expected in light of the significant increases in federal prosecutorial resources within the district. There now are Drug Task Forces in Chattanooga, Greeneville, and Knoxville. The

growth in local prosecutorial resources has stemmed not only from nationwide programs to fight the war on drugs, but from a series of major bank failures within the district during the 1980s that led to complex criminal prosecutions and related civil and bankruptcy proceedings. This litigation now is in its final stages, but the extra personnel brought to the district as a result have stayed on and continue to develop cases for federal criminal prosecution.

Nor is it difficult to understand why prosecutors and law enforcement personnel sometimes may prefer to bring criminal charges against a defendant in federal rather than in Tennessee state court. In 1982 conditions within the Tennessee state prison system were held to be unconstitutional by a federal judge in the Middle District of Tennessee, and in 1985 the state was ordered to reduce the number of state prisoners. As a result, the time that prisoners within the state system served was reduced at the same time that Congress began enacting much harsher sentences, including mandatory minimum sentences, for federal defendants. In addition, the 1984 Sentencing Reform Act abolished parole and greatly limited "good time" reductions that previously had been available to federal prisoners.

Under the Tennessee forfeiture law, T.C.A. § 39-11-116(4), forfeited money and other proceeds realized from the enforcement of Tennessee's criminal laws typically are paid into the state's general fund. If, however, a state law enforcement agency participates in a successful federal prosecution, the agency itself may be entitled to a share of any forfeited property. This disparity in state and federal forfeiture law is just one more reason why federal felony prosecutions doubled (from 190 to 380) between statistical years 1989 and 1991, at the same time that state criminal filings within the 41 counties comprising the Eastern District of Tennessee dropped by 7 percent (from 24,039 to 22,280).

Both the Court and the United States Attorney have adopted procedures to eliminate needless cost and delay within the criminal process. A defendant's initial appearance and arraignment are combined into a single court hearing, and the magistrate judges have developed a form to record more efficiently necessary information from this initial criminal appearance. The United States Attorney now uses "fast track letters" to move certain types of cases efficiently through the criminal process and considers pretrial diversion in appropriate cases. The problem, though, is one which cannot be addressed solely by dealing with inefficiencies within the criminal process.

The rising criminal caseload impacts upon the civil docket in several ways. The increasing numbers of criminal cases leave less time for judges to devote to civil cases. The priority that criminal cases are given under the Speedy Trial Act means that criminal cases sometimes "bump" long-standing civil trial dates, particularly in Chattanooga because of the district's judicial vacancy. To prevent dismissals that otherwise would have been mandated under the Speedy Trial Act, visiting judges from the Eastern District of Michigan and Middle District of Tennessee recently have heard criminal cases in Chattanooga. The resetting of civil trial dates not only means that those particular civil cases will not be heard on the date on which counsel and the parties had planned, but can have a domino effect throughout the civil docket as a judge's limited trial time must be spent on trial of the reset cases. As trial dates slip, counsel lose a primary motivation for settling cases.

Crime is a serious matter that concerns the Advisory Group just as it concerns the executive and legislative branches of the federal government. Officials in these branches of government must realize, though, that the ability of the federal courts to administer civil justice

is becoming an unintended casualty of the federal war on crime.

2. The Impact of Newly Created, Substantially Revised, and Complex Civil Causes of Action. In recent years Congress has created new statutory causes of action, both by the passage of new legislation and by substantially amending existing legislation. Unfortunately, Congress has not always considered the impact upon the federal courts of the civil lawsuits that have resulted from the legislation it has enacted. Congress, however, does not act in a vacuum. For each new right that Congress recognizes, aggrieved individuals look to the federal district courts for their remedies.

Many recent statutes have generated quite complex federal civil actions. These complex civil cases have had an impact upon the docket of this district. In statistical years 1989 through 1992 there were 187 ERISA cases filed in the district, more than double the 95 such cases filed in the eight previous statistical years combined. One of the very few cases in the district that has been pending for more than five years is a complex action filed under the Comprehensive Environmental Response, Compensation, and Liability Act. Such complex environmental litigation, as well as RICO actions and cases brought pursuant to antitrust, securities, and intellectual property statutes, can require extraordinary amounts of judicial time during both pretrial and trial.

A handful of complex cases can wreak havoc with caseload management in a district with only four sitting district judges. Over the course of the last year, one of the district judges has spent 99 days in trial of an accounting malpractice action brought by a federal government corporation. This single trial, involving only two parties and common law claims, has

effectively reduced the number of district judges within the district by twenty-five percent.

At the same time that new and complex causes of action are being added to the district's caseload, many of the more routine actions are no longer being filed in federal court. Routine tort, contract, and other diversity cases involving no more than $50,000 no longer can be filed in federal court. The judicial time necessary to dispose of an "average" civil case may well have risen due to the increase in the jurisdictional minimum for diversity cases.

III. RECOMMENDATIONS FOR REDUCTION OF LITIGATION COST AND DELAY

Having identified ten principal causes of litigation cost and delay, it is incumbent upon the Advisory Group to suggest solutions to the problems it has identified. The Advisory Group makes fifteen separate recommendations, which are discussed in this section of its report. These recommendations also have been incorporated into a proposed Civil Justice Expense and Delay Reduction Plan, a copy of which is attached to this report as Appendix C.

The Advisory Group's recommendations are offered "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." 28 U.S.C. § 471. As required by 28 U.S.C. § 472(c)(3), the Advisory Group's recommendations will require significant contributions by "the court, the litigants, and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts."

These recommendations constitute the "recommended measures, rules and programs" which advisory group reports are to include pursuant to 28 U.S.C. § 472(b)(3). As required by 28 U.S.C. § 472(b)(2), the basis for the Advisory Group's recommendation that the District

Court adopt the plan set forth in Appendix C follows. Because the plan proposed has been tailored to the specific needs of this Court, the Advisory Group recommends that the Court adopt this plan rather than a model plan or a plan developed to meet the needs of another federal district court.

A. Recommendation to Deal with the Failure to Fill the District's Judicial Vacancy. The solution for the problems of cost and delay caused by the failure to fill the judicial vacancy that has existed in this district since December 1, 1990, is quite simple: the vacancy should be filled at once. The President and Congress bear the responsibility for the failure to appoint and confirm a fifth judge, and the Advisory Group urges that they establish and act upon written, defined time limits in filling this and other judicial vacancies.

A court system cannot function without an adequate number of judges to dispense justice. Although Congress has determined that there are an insufficient number of district judges within this district, a judicial vacancy has existed for more than two years. The Advisory Group recommends that this vacancy be filled immediately and that any future vacancies that may occur be filled without the delay that has so often characterized judicial appointments within this district.

B. Recommendations to Deal with Cost and Delay Caused by Court Procedures. The following recommendations address the causes of cost and delay identified in Section II(C)(2) of this report: inadequate case management, resetting of trial dates, motion practice, and utilization of magistrate judges.

1. The Court Should Expand the Availability of Magistrate Judge Settlement Conferences on a District-Wide Basis. In response to the Advisory Group's civil case questionnaire, several attorneys suggested that the judges hold settlement conferences, and one specifically mentioned the judicial settlement conferences held in the Middle District of Tennessee. Of the attorneys responding to this survey, 31 indicated that the judge had conducted or facilitated settlement discussions in their case, while 55 attorneys indicated that he had not (although 35 other attorneys replied that such potential involvement was "not applicable" to their cases). One litigant stated in response to the litigant survey, "I would have liked the judge to take a greater role in pretrial settlement. The plaintiff could have had the outcome a year earlier without $200,000+ in legal fees."

Magistrate judges within the district have had very good success with judicially-hosted settlement conferences that they recently have held in selected cases. There seems to be a consensus among the district judges, magistrate judges, and attorneys who have agreed to participate in these conferences that they are an effective device to bring the parties together and facilitate realistic settlement discussions. This form of judicial management is an efficient use of the district's magistrate judges and, by relieving civil docket pressures through voluntary dismissals, obviates the need to reset civil trial dates. The Advisory Group therefore recommends the following local rule to provide for such settlement conferences throughout the district:

Local Rule 68.3. Judicially-Hosted Settlement Conferences

A judge of this court may refer any civil case for a judicial settlement conference.

These conferences will be held by a magistrate judge other than the judge to whom the case is assigned for trial. This judge shall be referred to as the "Settlement Judge" and shall conduct the settlement conference according to the following procedures.

(a) Party Attendance. The Settlement Judge may require the attendance of the parties and their representatives at the settlement conference. In the event that the Settlement Judge does not require the attendance of parties or representatives with full settlement authority at the conference, each party shall make available by telephone an individual with full settlement authority.

(b) Settlement Proposals. In order to facilitate discussions at the conference, each plaintiff shall propose a settlement to each defendant at least two but not more than three weeks before the settlement conference. Each defendant shall respond to each settlement proposal at least three days before the settlement conference.

(c) Party Statements. At least three days before the settlement conference, each party shall serve upon all other parties and the Settlement Judge a short statement including a description of the plaintiff's claims, the defendant's defenses and counterclaims, the relief sought by the parties, the primary disputed issues of law and fact, and the procedural posture of the case. Any party may include with this statement additional information that may help facilitate a case settlement. The Settlement Judge may require additional information, either in the party statements or at the settlement conference.

(d) Confidentiality. Statements made or documents offered by any person in connection with the settlement conference are confidential within the meaning of Rule

408 of the Federal Rules of Evidence. With the consent of the person making a statement or offering a document, the Settlement Judge may reveal information to another person during the conference in an effort to facilitate settlement. The Settlement Judge shall not reveal to any other persons, including other judges, matters addressed at the settlement conference, but may report to the trial judge on the sole issue of likelihood of settlement.

2. The Court Should Continue to Experiment with Alternative Dispute Resolution Mechanisms and Refer Appropriate Cases for Alternative Dispute Resolution. In response to the Advisory Group's civil case questionnaire, approximately one-third of the attorney respondents (40 of 123) said that they would have seriously considered requesting referral of their case to a lawyer who was not a judge for settlement evaluation, while 52 percent said they would not and 15 percent said that they were unsure whether they would or not. Thirteen of twenty-one respondents to the Advisory Group's experienced practitioner survey said that, in appropriate cases, they would consider referral to a lawyer for settlement evaluation and discussion, while only three of these twenty-one respondents said that they would not consider such a referral.

There may be even more interest in alternative dispute resolution options among clients than among their counsel. When asked whether they would have seriously considered requesting that their case be referred to a lawyer who was not a judge for settlement evaluation and discussions with counsel, 21 of the 49 responding litigants indicated that they would, 17 indicated they would not, and 11 were unsure whether they would or would not.

Consistent with these sentiments, the District Court in Chattanooga recently initiated an experimental program of early neutral evaluation. A form of court order for use in connection with this program has been drafted, a panel of attorneys has volunteered to evaluate cases referred by the Court, and the first cases have been referred to an attorney panel. In the event that the program works as well as the Advisory Group anticipates, the Advisory Group commends it to the Court for replication in the other divisions of the district. Such a program has the potential not only to lead to faster and less expensive dispositions in individual cases, but to relieve docket pressures generally and thereby alleviate the need to reset civil trial dates.

The Advisory Group recommends that the District Court continue to experiment with alternative dispute resolution mechanisms such as early neutral evaluation, provide judicially-hosted settlement conferences on a district-wide basis, and refer cases to other forms of alternative dispute resolution as appropriate. Because of the various types of alternative dispute resolution and ongoing experiments with alternative dispute resolution in other districts, the Advisory Group recommends adoption of a local rule that will permit judges to refer a case to the method of dispute resolution most appropriate to that case. The Advisory Group recommends adoption of the following local rule, which is quite similar to Rule 23 of the United States District Courts for the Eastern and Western Districts of Kentucky:

> Local Rule 16.3. Alternative Dispute Resolution
>
> A judge may, in the judge's discretion, refer any civil case for early neutral evaluation, a settlement conference, or any other method of alternative dispute resolution established within the district.

To assure the most effective implementation of alternative dispute resolution within the district, the Advisory Group recommends that all of the district's judges receive training in alternative dispute resolution. For instance, the magistrate judges should be provided the opportunity to receive training in negotiation, mediation, and settlement skills useful in the settlement conferences they now hold and which the Advisory Group recommends should be institutionalized throughout the district.

The district's use of alternative dispute resolution will be greatly facilitated by the presence of an individual within the Clerk's Office to coordinate alternative dispute resolution programs, to determine the potential suitability of particular cases for various dispute resolution possibilities, and to evaluate the success of the different dispute resolution programs that either have been or may be instituted within the district. The Clerk's Office recently has acquired funding for a Deputy Clerk CJRA Analyst and a CJRA Law Clerk, and these individuals could be instrumental in implementing and evaluating alternative dispute resolution on a district-wide basis.

Finally, the Advisory Group recommends that the Court establish an "alternative dispute resolution committee" to consider potential uses of alternative dispute resolution on an ongoing basis. Alternative dispute resolution is an extremely fast moving area of the law, with new dispute resolution mechanisms being instituted constantly throughout the nation. Such a committee, composed of a district judge, a magistrate judge, a representative of the Clerk's Office, and two or three lawyers, might help keep the Court abreast of potentially helpful alternative dispute resolution developments both within the country and within the district. The

committee also might become a resource for the Court in its future assessments of its docket and litigation management practices within the district.

3. A Judicial Officer Should Become More Actively Involved in Case Management in the Early Stages of the Civil Pretrial Process. In its note to the 1983 amendments to Rule 16 of the Federal Rules of Civil Procedure, the Advisory Committee recognized, "Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices." Rule 16(b) therefore was amended to assure that, in the words of the Advisory Committee, "except in exempted cases, the judge or a magistrate when authorized by district court rule will have taken some action in every case within 120 days after the complaint is filed that notifies the attorneys that the case will be moving toward trial."

Despite the policy behind Rule 16, the district or magistrate judge assigned to a case often does not hold any pretrial conference with counsel in the early stages of civil litigation. Because pretrial motions and conferences often are referred to magistrate judges, counsel's first appearance before the district judge who will try a case may be at trial. A conference with a non-judicial officer is not the same as an appearance before a judge. The mere fact that counsel must appear before a judge will often cause them to prepare more thoroughly for the scheduling conference. They also may be more realistic about the time needed for discovery and other pretrial tasks, the motions they intend to file, and the possibility of settlement.

The Advisory Group recommends that all pretrial conferences be held by either the district judge or magistrate judge assigned to the case. This recommended judicial involvement can be accomplished by an amendment to Local Rule 16.1, substituting the phrase "the district judge or magistrate judge assigned to the case" for the phrase "the court or a designee of the court" in the existing rule. The first portion of Rule 16.1 then would read: "In accordance with Rule 16 of the Federal Rules of Civil Procedure, the district judge or magistrate judge assigned to the case will conduct preliminary and final pretrial conferences and will issue preliminary and final pretrial orders in all civil actions . . . ."

The district judges and magistrate judges can determine the kind and degree of judicial management appropriate in a particular case far better than law clerks or other judicial adjuncts. Only judges have the authority to require compliance with plans and directions which emanate from management conferences. There is no substitute for early contact -- either in person or, in appropriate cases, during a telephone conference call -- between a judge and trial counsel. In the absence of such contact, early pretrial conferences can become meaningless formalities, important matters may have to be raised with both judicial and non-judicial officers, and preliminary decisions made and dates set by a law clerk may need to be reset by a judge -- all of which translates into needless additional cost and delay.

In a further effort to assure that pretrial conferences are as productive as possible, the Advisory Group recommends the addition of the following final paragraph to Local Rule 16.1:

> At all pretrial conferences, each party who is not proceeding pro se shall be represented by an attorney who has the authority to bind that party regarding all matters

previously identified by the court for discussion at the conference and all reasonably related matters. If settlement will be discussed at a pretrial conference, the court may require that the parties or party representatives with full settlement authority be present at the pretrial conference or be available by telephone.

This proposed addition to Rule 16.1 is based upon litigation management and cost and delay reduction techniques suggested by the Civil Justice Reform Act. 28 U.S.C. § 473(b)(2) and (5). Although there is no comparable provision in the existing local rules, the proposal confirms existing practice within the district.

4. The Court Should Fully Implement 28 U.S.C. § 636(c)(2) to Encourage Increased Consent to the Handling of Civil Trials and Dispositive Civil Motions by Magistrate Judges. The Advisory Group believes that, to the maximum extent possible, the district's magistrate judges should be employed as trial judges in civil cases. Because of the other demands on the district judges, especially those created by the criminal docket, parties often can obtain a speedier trial or ruling on a dispositive motion from a magistrate judge. Every case resolved by a magistrate judge is one less case that the district judges need consider.

The Judicial Improvements Act of 1990 (Title I of which is the Civil Justice Reform Act) includes as Title III the Federal Courts Study Committee Implementation Act. This title includes an amendment to Section 636(c)(2) of Title 28 concerning party consent to the exercise of jurisdiction over civil cases by magistrate judges. Under this amended section, the Clerk of Court is not only to notify the parties of the availability of a magistrate judge at the time an

action is filed, but "[t]hereafter, either the district judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences."

Currently, when issues are joined the Clerk's Office sends the parties a form on which they can consent to trial before a magistrate judge. This may be the only time that counsel are informed of their right to consent to trial before a magistrate judge, and the timing and manner of the notice may mean that some counsel do not consider the magistrate judge option as seriously as they otherwise might.

The Advisory Group recommends several changes in local rules and procedure, consistent with amended 28 U.S.C. § 636(c)(2), to keep the parties informed of their right to consent to have their case heard by a magistrate judge. Initially, the Advisory Group recommends that counsel be required to confer concerning the possibility of consent to trial before a magistrate judge and inform the Court of the parties' decision. To implement such a policy, the Advisory Group proposes the following local rule as a substitute for existing Local Rule 72.3(a) and (b):

Local Rule 72.3. Magistrate Judges - Civil Proceedings

(a) Notice of Opportunity to Consent to Proceed Before a Magistrate Judge. At the time a civil complaint is filed, plaintiff's counsel shall be given copies of Form 34 in the Appendix of Forms to the Federal Rules of Civil Procedure ("Consent to Proceed Before a United States Magistrate, Election of Appeal to District Judge, and Order of Reference"). Plaintiff's counsel shall serve one copy of this form upon each defendant and shall confer with defense counsel to determine whether the parties consent to have

a magistrate judge conduct all further proceedings in the case, including trial. Within 20 days after the appearance of the defendant, plaintiff's counsel shall file with the Clerk either: (a) a statement certifying that he or she has conferred with defense counsel but the parties do not consent to the exercise of jurisdiction by a magistrate judge or (b) the signed "Consent to Proceed Before a United States Magistrate, Election of Appeal to District Judge, and Order of Reference."

At least one of the district judges has adopted an informal policy of informing counsel of their right to consent to trial before a magistrate judge if a civil trial date must be reset. This procedure not only encourages greater use of magistrate judges to try civil cases, but helps the Court maintain trial dates. The Advisory Group endorses this procedure and recommends that the following addition to Local Rule 72.3 be adopted to implement the procedure throughout the district:

In the event that a district judge cannot hold a civil trial on the date previously set for trial, the judge shall inform counsel of that fact as soon as possible. At the time counsel are informed that the district judge cannot hear the case on the date previously set, counsel also shall be informed as to their right to consent to trial before a magistrate judge and told of possible dates on which the magistrate judge assigned to the case can hold the trial.

The Advisory Group also recommends that the Court inform counsel of their right to

consent to a final trial court determination of dispositive motions by a magistrate judge. While some of the district judges refer dispositive motions to the magistrate judges for reports and recommendations, a party's right to object to the magistrate judge's report and recommendation and the requirement of de novo consideration by the district judge can effectively double the Court's motion burden. Reports and recommendations also can increase the delay and expense for the parties in connection with dispositive motions. If objections are filed to a report and recommendation, the parties are obliged to file a second set of papers concerning the motion.

The Advisory Group therefore recommends the following local rule:

Local Rule 7.5. Duty of Counsel to Confer Concerning Resolution of Dispositive Motions by Magistrate Judge

(a) Duty of Counsel to Confer. Counsel for the moving party shall file in connection with any dispositive motion a statement (i) that counsel has conferred with all other counsel concerning party consent to the final resolution and entry of judgment on the dispositive motion by a magistrate judge and (ii) indicating whether or not the parties consent to the exercise of such jurisdiction by a magistrate judge. This statement shall be filed no later than the date upon which a reply brief must be filed.

(b) Final Rulings by Magistrate Judges. If all parties consent to a final ruling on the motion by a magistrate judge and one is available to hear the motion, the motion will be heard by a magistrate judge pursuant to 28 U.S.C. § 636(c)(1). Unless the parties specify otherwise in their consent to the exercise of jurisdiction by the magistrate judge, any appeal shall be to the court of appeals pursuant to 28 U.S.C. § 636(c)(4). Consent

to a final ruling on a dispositive motion by a magistrate judge does not waive any party's right to have other matters heard by a district judge.

Finally, the Advisory Group recommends that Local Rule 72.3 be amended to provide that the magistrate judges can exercise civil jurisdiction with party consent pursuant to 28 U.S.C. § 636(c)(1). This would eliminate the need for a district judge's order of reference before any civil case can be heard by a magistrate judge. Rule 72.3(b), in requiring an order of reference, is inconsistent with Local Rule 72.1, which provides: "The full-time magistrate judges are specially designated, upon consent of the parties, to conduct any and all proceedings in jury or nonjury civil matters and to order the entry of judgment, pursuant to 28 U.S.C. § 636(c)(1)." The Advisory Group recommends that the language in Local Rule 72.3(b) requiring orders of reference in individual cases be eliminated from that rule.

5. The Court Should Require Parties to Address Specifically Material Factual Issues in Connection with Summary Judgment Motions. Perhaps the motion on which counsel most often desire a speedy ruling is the motion for summary judgment. If such a motion is granted, further trial preparation may be unnecessary. Therefore, delays in ruling on summary judgment motions can greatly increase litigation cost and delay. Unfortunately, summary judgment motions often are among the lengthier and more complex pretrial motions, which means they typically take longer than other motions to resolve.

In order to make the summary judgment motion process more efficient, the Advisory Group recommends that the Court follow the lead of many other districts and adopt a

requirement that material issues of fact be specifically addressed in connection with all summary judgment motions. This requirement should focus both counsel and the Court on whether factual disputes actually do, or do not, exist. In addition, such statements should make it easier for the Court to grant partial summary judgment when a genuine issue of material fact precludes summary judgment concerning an entire case. So litigants will not have to file additional papers in connection with summary judgment motions, the Advisory Group recommends that the proposed fact statements be included in the parties' summary judgment briefs rather than filed as separate documents.

The Advisory Group recommends that the Court adopt the following local rule, which is based upon Rule 8(b)(7) of the United States District Court for the Middle District of Tennessee:

Local Rule 56.1. Summary Judgment Practice

(a) Opening Briefs. The opening brief filed in support of a motion for summary judgment shall contain a separate section consisting of a concise, numbered listing of: (i) the material facts as to which the moving party contends there is no genuine issue to be tried or (ii) a statement why, even if all facts alleged in the opposing party's pleading are taken as true, the granting of summary judgment is warranted.

(b) Answering Briefs. The answering brief filed in response to a motion for summary judgment shall include a separate section with a concise, numbered statement of (i) the material facts as to which it is contended there exists a genuine issue to be tried or (ii) the reason why, even if all allegations of the moving party are taken as true,

summary judgment in the moving party's favor is unwarranted.

6. The Court Should Establish Motion Briefing Schedules Early in Each Case and Hold Counsel to Those Schedules. A prerequisite to timely rulings on motions is the timely filing and briefing of those motions. The Advisory Group therefore recommends that, at the initial pretrial conference proposed in Recommendation A(3), the judge discuss with counsel potential motions and, as recommended in the Civil Justice Reform Act, set "deadlines for filing motions and a time framework for their disposition." 28 U.S.C. § 473(a)(2)(D).

The Advisory Group heard from both judges and lawyers about situations in which motions for summary judgment were not filed until the eve of trial. This not only precludes judges from devoting the time to such motions that they may deserve, but it may require unnecessary expenditures of time and money on pretrial discovery by the parties. The Advisory Group therefore recommends that judges at the initial pretrial conference determine the discovery necessary for any dispositive motion and determine whether to restrict other discovery until the dispositive motion has been briefed and decided.

The Civil Justice Reform Act reports filed by the judges of this district concerning motions that have been pending for more than six months indicate that the Court has permitted additional or untimely briefing in connection with many of these motions. While recognizing that requests for additional time or briefing are sometimes necessary, the Advisory Group recommends that the Court make a greater effort to hold counsel to the motion briefing schedules set at the initial pretrial conference and in the local rules.

It is customary in this district for the parties to file three briefs in connection with

motions, including a reply or rebuttal brief filed by the movant in response to the respondent's answering brief. Unfortunately, there is no guidance in the local rules regarding the timing and nature of reply briefs. Sometimes parties respond to reply briefs by filing surreply briefs. The Advisory Group believes that the number and nature of motion briefs should be addressed in the local rules.

In order to effectuate these recommendations, the Advisory Group recommends the following local rule, adapted from Rule 3.1 of the United States District Court for the District of Delaware. This proposed rule is offered as a substitute for existing Local Rules 7.1 and 7.3, which now govern motion practice in the district.

Local Rule 7.1. Motion Practice

(a) Briefing Schedule. Unless the court notifies the parties to the contrary, the briefing schedule for all motions shall be: (1) the opening brief and any accompanying affidavits or other supporting material shall be filed with the motion; (2) the answering brief and any accompanying affidavits or other material shall be filed no later than 10 days after the service of the opening brief, except that parties shall have 20 days in which to respond to motions for summary judgment; (3) any reply brief and accompanying material shall be filed no later than 10 days after the service of the answering brief. The above briefing schedule shall be set aside if within 10 days after the filing of a motion a stipulated briefing schedule is approved by the court.

(b) Brief Format. Briefs shall include a concise statement of the factual and legal grounds which justify the ruling sought from the court. Briefs shall comply with the

format requirements of Local Rule 5.1 and shall not exceed 25 pages in length unless otherwise ordered by the court. This page limitation shall also apply to all briefs filed in bankruptcy appeals, in accordance with Bankruptcy Rule 8010(c).

(c) Reply Briefs. A reply brief shall not be used to reargue the points and authorities included in the opening brief, but shall directly reply to the points and authorities contained in the answering brief.

(d) Supplemental Briefs. No additional briefs, affidavits, or other papers in support of or in opposition to a motion shall be filed without prior approval of the court, except that a party may file a supplemental brief of no more than five pages to call to the court's attention developments occurring after a party's final brief is filed. Any response to a supplemental brief shall be filed within five days after service of the supplemental brief and shall be limited to no more than five pages.

This proposed local rule would require parties to brief their motions in a relatively expeditious fashion, but permit parties to request, and the Court to approve, additional time for briefing complex motions. In this connection, the proposed rule would encourage counsel to propose and adhere to a single briefing schedule, rather than submit multiple stipulated orders extending the time for filing briefs concerning a particular motion. The rule also limits briefing to the papers specified in the rule and formally recognizes the right to file a reply brief. Section (b) of the proposed rule is largely a restatement of the brief format requirements contained in existing Local Rule 7.3.

The proposed rule would permit judges to take a more active role in the briefing process

in appropriate cases. Thus, if a motion is filed that had not been discussed previously with the Court, a judge could hold a telephone conference concerning that motion before the parties commit themselves to formally briefing the motion.

7. The Court Should Endeavor to Rule upon Each Pretrial Motion within 60 Days After It Is Fully Briefed. To the extent that cost and delay are engendered by judicial failure to rule on motions, there is a simple solution: the district and magistrate judges within the district should rule promptly upon all motions. In their interviews with the judges, Advisory Group members were impressed with judicial efforts to stay current with civil motions. However, at a time when the judges are working at full capacity due to a burgeoning criminal caseload and a long-standing judicial vacancy, civil motions necessarily cannot receive the priority they would under other circumstances.

Nevertheless, the Advisory Group is hopeful that, once the judicial vacancy within the district is filled, the Court will rule on all fully briefed motions within 60 days. In order to effectuate such a policy, the Advisory Group recommends that the Clerk of Court track all pending motions and make available to the judges every quarter a list of all motions still pending more than 60 days after briefing is complete. Prior to the Civil Justice Reform Act, quarterly data was reported by all judges. Using the new computerized case docketing that the district soon will implement, it will be a relatively easy matter for the Clerk's Office to produce reports concerning pending motions. This information also may prove helpful to the Court as it conducts the annual docket assessments required by 28 U.S.C. § 475.

8. The Court Should, in Appropriate Cases, Expand the Use of Oral Argument and Oral Rulings. The preparation of written briefs by counsel and written opinions by the Court can add substantially to the cost of pretrial litigation. In some cases, these efforts may do little more than add to the time required for a ruling on a pretrial motion. The Advisory Group therefore recommends that the Court, in appropriate cases, make expanded use of oral argument and oral rulings as a substitute for formal briefing and written judicial opinions.

The magistrate judges within the district are generally available to resolve discovery disputes without formal briefing, often over the telephone. This informal procedure helps counsel obtain quick and inexpensive determinations of uncomplicated discovery disputes. The Advisory Group recommends that the magistrate judges continue to hear discovery disputes in this manner in appropriate situations.

Discovery motions are not the only motions that sometimes can be resolved without a great deal of paperwork. The judicially-hosted pretrial conferences discussed in Recommendation A(3) would provide an excellent opportunity for a district or magistrate judge to discuss potential motions with counsel. Based upon such discussions, judges could set briefing schedules, limit the amount of briefing, focus briefs on the truly important issues, and decide particular disputes without formal briefs. Conversely, a judge could determine at such a conference that oral argument on a motion would be superfluous and the motion can best be determined on written briefs. Pretrial conferences therefore can be used to pinpoint cases in which oral argument should be dispensed with, as well as cases in which it should be utilized.

The Advisory Group recommends not only that the Court consider the use of oral argument as a substitute for written briefing in appropriate cases, but consider greater use of oral

rulings. In many cases it is more important to parties to receive an expeditious ruling upon a motion than it is to have a polished written decision. The Advisory Group recommends that, in setting cases for oral argument, the judges consider whether a ruling from the bench would be feasible.

The Advisory Group also recommends that, as urged by the Federal Courts Study Committee, judges take greater advantage of their ability to render findings of fact and conclusions of law orally pursuant to Federal Rule of Civil Procedure 52(a). When bench trials are taken under advisement, judicial rulings can be delayed. While there is often a need for the court to reflect upon and review the evidence presented at a hearing, a case is never fresher in the minds of both the judge and counsel than at its conclusion. In addition, counsel's presence in the courtroom may save the need for motions to clarify particular aspects of the court's findings of fact and conclusions of law.

Oral rulings have long been recommended as a means of increasing judicial efficiency. The Advisory Group recommends that the judges within this district make greater use of such rulings in appropriate cases.

9. The Court Should Permit One Automatic Thirty-Day Extension of Time to Respond to Complaints, Cross-Claims, and Counterclaims and Should Require Counsel to Confer Before Filing Non-Dispositive Motions. The judges and Clerk's Office often must deal with routine motions for extension of time to respond to complaints, cross-claims, and counterclaims. Once counsel agree to a proposed extension of time, they must submit a written motion to the Court, the judge must sign an order, and the order must be sent by the Clerk's

Office to all parties. To avoid this paperwork in connection with routine motions for extension of time, the Advisory Group recommends the following local rule:

> Local Rule 12.1. Extensions of Time to Respond or Plead
>
> If all counsel agree, parties shall be entitled to one automatic thirty-day initial extension of time in which to respond to the complaint, to a cross-claim, or to a counterclaim. The party seeking the extension shall inform the court of agreement between counsel by sending a stipulation to the Clerk's Office and a copy of this stipulation to all other counsel in the case. No order is necessary for an initial extension of time, but any extension of time beyond an initial extension will not be allowed except by order of the court.

In addition, the Advisory Group recommends that the duty imposed on counsel by Local Rule 37.1, the district's "meet and confer" rule concerning discovery motions, be extended to all non-dispositive motions. This rule has worked well in resolving and narrowing discovery disputes. The Advisory Group believes it could have the same salutary effect if applied to all non-dispositive motions.

C. Recommendations to Deal with Cost and Delay Caused by the Ways in Which Litigants and their Attorneys Approach and Conduct Litigation. These recommendations address the causes of cost and delay identified in Section II(C)(3) of this report: discovery abuse, problems of lawyer incompetence and failure to cooperate, and lawyer and litigant choice for

delay.

1. The Court Should Limit the Amount of Discovery to which a Party is Entitled Without Leave of Court. While discovery is not a problem in all cases, in some cases it needlessly increases both the expense of civil litigation and the time necessary for its final disposition. Local Rule 33.1 is an existing limitation on interrogatories. However, by its terms it merely limits the number of interrogatories that may be included in any set of interrogatories, without limiting the number of sets of interrogatories. The Advisory Group recommends that Rule 33.1 be amended to limit parties to thirty interrogatories per civil action without prior leave of court.

The Advisory Group also recommends that the Court adopt comparable local rules limiting parties to no more than ten depositions of no more than eight hours each without prior leave of court. If more than ten depositions are requested, the Advisory Group further recommends that the requesting party must submit with his or her request a motion for a discovery conference containing a proposed discovery plan and schedule. If a party intends to take more than ten depositions, the case warrants the closer judicial supervision contemplated by Federal Rule of Civil Procedure 26(f). While most cases will proceed with limited judicial involvement in discovery, in those few cases that require such involvement it will be triggered by a request for leave to take more than ten depositions.

The Advisory Group recommends the following new local rule to effectuate its recommendations:

Local Rule 30.1. Deposition Limitations

No party shall be entitled to take more than ten depositions without prior leave of court or to take any single deposition of more than eight hours without prior leave of court or agreement of the parties. In the event a party requests leave to take more than ten depositions, the request shall be accompanied by a motion for a discovery conference. This motion shall contain (1) a statement of the issues as they then appear; (2) a proposed discovery plan and discovery schedule; and (3) a statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing counsel on the matters set forth in the motion.

2. Federal Rule of Evidence 702 Should be Amended to Restrict Expert Testimony and Experts Should be Identified Early in the Pretrial Process. Expert witnesses increasingly account for a significant portion of litigation cost. The Advisory Group offers two recommendations to curtail unnecessary expert witness costs.

First of all, the Advisory Group favors the adoption of the pending proposed amendment to Federal Rule of Evidence 702. This proposed amendment would change Rule 702 so that, in order to qualify as an expert witness, an individual must be able to provide testimony which will substantially assist the trier of fact. Tennessee Rule of Evidence 702 so provides, and that rule has proved quite workable for attorneys practicing in the Tennessee courts. To amend Federal Rule of Evidence 702 in a similar manner would not interfere with a party's ability to present his or her case. It would, though, limit the role that marginally relevant, but quite costly, expert testimony plays in federal litigation.

In addition, the Advisory Group recommends that the Court adopt as a local rule that portion of the proposed amendment to Federal Rule of Civil Procedure 26 requiring the early identification of expert witnesses. While the Advisory Group believes that the across-the-board discovery disclosure contemplated by the proposed amendments to Rule 26 actually could increase litigation costs in some cases, the early disclosure of expert witnesses would have the opposite effect. Counsel should know as soon as possible which expert witnesses will testify in a case. Counsel's inability to disclose experts may indicate a failure adequately to define claims or defenses. Finally, the Advisory Group believes that motions to depose experts are almost uniformly granted and that needless time and money is spent in seeking agreements or preparing motions with respect to such depositions.

The Advisory Group therefore recommends the following local rule concerning expert witness disclosure and discovery:

Local Rule 26.4. Disclosure and Depositions of Expert Witnesses

(a) Disclosure of Expert Witnesses. Each party shall disclose to every other party the name of every expert witness whom the party expects to call at trial pursuant to Rule 702 of the Federal Rules of Evidence. In addition to identifying each expert, the party who may offer that expert shall provide every other party with a curriculum vita containing the expert's qualifications.

(b) Timing of Disclosure. Unless the court designates a different time, experts shall be identified pursuant to subsection (a) at least 90 days before the date the case has been directed to be ready for trial, or, if the expert is intended solely to contradict or

rebut an expert identified by another party under subsection (a) of this rule, within 30 days after the identification made by such other party.

(c) Expert Depositions. A party may depose any person identified pursuant to subsection (a) of this rule whose opinions may be presented at trial. Rule 26(b)(4)(C) of the Federal Rules of Civil Procedure shall apply to the fees and expenses incurred in connection with any deposition taken under this rule.

3. The Advisory Group and the Court Should Undertake an Educational Effort concerning the Court, its Civil Justice Expense and Delay Reduction Plan, and Federal Practice. Regardless of the Civil Justice Expense and Delay Reduction Plan adopted by the Court, there will be a need to inform and educate attorneys about the new plan. In addition, existing problems of lawyer competence, failure to cooperate, and choice for delay could be addressed by an educational effort. The Advisory Group therefore recommends that the Court undertake an educational program concerning the Court, its new Civil Justice Expense and Delay Reduction Plan, and federal practice. Advisory Group members, individually and collectively, offer to help in such an effort in the manner the Court deems most appropriate.

The Advisory Group recommends that the proposed educational program include several components. First of all, the Group recommends that the Clerk's Office prepare a brochure describing any new policies adopted as a result of the Advisory Group's recommendations, as well as existing policies of the Court and the Clerk's Office. Although the Court's local rules are available to counsel, the contemplated brochure could describe internal operating procedures such as case assignment procedures and matters of local practice not covered in the rules.

Presumably this booklet initially would be sent to all current members of the District Court bar. Thereafter, it would be provided to attorneys upon their bar admission.

The proposed booklet also might focus on areas with which attorneys typically have difficulty. For instance, the booklet might describe the procedures for obtaining a default judgment, for submission of proposed orders, or for obtaining extensions of time. In addition to providing such information to improve lawyer competence, the booklet could address lawyer cooperation, the manner in which actions by counsel may increase litigation cost and delay, and the attitude of the judges toward such actions. The Advisory Group considered but rejected a recommendation that the Court adopt a lawyer's "creed of professionalism," it being noted that the Tennessee Bar Association and some local bar associations already have adopted such creeds. However, the Clerk's Office brochure could address this topic, perhaps referring to the lawyer's creed of professionalism adopted by the Tennessee Bar Association.

The proposed brochure could include information from the District Court's local history project, as well as biographical information concerning the district and magistrate judges within the district. Information concerning the district's judges might be particularly helpful to counsel from outside the district and might help these attorneys in deciding whether to consent to the exercise of civil jurisdiction by a magistrate judge.

The Advisory Group further recommends that the Court hold a formal swearing-in ceremony for all new attorneys. In connection with this ceremony, a short orientation to the Court could be held. New attorneys could be addressed by one of the district judges, a magistrate judge, a representative of the Clerk's Office, and a member of the District Court bar. Such a ceremony might not only acquaint newly admitted counsel with local federal practice,

but could be used to stress to counsel their role as officers of the court and their duty to work cooperatively to reduce litigation cost and delay.

The Advisory Group recognizes that none of its recommendations will be successful unless there is both communication and cooperation between the bench and bar concerning the implementation of those recommendations. The Advisory Group therefore commits itself, both as a group and individually, to work to educate the bar about any new procedures adopted as a result of the group's recommendations. The Advisory Group also recommends that the district judges, the magistrate judges, and personnel of the Clerk's Office offer to speak at continuing legal education sessions concerning any new procedures. Most immediately, the Advisory Group wishes to host a continuing legal education program in 1993 concerning federal practice and procedure, with a particular emphasis on the district's expense and delay reduction plan. The Advisory Group welcomes the participation of judges and court personnel at this program. If this initial program proves successful, the Advisory Group and the Court may wish to continue the program on an annual basis.

The Advisory Group recommends that the Tennessee Bar Association, the Tennessee Trial Lawyers Association, the Tennessee Association of Criminal Defense Lawyers, and local bar associations within the state increase their focus on federal practice, procedure, and the federal courts. These bar associations might sponsor continuing legal education seminars concerning federal practice and add regular federal practice columns to their bar publications. The Advisory Group notes that an effort is underway to organize a chapter of the Federal Bar Association in Greeneville and recommends that attorneys in other parts of the district consider joining the Federal Bar Association and forming additional chapters of that association in the

district.

D. Recommendations to Deal with Cost and Delay Caused by the Impact of New Legislation on the Courts. The following recommendations deal with the causes of cost and delay identified in Section II(D) of this report: the impact upon the civil docket of criminal cases and newly created, substantially revised, and complex civil causes of action.

1. The Attorney General and the United States Attorney Should Limit Federal Prosecutions to Cases that Cannot or Should Not be Brought in State Court. The federal courts are limited resources faced with many competing demands. The Advisory Group commends the United States Attorney for aggressively pursuing crime within the district, particularly cases involving organized drug trafficking. However, at least some of the federal prosecutions initiated in recent years could have been brought equally well in state court. The Advisory Group therefore endorses the recommendation of the Federal Courts Study Committee dealing with drug prosecutions, adding a clause to the beginning of that recommendation endorsing the continued use of the federal courts to prosecute organized drug traffickers:

> Except with respect to cases involving organized drug trafficking, federal prosecuting authorities should limit federal prosecutions to charges that cannot or should not be prosecuted in the state courts and should forge federal-state partnerships to coordinate prosecution efforts. Congress should direct additional funds to the states to help them to assume their proper share of the responsibilities for the war on drugs,

including drug crime adjudication.

Report of the Federal Courts Study Committee 35 (1990).

To effectuate this recommendation will require continuing communication and coordination between state and federal law enforcement personnel. The United States Attorney periodically meets with state authorities, and the Advisory Group endorses this cooperation of federal and state prosecutorial authorities. The Tennessee prison system is no longer under federal judicial supervision, many new state prisons have been built within the last decade, and the state's capacity to prosecute crime has grown. The Advisory Group encourages state authorities to use this increased capacity to bring criminal prosecutions that traditionally have been handled in state court and that greatly exacerbate problems of cost and delay within an overburdened federal judicial system.

2. The Congress Should More Carefully Consider the Impact upon the Federal Judiciary of Proposed Legislation. Before enacting either criminal or civil legislation, Congress should more carefully consider the potential judicial impact of that legislation. The likely number and magnitude of additional federal lawsuits filed under proposed causes of action should be considered. Congress also should consider the potential for additional litigation as an unintended side-effect of proposed legislation, due, for instance, to ambiguous statutory language or to incentives created for litigants to file claims in federal court rather than utilize an existing state forum.

Just as impact statements are required to preserve certain natural resources, Congress and

the Executive should systematically consider the impact of their actions on another limited resource: the federal courts. The Advisory Group therefore endorses the recommendation of the Federal Courts Study Committee that there be created in the judicial branch an Office of Judicial Impact Assessment to advise Congress on the effect of proposed legislation on the judicial branch and legislative drafting matters likely to lead to unnecessary litigation. Report of the Federal Courts Study Committee 89 (1990).

The Advisory Group is sympathetic to the important public policies motivating proposed legislation that would create new federal crimes covering firearms homicides, violence against women, child abuse, and failure to pay child support. However, if these traditionally state crimes are prosecuted in federal court, the federal courts will not have the capacity to handle traditionally federal causes of action. In considering the impact of new legislation, particularly legislation that would result in complex civil and criminal litigation, Congress should consider not only the nationwide impact of that legislation but the impact of the contemplated litigation upon particular districts. Some federal district courts may be more affected by new legislation than others because, for instance, of a small number of judges, judicial vacancies, or a disproportionate number of new case filings if the proposed legislation is enacted.

The Advisory Group favors a conservative approach to new civil and criminal causes of action, as opposed to efforts to alleviate docket congestion by restricting the jurisdiction of the federal courts to federal crimes and federal questions. Only two of the twenty-one experienced federal practitioners who responded to the Advisory Group's non-case specific survey favored the abolition or further restriction of federal diversity jurisdiction. Perhaps more significantly, twenty-nine of the attorneys who responded to the civil case survey indicated that federal

diversity jurisdiction was invoked in their case and led to a faster and less expensive case resolution than would have been possible in state court.

E. The Recommended Plan's Compliance with 28 U.S.C. § 473. Section 472(b)(4) of the Civil Justice Reform Act requires that the Advisory Group's report include "an explanation of the manner in which the recommended plan complies with section 473." Section 473 requires that each United States District Court consider six specific "principles and guidelines of litigation management and cost and delay reduction," 28 U.S.C. § 473(a), as well as six "litigation management and cost and delay reduction techniques." 28 U.S.C. § 473(b). This section of the report is the explanation of the manner in which the plan recommended by the Advisory Group complies with 28 U.S.C. § 473.

1. Principles and Guidelines of Litigation Management and Cost and Delay Reduction. The Advisory Group's recommendations are in large measure based upon the six principles and guidelines of litigation management set forth in the Civil Justice Reform Act. In addition, existing rules and practices within the district are premised upon these principles and guidelines.

a. Systematic, differential treatment of civil cases. Although the Advisory Group has proposed no single recommendation concerning differential case management, such management is a recurring theme of the Group's recommendations. A major reason for Recommendation B(3), concerning early judicial case involvement, is to assure that counsel and

the Court tailor pretrial proceedings to each particular case. Recommendation C(1) proposes that requests to take more than ten depositions must be accompanied by a motion for a discovery conference. Under existing procedures of the Court, there already are separate case tracks for bankruptcy, prisoner, and social security cases.

The Advisory Group will watch with great interest differential case management plans that have been implemented in other districts, particularly the demonstration programs undertaken in the United States District Courts for the Northern District of Ohio and the Western District of Michigan. The Advisory Group looks forward to the report that will be issued concerning these programs by the Judicial Conference of the United States in 1995. Until that time, however, the Advisory Group does not believe this district should adopt the extensive differential case management systems used in those districts.

b. Early and ongoing control of the pretrial process through involvement of a judicial officer. This principle of litigation management is most directly adopted by the Advisory Group in Recommendation B(3), proposing that judicial officers become more actively involved in case management in the early stages of the civil pretrial process. Many of the Advisory Group's other recommendations also contemplate early and ongoing judicial control of the pretrial process.

The series of recommendations concerning motion practice (Recommendations B(5) - B(9)) will require early and ongoing judicial involvement to assure that motions are made and resolved in the most efficient fashion. Recommendation C(1) would require judicial approval of proposals to take more than ten depositions. By more efficient utilization of the district's

magistrate judges as contemplated by Recommendation B(4), judicial resources should be freed to permit the Court to hold trial dates, rule promptly on pretrial motions, and otherwise assure the expeditious resolution of civil cases.

c. Monitoring of complex and other appropriate cases through discovery-case management conferences. Under the recommendations contained in this report, discovery-case management conferences would be held by the Court in appropriate cases. Recommendation B(3) of the Advisory Group is that a district judge or magistrate judge become more actively involved in the early stages of all civil cases. The early judicial conferences contemplated by this proposal would enable judges to explore the possibility of settlement, identify the principal issues, consider bifurcation, prepare a discovery schedule and plan, and set deadlines for the filing and disposition of motions.

In addition, judicial monitoring of motion practice, as appropriate to particular motions and cases, is inherent in Recommendations B(5) through B(9). Recommendation C(1) would involve the Court in discovery planning in more complex cases in which more than ten depositions are sought by a party. Recommendation B(1) would involve magistrate judges throughout the district in discussions concerning settlement of civil cases.

d. Encouragement of cost-effective discovery. Discovery, and the most cost-effective means of discovery in particular cases, will be a subject of discussion at most of the early judicial pretrial conferences proposed in Recommendation B(3). The presumptive discovery limitations proposed in Recommendation C(1) should encourage counsel to work

cooperatively to provide relevant discovery without the need for formal discovery requests and responses.

The Advisory Group considered recommending a mandatory discovery disclosure rule, but decided against such a recommendation. Members of the Advisory Group believe that such an across-the-board rule would be difficult to apply in all cases and, in some cases, would require disclosure of more information (with the attendant cost) than would be requested under existing discovery rules. However, Recommendation C(2) contains a proposed local rule that would require the voluntary pretrial disclosure of expert witnesses and would permit expert witness depositions without an order of court. Because of the key role expert testimony plays in civil litigation, there is no reason to wait for a formal request to identify expert witnesses or for a court order to depose experts who will testify at trial.

e. Attorney certification of non-judicial attempts to resolve discovery disputes. Local Rule 37.1 already requires that all discovery motions must be accompanied by a certificate of counsel that, after consultation among the parties, they are unable to reach agreement concerning the discovery dispute presented to the Court. The Advisory Group believes that this rule has worked well, and it recommends that the Court continue to require adherence to the rule. In addition, the Advisory Group recommends that such a counsel certification requirement be extended to all non-dispositive motions (Recommendation B(9)), motions for discovery conferences (Recommendation C(1)), and consent to the exercise of jurisdiction by magistrate judges (Recommendation B(4)).

f. Authorization for the referral of appropriate cases to alternative dispute resolution. Recommendation B(2) not only encourages greater experimentation with alternative dispute resolution within the district, but proposes a new local rule giving judges the express authority to refer cases to appropriate forms of alternative dispute resolution. If such a rule is adopted, the Advisory Group anticipates that actual referrals will become increasingly common as judges within the district continue to develop and experiment with different alternative dispute resolution techniques and as lawyers and litigants become more familiar with ADR.

2. Litigation Management and Cost and Delay Reduction Techniques. The Advisory Group considered each of the litigation management and cost and delay reduction techniques specified in the Civil Justice Reform Act. The Advisory Group recommends the adoption of some of these techniques, does not consider that some of these techniques are suitable for this district, and notes that some of these techniques already are in place within the district.

a. Requirement of discovery-case management plans. The Advisory Group does not recommend that the Court require counsel to present joint discovery-case management plans in all civil cases. Consistent with the litigation management principle of differential treatment of civil cases, the Advisory Group believes that such a requirement would impose needless costs upon the parties in many cases.

In Recommendation B(3) the Advisory Group recommends early judicial pretrial conferences, a major purpose of which would be for counsel and the Court to discuss pretrial

case management, including discovery. While judges may request written discovery-case management plans in connection with these conferences in appropriate cases, the Advisory Group believes that, as a general rule, these topics can be quite adequately discussed without imposing upon all parties the requirement of a written submission. However, when a party desires to take more than ten depositions in a case, Recommendation C(1) would require that party to submit a proposed discovery plan to the Court after consultation with opposing counsel.

b. Requirement of attorney authority at pretrial conferences. Recommendation B(3) makes explicit the general practice concerning pretrial conferences within the district. Under this proposed addition to Local Rule 16.1, each party who is not proceeding pro se would be represented at each pretrial conference by counsel with authority to bind that party regarding all matters previously identified by the Court for discussion at the conference and all reasonably related matters.

c. Requirement that extension requests be signed by counsel and client. This litigation management and cost and delay reduction technique was considered but rejected by the Advisory Group. For litigants who do not reside within the district, and particularly for the increasing number of litigants who do not reside within the United States, this requirement actually could increase expenses by requiring otherwise unnecessary attorney-client correspondence on routine extension requests.

More fundamentally, the Advisory Group believes that such a requirement would impinge upon the attorney-client relationship without any real reduction in litigation cost and delay.

Inherent in the adversary system is the presumption that counsel are representing the best interests of their clients and are keeping their clients properly advised. The Advisory Group sees no reason to presume that the district's bar is failing to act properly in connection with requests for extension of time.

d. Establishment of a neutral evaluation program. In the Southern Division of the district, a neutral evaluation program recently has been instituted. As noted in Recommendation B(2), the Advisory Group believes that this experimental program has promise. If the program is as successful as Advisory Group members believe it may be, it should be considered by the Court for possible replication in other divisions within the district.

e. Requirement of client participation in settlement conferences. In Recommendation B(1), the Advisory Group has proposed a new local rule that would expand the availability of magistrate judge settlement conferences on a district-wide basis. This proposed rule gives magistrate judges conducting settlement conferences the authority to require the attendance of the parties and their representatives at such conferences and requires that party representatives with full settlement authority be available during conferences by telephone if they are not personally present. Apart from these settlement conferences conducted by magistrate judges, Recommendation B(3) explicitly recognizes the discretionary power of judges to require client participation, in person or by telephone, in other pretrial conferences at which the subject of settlement is expected to arise.

f. Other recommended litigation management and cost and delay reduction techniques. In its recommendations to the Court, the Advisory Group has gone beyond the litigation management and cost and delay reduction techniques specified in the Civil Justice Reform Act. The Advisory Group has recommended: expansion of the existing program of magistrate judge settlement conferences (Recommendation B(1)); continued experimentation with alternative dispute resolution techniques (Recommendation B(2)); judicially-hosted pretrial conferences (Recommendation B(3)); additional efforts to inform parties of their right to consent to civil jurisdiction by magistrate judges (Recommendation B(4)); various procedures to streamline motion practice (Recommendations B(5) - B(9)); and limitations on discovery (Recommendation C(1)) and expert witness costs (Recommendation C(2)). In addition, Recommendation C(3) of the Advisory Group is that the Group and the Court undertake an educational effort concerning the Court, its civil justice expense and delay reduction plan, and federal practice.

F. The Recommended Plan's Compliance with 28 U.S.C. § 472(c)(2) and (3). As should be clear by this point in this report, the recommendations of the Advisory Group have been offered after due consideration of "the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys." 28 U.S.C. § 472(c)(2). The Advisory Group's investigations included analysis of extensive data concerning the Court, including statistical data from the Administrative Office of the United States Courts, the Federal Judicial Center, and the Clerk of Court. Advisory Group members interviewed every district judge and magistrate judge in the district, as well as the Clerk of Court and key personnel in the Clerk's

Office. Non-attorney litigants were represented on the Advisory Group, and a litigant survey was undertaken by the group. Finally, all members of the Advisory Group, including the non-attorney members, have had extensive litigation experience within the district, and the views of additional litigants' attorneys were solicited by means of the several attorney surveys employed by the Group.

As required by 28 U.S.C. § 472(c)(3), the Advisory Group's recommended actions will require significant contributions by "the court, the litigants, and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts." If these recommendations are adopted, the judges within the district will be required to become more active case managers, particularly in the early stages of civil litigation. The role of magistrate judges will change somewhat under the Advisory Group's recommendations, and the closer monitoring of the pretrial process recommended will require the active cooperation of judicial staff members and the Clerk of Court. Adoption of Recommendation B(7) would commit the Court to the goal of ruling on motions within 60 days and would require the Clerk's Office to help judges meet this goal by providing them with continuing information concerning pending motions.

Litigants also will be required to make significant contributions to cost and delay reduction if the Advisory Group's recommendations are adopted. They will be required to become more actively involved in their cases, particularly by attendance at the magistrate judge settlement conferences (Recommendation B(1)) and by participation in alternative dispute resolution techniques (Recommendation B(2)) recommended by the Advisory Group.

Attorneys, too, will be required to contribute significantly to the reduction of litigation cost and delay under the Advisory Group's recommendations. Attorneys may participate in

additional pretrial conferences and, to represent their clients effectively at these conferences, would be required to come to grips with their cases earlier in the pretrial process. Under Recommendation B(5), attorneys would be required to address specific material issues in connection with summary judgment motions, while Recommendation B(6) would require counsel to adhere to expeditious motion briefing schedules. Attorneys would be required to consider alternative dispute resolution possibilities and therefore would be required to educate themselves about these new opportunities for serving their clients.

Under the recommendations contained in this report, attorneys of all types would be required to contribute to the reduction of litigation cost and delay. While attorneys who regularly practice within the district would make the most substantial contributions, attorneys from other districts would contribute as well. For instance, attorneys from outside the district would be required to consult with opposing counsel concerning possible consent to the jurisdiction of magistrate judges, a process that should be facilitated by the informational brochure contemplated in Recommendation C(3). Attorneys would be expected to consult and cooperate with one another under the proposed meet and confer certification provisions concerning consent to magistrate judge jurisdiction (Recommendation B(4)), non-dispositive motions (Recommendation B(9)), and discovery plans (Recommendation C(1)).

Under Recommendations B(1) (expansion of magistrate judge settlement conferences) and B(3) (early judicial involvement in pretrial case management), in-house counsel may find themselves more directly participating in the litigation process by attendance at pretrial conferences. They also may need to be present at alternative dispute resolution proceedings held pursuant to Recommendation B(2) and may be expected to actively participate in case evaluation

in connection with such proceedings.

The Advisory Group's recommendations would affect attorneys regardless of the basis upon which they are compensated. The Advisory Group does not believe that attorneys paid on an hourly basis, or contingent fee attorneys, or attorneys seeking fees under federal statutes, or any other group of attorneys are particularly responsible for the problems of cost and delay identified within the district. The recommendations contained in this plan, therefore, contemplate contributions by all attorneys, rather than singling out anyone for special treatment.

The Advisory Group's recommendations address all of the principal components of litigation costs. Attorneys' fees, expert witness costs, and court reporting expenses related to discovery should be reduced if Recommendations C(1) and C(2) are adopted by the Court. Attorneys' fees incurred in motion practice are addressed in Recommendations B(5) through B(9). Recommendations B(1) and B(2) should reduce trial expenses, by the resolution of disputes through settlement or other means of alternative dispute resolution. To the extent that trials can be provided more expeditiously before magistrate judges, Recommendation B(4) also should result in a reduction of trial cost and delay.

Finally, Recommendations A (filling the district's judicial vacancy), D(1) (limiting federal criminal prosecutions), and D(2) (congressional consideration of the impact upon the judiciary of proposed legislation) should lead to a general decrease in litigation cost and delay within the district. Full implementation of the Advisory Group's other recommendations presupposes a fully-staffed court that can concentrate on civil dispute resolution. This is not possible when, as at present, civil trial dates must be reset because of the criminal docket and judges, staff, and attorneys must travel throughout the district because of the judicial vacancy in the district's

Southern Division. Absent action by the executive and legislative branches of the federal government, civil justice reform within the Eastern District of Tennessee will remain an unfulfilled promise.

CONCLUSION

The United States District Court for the Eastern District of Tennessee has a proud heritage and is a court which remains committed to the "just, speedy, and inexpensive determination of every action." The Advisory Group on Litigation Cost and Delay offers this report with the belief that adoption of the recommendations it contains will permit the Court to continue its enviable record well into the 21st century.

December 18, 1992

APPENDIX A

BIOGRAPHIES

Donald J. Aho. A partner of the firm of Chambliss & Bahner in Chattanooga, Mr. Aho is a 1983 graduate of the Wayne State University School of Law and a 1979 graduate of Northern Michigan University. He is a former law clerk for the Honorable R. Allan Edgar, and his practice is concentrated in the areas of civil litigation including, in particular, business, torts, and commercial matters. Mr. Aho chaired the Advisory Group Committee on Alternative Dispute Resolution.

Thomas A. Bickers. Mr. Bickers is a 1984 graduate, with high honors, of the University of Tennessee College of Law, where he was elected a member of the Order of the Coif and a member of the Tennessee Law Review. Following law school, he spent two years clerking for the Honorable H. Ted Milburn of the United States Court of Appeals for the Sixth Circuit. Mr. Bickers is a 1984 graduate of Middle Tennessee State University, where he received a Bachelor of Science Degree, cum laude. He practices with the Knoxville firm of Paine, Swiney & Tarwater. His practice is a litigation practice, with particular emphasis on mass tort litigation.

Frank M. Brogden. One of two non-lawyers on the Advisory Group, Mr. Brogden was formerly Assistant Vice-President and Director for Communications and Public Affairs at Tennessee Eastman Company in Kingsport, Tennessee. He has been active in a number of business, civic, and governmental affairs. He is currently serving as an Alderman on Kingsport's Board of Mayor and Aldermen and chairs its Annexation Committee. He has chaired the Tennessee Health Facilities Commission, the Leadership Giving branch of the United Way of Greater Kingsport, and the American Legion's Boys State Committee. He is a former president of the Kingsport area Chamber of Commerce and of the Kingsport Kiwanis Club. He is a former trustee of the Tennessee Student Assistance Corporation and a former member and vice-chairman of the Tusculum College Board of Trustees, having graduated from Tusculum College with a Bachelor of Arts degree in 1950.

David A. Burkhalter, II. Mr. Burkhalter, a Knoxville lawyer practicing largely in the areas of personal injury, wrongful discharge, and discrimination, chaired the Advisory Group's Education Committee. Mr. Burkhalter is a 1976 cum laude graduate of the University of Tennessee College of Law. His undergraduate degree was obtained from the University of Tennessee in 1973. While at law school, Mr. Burkhalter was a member of the Tennessee Law Review and the Order of the Coif. He has chaired the Tennessee Chapter of the National Employment Lawyers Association.

Harry F. Burnette. Mr. Burnette is a 1973 graduate of the University of Tennessee College of Law. He received his undergraduate degree from Maryville College in 1970. He is a partner in the law firm of Brown, Dobson, Burnette & Kesler in Chattanooga. In 1979-80, he served as President of the Chattanooga Chapter of the Federal Bar Association, and he concentrates his work in the areas of civil litigation, labor law, employment law, and discrimination litigation.

Robert R. Campbell. Mr. Campbell, a Fellow of the American College of Trial Lawyers, an Advocate of the American Board of Trial Advocates, and a Life Member of the Sixth Circuit Judicial Conference, practices law with the firm of Hodges, Doughty & Carson in Knoxville. He is also a Fellow of the American Bar Foundation and the Tennessee Bar Foundation. He received his undergraduate degree from the University of Tennessee in 1953 and is a 1956 graduate of the College of Law of the University of Tennessee. He has served on the Tennessee Appellate Court Nominating Commission (1979-85) and has Chaired the Commission (1984-85). He was president of the Knoxville Bar Association in 1972.

Jerry Glenn Cunningham. Mr. Cunningham is United States Attorney for the Eastern District of Tennessee. Appointed in 1991, he previously practiced law with the firm of Thomas & Cunningham in Maryville, Tennessee, where he served as President of the Blount County Bar Association in 1974-75. He is a 1963 graduate of the University of Tennessee and a 1965 graduate of the University of Tennessee College of Law. He served in the United States Marine Corps where he attained the rank of Captain.

R. Lawrence Dessem. Professor Dessem served as the Reporter to the Advisory Group. He is Professor of Law at the University of Tennessee College of Law. He received his undergraduate degree from Macalester College, where he was elected to Phi Beta Kappa. He attended the Harvard Law School, graduating cum laude in 1976. After law school and a judicial clerkship, he was employed as a trial lawyer and senior trial counsel by the United States Department of Justice. The author of Pretrial Litigation: Law, Policy and Practice (West 1991), Pretrial Litigation in a Nutshell (West 1992), and a number of law journal articles, Professor Dessem is presently serving as President of the Hamilton Burnette American Inn of Court.

Thomas F. Fine. Mr. Fine is Senior Litigation Attorney and a 17 year veteran of the Office of the General Counsel of the Tennessee Valley Authority, where his practice is focused in the areas of employment law and employment discrimination, practicing before a large number of judicial and administrative fora. He obtained his undergraduate degree, magna cum laude, from Duke University in 1974 and was elected to Phi Beta Kappa. His legal education was completed at Boston University School of Law, where he graduated cum laude in 1974. Following graduation from law school, he clerked for the Honorable Frank H. McFadden, then Chief Judge of the United States District Court for the Northern District of Alabama.

James W. Gentry, Jr. Mr. Gentry received his undergraduate degree from the University of the South in 1950. From 1951 to 1953, he was as an officer in the Marine Corps serving in the Korean Conflict. He then attended the Vanderbilt Law School, graduating in 1956. He is a partner in the Chattanooga firm of Spears, Moore, Rebman & Williams, where his practice is concentrated in the areas of environmental consultation and litigation and corporate litigation. Mr. Gentry chaired the Advisory Group's Committee on Complex Litigation.

Shelby R. Grubbs. Mr. Grubbs, the Chair of the Advisory Group, practices law with Grant, Konvalinka & Grubbs in Chattanooga. He is a 1975 graduate of the University of Alabama School of Law, where he was a member of the Editorial Board of the Alabama Law Review. He received his undergraduate degree from the University of Mississippi in 1971. He has taught at the University of Tennessee at Chattanooga and is a past President of the Chattanooga Bar Association (1988-89). He is an approved panelist for the American Arbitration Association and the National Association of Securities Dealers. His practice is concentrated in the areas of business law, products liability law, and dispute resolution. He also chairs the Tennessee Supreme Court Commission on Dispute Resolution.

Charles T. Herndon, IV. A partner in the Johnson City, Tennessee firm of Herndon, Coleman, Brading & McKee and a past President of the Washington County Bar Association, Mr. Herndon chaired the Advisory Group Committee on Discovery. He is a 1974 graduate of the University of Tennessee College of Law. He obtained his undergraduate degree from the University of Tennessee as well, taking that degree in 1971. He is a member of the American Board of Trial Advocates.

G. Wilson Horde. Mr. Horde is General Counsel of Martin Marietta Energy Systems in Oak Ridge, Tennessee. He attended Peabody College in Nashville and obtained his law degree in 1951 from Vanderbilt University. Mr. Horde chaired the Advisory Group's Committee on Motion Practice. A life member of the Judicial Conference of the Sixth Circuit, he has served as vice-chairman of the Board of Professional Responsibility of the Tennessee Supreme Court (1984-1987). He was in private practice in Knoxville from 1956 until 1963 with the firm of Stone, Bozeman & Horde. He is a fellow of the Tennessee Bar Foundation and, at present, is its General Counsel. He is a member of the Hamilton Burnette Chapter of the American Inns of Court.

Raymond R. Murphy, Jr. Mr. Murphy is senior litigation partner at Miller & Martin in Chattanooga. He is a 1960 graduate of the University of Michigan Law School, and he received his undergraduate degree from the University of North Carolina in 1957. He is a Fellow of the American College of Trial Lawyers, as well as the Tennessee Bar Foundation and the Chattanooga Bar Foundation. He was President of the Chattanooga Bar Association from 1971 to 1972.

Robert S. Peters. Mr. Peters is a 1969 graduate of the University of Tennessee College of Law, where he was Editor in Chief of the Tennessee Law Review and a member of the Order of the Coif. He received his undergraduate degree from Vanderbilt University in 1961. He practices law in Winchester, Tennessee with the firm of Swafford, Peters & Priest.

Robert E. Pryor. Mr. Pryor is senior partner in the Knoxville firm of Pryor, Flynn, Priest & Harber, where he focuses his practice in the areas of plaintiff's personal injury law, products liability law, and medical malpractice. He was educated at the University of Tennessee in Knoxville, where he received his baccalaureate degree in 1966 and his law degree in 1969, and he is an Adjunct Professor of Law at U. T. Law School. He is an Advocate of the American Board of Trial Advocates, a Master of the Bench of the American Inns of Court, and a former President of the Knoxville Trial Lawyers Association (1980-84).

Edwin H. Rayson. Mr. Rayson served as Chair of the Advisory Group's Committee on Differential Case Management. He began his undergraduate education at Northwestern University and completed it at the University of Tennessee in 1944. He received his law degree from the University of Tennessee College of Law in 1948, where he was elected to the Order of the Coif. He is a senior partner at the Knoxville firm of Kramer, Rayson, Leake, Rodgers & Morgan.

John T. Milburn Rogers. A 1974 graduate of the University of Tennessee College of Law, Mr. Rogers is the senior member of the Greenville, Tennessee firm of Rogers, Laughlin, Nunnally & Hood, where his practice is concentrated in the areas of plaintiffs' personal injury, including products liability law, and criminal defense. He is certified as a Civil Trial Advocate and Criminal Trial Advocate by the National Board of Trial Advocacy and is a past President of the Tennessee Trial Lawyers Association (1981-82). His practice is concentrated in the areas of personal injury law, criminal law and products liability law. Mr. Rogers chaired the Advisory Group's Committee on Criminal Practice. He was educated at the University of Tennessee, where he received a Bachelor of Science degree in 1971 and a Juris Doctor degree in 1974.

Wanda G. Sobieski. Ms. Sobieski is a 1982 honors graduate of the University of Tennessee College of Law. She received her undergraduate degree, also with honors, from the Wichita State University in 1969. She practices in the Knoxville office of Baker, Worthington, Crossley, Stansberry & Woolfe and is a partner in the firm. Her practice is concentrated in the areas of commercial litigation, construction and surety law, and appellate practice.

William B. Stokely. Mr. Stokely, a Knoxville businessman, is a 1963 graduate of the University of Tennessee College of Business. He served in numerous executive positions with Stokely Van-Camp, Inc., culminating as Chairman and CEO. He negotiated its sale to Quaker Oats in 1983 and subsequently moved his family back to East Tennessee where Mr. Stokely is Chairman and President of The Stokely Company, Tellico Development Corporation, Stokely Hospitality Properties, Inc., Stokely Affiliated Enterprises, Inc., Managing/Operating Partner of Stokely Hospitality Enterprises and President of the William B. Stokely, Jr. Foundation. He served two terms on the UT Development Council and as a member of the Chief Executives Organization and the World Business Council. In 1983 Mr. Stokely was awarded the CEO of the Year Award from the Indianapolis Business Journal Enterprises. Franklin College, Franklin, Indiana, awarded him the Honorary Doctorate of Humanities in 1984. In 1987, Mr. Stokely received a Citation of Merit and two U.S. Treasury Medal of Merit awards from Hiwassee College, Madisonville, Tennessee. He was also voted, and awarded, "Volunteer of the Year" in 1989 from the University of Tennessee.

Jerry H. Summers. Mr. Summers, a senior partner in the Chattanooga firm of Summers, McCrea & Wyatt, obtained his bachelors degree from the University of the South in 1961 and is a 1966 graduate of the University of Tennessee College of Law. Mr. Summers is a Fellow of the American College of Trial Lawyers as well as the Tennessee Bar Foundation. He has served as President of the Tennessee Trial Lawyers Association (1977), the Tennessee Association of Criminal Defense Lawyers (1975), the Chattanooga Trial Lawyers Association (1973), and the Chattanooga Bar Association (1983-84). He was a founding member and President of the American Board of Trial Advocates (1986-87).

Charles R. Terry. Mr. Terry is a 1956 graduate of the University of Tennessee College of Law. He received his undergraduate degree at East Tennessee State University in 1955. He practices with Charles Terry & Associates in Morristown, Tennessee, primarily in the areas of plaintiff's personal injury law, worker's compensation law, medical malpractice, and criminal defense law. Mr. Terry is a past president of the Tennessee Trial Lawyers Association (1968-69) and of the Hamblem County Bar Association (1978). From 1958 to 1960, he served in the U.S. Army Judge Advocate General Corps.

Edwin L. Treadway. A senior member of the Kingsport, Tennessee firm of Hunter, Smith & Davis, Mr. Treadway's practice is in the area of civil litigation. He is a Fellow of the American College of Trial Lawyers and in 1990 and 1991 was President of the Kingsport Bar Association. He is a 1954 graduate of the University of Tennessee College of Law. His undergraduate degree was granted in 1952 by East Tennessee State University.

APPENDIX B

DOCKET ASSESSMENT ANALYSIS

The Advisory Group collected data in several ways, and from several sources, in order to assess the state of the District Court's civil and criminal dockets pursuant to 28 U.S.C. § 472(c) of the Civil Justice Reform Act. Descriptions of these data collection methods and sources follow.

1. Consideration of Existing Statistical Data. In conducting its docket analysis, the Advisory Group relied heavily upon statistical data provided by the Federal Judicial Center, the Administrative Office of the United States Courts, and the Clerk of Court for the United States District Court for the Eastern District of Tennessee. In addition, the Advisory Group consulted the reports filed by judges within the district pursuant to 28 U.S.C. § 476 of the Civil Justice Reform Act concerning motions under advisement and cases under submission for more than six months and cases pending for more than three years.

The Advisory Group found to be particularly helpful the statistics contained in the February 1991 memorandum "Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990" and the subsequent updates to this memorandum. Much other data was supplied to the Advisory Group on a continuing basis by the Clerk of Court. The Group appreciates the great help provided by Clerk of Court R. Murry Hawkins, as well as Chief Deputy Clerk Don Ferguson, Deputies-in-Charge Kathy Ladd and John Medearis, CJRA Analyst Janet Jackson, and Programmer/Systems Analyst Steve Johnson.

The Advisory Group also considered data concerning state criminal filings within the 41 counties comprising the Eastern District of Tennessee and used this data to compare trends in

criminal case filings in the state and federal courts. Finally, the Advisory Group considered the statistics compiled by the Administrative Office of the United States Courts in the annual Federal Court Management Statistics to compare judicial activity in this district with that in other districts and in the nation as a whole.

2. Surveys of Attorneys and Litigants. In an effort to gauge the satisfaction of attorneys and litigants with the Court, the Advisory Group surveyed both attorneys and litigants who have been involved in litigation within the district.

With the help of John Shapard of the Federal Judicial Center, 84 civil cases that had terminated within the district between April 1, 1990, and March 31, 1991, were randomly selected. These cases fell into seven different categories: contract, products liability, tort, civil rights, labor, potentially complex, and other civil cases not falling within one of the above categories. The twelve cases in these seven categories then were divided into subcategories of cases that had terminated in an "average" amount of time (in the 40th to 80th percentile range of age for cases within each category) and cases that were among the oldest 20% of the cases in each category at the time of their termination.

The names of 247 attorneys and 226 litigants who had been involved in these 84 cases were taken from case docket sheets. There were 228 attorneys who were sent surveys who did not respond that there was some reason they believed they could not participate in the survey. Of these 228 attorneys, 125 (55%) responded to the survey. There were 197 litigants who did not indicate that they could not complete a separate litigant questionnaire. The litigant questionnaires were not sent directly to the litigants, but their attorneys were asked to send the questionnaires to them and request that they return them to the Advisory Group. Of the 197

litigants, 50 (25%) completed their questionnaires.

A random sample of 36 criminal cases that had terminated between April 1, 1990, and March 31, 1991, also was taken. Of these 36 cases, 12 involved drug indictments, 12 involved firearms, and the remaining 12 involved other types of criminal cases that had terminated in the period in question. The docket sheets of these 36 cases listed 79 attorney appearances entered by 49 different attorneys. Four of the 79 appearances had been entered by attorneys who were unavailable to the Advisory Group for various reasons. Criminal questionnaires were sent to attorneys who had entered the remaining 75 appearances, and 59 (79%) of the questionnaires were completed and returned to the Advisory Group.

In addition to these case-specific surveys, the Advisory Group surveyed experienced attorneys within the district who had not been questioned in connection with the case-specific surveys. Questionnaires were sent to 26 attorneys with extensive federal civil practices and 13 attorneys with extensive federal criminal practices. These attorneys were dispersed throughout the district, with practices in Bristol, Chattanooga, Cleveland, Greeneville, Jasper, Johnson City, Kingsport, Knoxville, Morristown, Sevierville, and Summerville. As with the other surveys, there was a good response by the attorneys questioned, with 21 of 26 attorneys completing the civil questionnaire and 9 of 13 attorneys completing the criminal questionnaire.

In connection with all of its surveys, the Advisory Group received helpful suggestions from Donna Stienstra and John Shapard of the Research Division of the Federal Judicial Center. The survey responses were tabulated by Dr. William Lyons and Linda Gaddis of the University of Tennessee Social Science Research Institute.

The Advisory Group did not consider the results of any of its surveys to be a statistically

precise measurement of attorney or litigant sentiments. However, as the Group's report indicates, on many important points there was a consensus among the survey respondents. In these instances, the survey results provided an important check upon data gathered by the Advisory Group from other sources and were helpful in interpreting statistical data provided to the Group.

3. Review of Older Case Files. Because of the Civil Justice Reform Act's focus on judicial delay, members of the Advisory Group looked at the docket sheets, and some case files, of 20 cases within the district that had taken longer than average to resolve. These reviews suggested that in many instances there were good reasons for a longer than average case duration, while in other instances the reason for the delayed resolution was not clear from the face of the docket sheet or documents in the case file.

4. Interviews with District Judges, Magistrate Judges, and Court Personnel. The Advisory Group received the full cooperation of all judicial officers and court personnel as it completed its statutory task. The judges provided all of the information requested by the Advisory Group, yet remained separate from the operations of the Group so that its report and recommendations would be truly independent.

Every judge in the district was interviewed by a team of Advisory Group members, as were the Clerk of Court and key personnel in his office. Advisory Group members used a written questionnaire in conducting their interviews, a copy of which was sent to each judge in advance of his interview. All of the judges talked freely with Advisory Group members, with the interviews ranging from one to two hours in duration.

The Advisory Group wishes to thank Chief Judge James Jarvis, District Judges Thomas

Hull, R. Allan Edgar, and Leon Jordan, Magistrate Judges Robert Murrian, John Powers, Joe Tilson, and Thomas Phillips, and Clerk of Court R. Murry Hawkins and those on his staff who talked with members of the Advisory Group concerning the work of the Group.

5. Reliance upon the Expertise of Advisory Group Members. One of the greatest resources upon which the Advisory Group relied in completing its docket assessment was the expertise of individual Advisory Group members. Group members practice law throughout the district, in law firms of all sizes and in government agencies, and they handle many different types of cases and represent many different clients and interests. The non-attorney members of the Advisory Group also brought a unique, and very helpful, perspective to Group discussions.

The expertise of individual Advisory Group members was supplemented by the literature reviews conducted by Group members. Advisory Group members were appointed to committees concerning alternative dispute resolution, complex litigation and judicial management, the criminal docket, differential case management, discovery, education and credentialing, and motion practice. Group members then reviewed material related to the subject matter of their committees. This data consisted primarily of relevant portions of the reports of other advisory groups, local rules and expense and delay reduction plans from other districts, and reports and studies addressing judicial delay and cost.

6. Public Input. In addition to the above data collection, the Advisory Group attempted to gather input more generally from the practicing bar and the public. The Chair of the Advisory Group wrote an article about the work of the Group that was submitted to bar associations and newspapers within the district, and a notice about the Advisory Group was posted in the Clerk's Office in Knoxville, Chattanooga, and Greeneville. The article and the

notices invited members of the bar and of the general public to comment upon the Advisory Group's draft report or make other suggestions to the Group.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE

PROPOSED CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

After consideration of the recommendations of the Advisory Group appointed pursuant to the Civil Justice Reform Act of 1990, the United States District Court for the Eastern District of Tennessee adopts the following Expense and Delay Reduction Plan ("Plan"). The Plan is intended to address the four principal causes of cost and delay within the district identified in the Advisory Group's report: the failure to fill the district's judicial vacancy, court procedures, the ways in which litigants and their attorneys approach and conduct litigation, and the failure to assess the impact of new legislation on the courts.

[At this point the Court might address the Advisory Group's findings concerning the principal causes of cost and delay within the district and set forth its own findings to the extent they differ from those of the Advisory Group. The Court also might include here a general statement of purpose or of the principles guiding the Court in its adoption of an Expense and Delay Reduction Plan. See generally Judicial Conference of the United States, Model Civil Justice Expense and Delay Reduction Plan Attachment C at 1 - 3 (Oct. 1992).]

I. THE PLAN

The United States District Court for the Eastern District of Tennessee adopts the following Expense and Delay Reduction Plan to address the conditions of the Court's civil and criminal dockets and the recommendations of the Advisory Group on Litigation Cost and Delay.

> [The Court explicitly must consider the recommendations of the Advisory Group. 28 U.S.C. §§ 472(a) and 473(b)(6). If Advisory Group recommendations are rejected by the Court, either the Plan or an appendix to the Plan should explain the Court's reasoning in rejecting the recommendations.]

A. Aspect of the Plan that Addresses the Failure to Fill the District's Judicial Vacancy. The Court makes the following recommendation to deal with the principal cause of cost and delay identified in Section II(C)(1) of the Advisory Group's report, the failure to fill the judicial vacancy within the district:

> Congress and the Executive should fill the district's existing judicial vacancy at once and should establish and act upon written, defined time limits in filling this and other judicial vacancies without the delay that has so often characterized judicial appointments within this district. [Advisory Group Recommendation III(A), Report p. 51.]

B. Aspects of the Plan that Address Cost and Delay Primarily Related to Court

Procedures. Section II(C)(2) of the Advisory Group's report identifies four principal causes of cost and delay that stem, at least in part, from court practices and procedures: (a) inadequate case management, (b) resetting of trial dates, (c) motion practice, and (d) the manner in which magistrate judges are utilized. To address these causes of cost and delay, the Court has promulgated the following new local rules and adopted the following new operating procedures.

1. New Local Rules. Simultaneously with the adoption of this Plan, the Court has issued notice of its intention to adopt the following local rules pursuant to Rule 83 of the Federal Rules of Civil Procedure. These rules shall be effective on _____, 1993.

[What follows are all of the local rules proposed by the Advisory Group to deal with the principal causes of cost and delay identified by the Advisory Group that stem from court practices and procedures. While some of these recommendations may not be adopted by the Court, review of the Plan may be facilitated if the Court explicitly addresses each of the following recommendations.]

a. Local Rule 7.1. Motion Practice

(a) Briefing Schedule. Unless the court notifies the parties to the contrary, the briefing schedule for all motions shall be: (1) the opening brief and any accompanying affidavits or other supporting material shall be filed with the motion; (2) the answering brief and any accompanying affidavits or other material shall be filed no later than 10

days after the service of the opening brief, except that parties shall have 20 days in which to respond to motions for summary judgment; (3) any reply brief and accompanying material shall be filed no later than 10 days after the service of the answering brief. The above briefing schedule shall be set aside if within 10 days after the filing of a motion a stipulated briefing schedule is approved by the court.

(b) Brief Format. Briefs shall include a concise statement of the factual and legal grounds which justify the ruling sought from the court. Briefs shall comply with the format requirements of Local Rule 5.1 and shall not exceed 25 pages in length unless otherwise ordered by the court. This page limitation shall also apply to all briefs filed in bankruptcy appeals, in accordance with Bankruptcy Rule 8010(c).

(c) Reply Briefs. A reply brief shall not be used to reargue the points and authorities included in the opening brief, but shall directly reply to the points and authorities contained in the answering brief.

(d) Supplemental Briefs. No additional briefs, affidavits, or other papers in support of or in opposition to a motion shall be filed without prior approval of the court, except that a party may file a supplemental brief of no more than five pages to call to the court's attention developments occurring after a party's final brief is filed. Any response to a supplemental brief shall be filed within five days after service of the supplemental brief and shall be limited to no more than five pages.

[Advisory Group Recommendation III(B)(6), Report pp. 65-68.]

b. Local Rule 7.3. Duty to Meet and Confer Concerning Motions

All non-dispositive motions shall be accompanied by a certificate of counsel affirming that, after consultation between the parties to the motion, they are unable to reach an accord. The certificate must contain the names of counsel and parties appearing pro se participating and the manner of consultation. The burden will be on counsel or the party appearing pro se filing the motion to initiate a conference attempting to resolve the motion informally. Failure to file an accompanying certificate of consultation may be deemed good grounds for denying any non-dispositive motion.

[Proposed Local Rule 7.3 would replace existing Local Rule 37.1. Advisory Group Recommendation III(B)(9), Report p. 71. Existing Local Rule 7.3 would be incorporated into proposed Local Rule 7.1(b). Supra p. 4.]

c. Local Rule 7.5. Duty of Counsel to Confer Concerning Resolution of Dispositive Motions by Magistrate Judge

(a) Duty of Counsel to Confer. Counsel for the moving party shall file in connection with any dispositive motion a statement (i) that counsel has conferred with all other counsel concerning party consent to the final resolution and entry of judgment on the dispositive motion by a magistrate judge and (ii) indicating whether or not the parties consent to the exercise of such jurisdiction by a magistrate judge. This statement shall be filed no later than the date upon which a reply brief must be filed.

(b) Final Rulings by Magistrate Judge. If all parties consent to a final ruling on

the motion by a magistrate judge and one is available to hear the motion, the motion will be heard by a magistrate judge pursuant to 28 U.S.C. § 636(c)(1). Unless the parties specify otherwise in their consent to the exercise of jurisdiction by the magistrate judge, any appeal shall be to the court of appeals pursuant to 28 U.S.C. § 636(c)(4). Consent to a final ruling on a dispositive motion by a magistrate judge does not waive any party's right to have other matters heard by a district judge.

[Advisory Group Recommendation III(B)(4), Report pp. 61-62.]

d. Local Rule 12.1. Extensions of Time to Respond or Plead

If all counsel agree, parties shall be entitled to one automatic thirty-day initial extension of time in which to respond to the complaint, to a cross-claim, or to a counterclaim. The party seeking the extension shall inform the court of agreement between counsel by sending a stipulation to the Clerk's Office and a copy of this stipulation to all other counsel in the case. No order is necessary for an initial extension of time, but any extension of time beyond an initial extension will not be allowed except by order of the court.

[Advisory Group Recommendation III(B)(9), Report pp. 70-71.]

e. Local Rule 16.1. Pretrial Orders and Conferences in Civil Actions

(a) Pretrial Orders and Conferences. In accordance with Rule 16 of the Federal

Rules of Civil Procedure, the district judge or magistrate judge assigned to the case will conduct preliminary and final pretrial conferences and will issue preliminary and final pretrial orders in all civil actions, except in the following classes of cases:

(1) Social Security cases;

(2) petitions for relief under 28 U.S.C. § § 2254 and 2255;

(3) actions brought under 42 U.S.C. § 1983 in which the plaintiff is pro se and is in the custody of either state or federal authorities;

(4) bankruptcy appeals; and

(5) any other cases which, in the discretion of the court, do not require pretrial conferences.

(b) Authority of Counsel and Parties. At all pretrial conferences, each party who is not proceeding pro se shall be represented by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters. If settlement will be discussed at a pretrial conference, the court may require that the parties or party representatives with full settlement authority be present at the pretrial conference or be available by telephone.

[Advisory Group Recommendation III(B)(3), Report pp. 57-59.]

f. Local Rule 16.3. Alternative Dispute Resolution

A judge may, in the judge's discretion, refer any civil case for early neutral evaluation, a settlement conference, or any other method of alternative dispute resolution

established within the district.

[Advisory Group Recommendation III(B)(2), Report pp. 54-55.]

g. Local Rule 56.1. Summary Judgment Practice

(a) Opening Briefs. The opening brief filed in support of a motion for summary judgment shall contain a separate section consisting of a concise, numbered listing of: (i) the material facts as to which the moving party contends there is no genuine issue to be tried or (ii) a statement why, even if all facts alleged in the opposing party's pleading are taken as true, the granting of summary judgment is warranted.

(b) Answering Briefs. The answering brief filed in response to a motion for summary judgment shall include a separate section with a concise, numbered statement of (i) the material facts as to which it is contended there exists a genuine issue to be tried or (ii) the reason why, even if all allegations of the moving party are taken as true, summary judgment in the moving party's favor is unwarranted.

[Advisory Group Recommendation III(B)(5), Report pp. 63-65.]

h. Local Rule 68.3. Judicially-Hosted Settlement Conferences

A judge of this court may refer any civil case for a judicial settlement conference. These conferences will be held by a magistrate judge other than the judge to whom the case is assigned for trial. This judge shall be referred to as the "Settlement Judge" and

shall conduct the settlement conference according to the following procedures.

(a) Party Attendance. The Settlement Judge may require the attendance of the parties and their representatives at the settlement conference. In the event that the Settlement Judge does not require the attendance of parties or representatives with full settlement authority at the conference, each party shall make available by telephone an individual with full settlement authority.

(b) Settlement Proposals. In order to facilitate discussions at the conference, each plaintiff shall propose a settlement to each defendant at least two but not more than three weeks before the settlement conference. Each defendant shall respond to each settlement proposal at least three days before the settlement conference.

(c) Party Statements. At least three days before the settlement conference, each party shall serve upon all other parties and the Settlement Judge a short statement including a description of the plaintiff's claims, the defendant's defenses and counterclaims, the relief sought by the parties, the primary disputed issues of law and fact, and the procedural posture of the case. Any party may include with this statement additional information that may help facilitate a case settlement. The Settlement Judge may require additional information, either in the party statements or at the settlement conference.

(d) Confidentiality. Statements made or documents offered by any person in connection with the settlement conference are confidential within the meaning of Rule 408 of the Federal Rules of Evidence. With the consent of the person making a statement or offering a document, the Settlement Judge may reveal information to another

person during the conference in an effort to facilitate settlement. The Settlement Judge shall not reveal to any other persons, including other judges, matters addressed at the settlement conference, but may report to the trial judge on the sole issue of likelihood of settlement.

[Advisory Group Recommendation III(B)(1), Report pp. 52-54.]

i. Local Rule 72.3. Magistrate Judges - Civil Proceedings

(a) Notice of Opportunity to Consent to Proceed Before a Magistrate Judge. At the time a civil complaint is filed, plaintiff's counsel shall be given copies of Form 34 in the Appendix of Forms to the Federal Rules of Civil Procedure ("Consent to Proceed Before a United States Magistrate, Election of Appeal to District Judge, and Order of Reference"). Plaintiff's counsel shall serve one copy of this form upon each defendant and shall confer with defense counsel to determine whether the parties consent to have a magistrate judge conduct all further proceedings in the case, including trial. Within 20 days after the appearance of the defendant, plaintiff's counsel shall file with the Clerk either: (a) a statement certifying that he or she has conferred with defense counsel but the parties do not consent to the exercise of jurisdiction by a magistrate judge or (b) the signed "Consent to Proceed Before a United States Magistrate, Election of Appeal to District Judge, and Order of Reference."

(b) Appeals. If parties consenting to proceed before a magistrate judge elect to take any appeal in the case to the district judge, that election must be affirmatively

indicated on the consent form by counsel for all parties. In the absence of such an election, appeal will be to the United States Court of Appeals for the Sixth Circuit.

(c) Notice of Opportunity to Consent if Trial Date is Reset. In the event that a district judge cannot hold a civil trial on the date previously set for trial, the judge shall inform counsel of that fact as soon as possible. At the time counsel are informed that the district judge cannot hear the case on the date previously set, counsel also shall be informed as to their right to consent to trial before a magistrate judge and told of possible dates on which the magistrate judge assigned to the case can hold the trial.

[Advisory Group Recommendation III(B)(4), Report pp. 59-61.]

2. Court Operating Policies and Procedures. In order to address the causes of cost and delay stemming from court procedures, the Court adopts the following operating policies and procedures.

[The Plan is to include an implementation schedule set by the Court so that reviewers can determine when specific provisions will be in effect and what cases will be subject to the Plan's provisions. The role that the CJRA Analyst and CJRA Law Clerk will play in implementing various aspects of the Plan also might be set forth as the new policies and procedures of the Court are discussed.]

a. During 1993, each district judge and magistrate judge will attend at least one

educational seminar to learn more about alternative dispute resolution. [Advisory Group Recommendation III(B)(2), Report p. 56.]

b. By March 31, 1993, the Chief Judge will appoint an Alternative Dispute Resolution Committee consisting of one district judge, one magistrate judge, the Clerk of Court or his designee, and three attorneys. This committee shall meet two to three times per year and shall disseminate information to the judges and court personnel concerning alternative dispute resolution. The committee shall consider semi-annual reports prepared by the Clerk's Office concerning the operation of ADR programs within the district. [Advisory Group Recommendation III(B)(2), Report pp. 56-57.]

c. At initial pretrial conferences, the judge or magistrate judge presiding will establish motion briefing schedules as are appropriate. Absent good cause, counsel will be held to these briefing schedules. In appropriate cases, the district judge or magistrate judge will determine at the initial pretrial conference the discovery necessary for any dispositive motion and restrict other discovery until the dispositive motion has been briefed and decided. [Advisory Group Recommendations III(B)(3) and (6), Report pp. 57-58; 65-68.]

d. Judges will attempt to rule upon all motions within 60 days after they have been briefed. The Clerk of Court will provide each judge with a quarterly report of all motions for which that judge is responsible that have been pending for more than 60

days. [Advisory Group Recommendation III(B)(7), Report p. 68.]

e. Judges will consider whether oral argument and oral rulings will reduce litigation expense and delay in connection with all motions and findings of fact and conclusions of law. The magistrate judges will continue to attempt to hear discovery motions without formal briefing and, in appropriate situations, over the telephone. [Advisory Group Recommendation III(B)(8), Report pp. 69-70.]

C. Aspects of the Plan that Address Cost and Delay Primarily Related to the Ways in which Litigants and their Attorneys Approach and Conduct Litigation. Section II(C)(3) of the Advisory Group's report identifies three principal causes of cost and delay that stem from the ways in which litigants and their attorneys approach and conduct litigation: (a) discovery abuse, (b) problems of lawyer competence and failure to cooperate, and (c) lawyer and litigant choice for delay. The following local rules are promulgated and the following operating procedures are adopted to address these causes of cost and delay.

1. New Local Rules. Simultaneously with the adoption of this plan, the Court has issued notice of its intention to adopt the following local rules pursuant to Rule 83 of the Federal Rules of Civil Procedure. These rules shall be effective on _____, 1993.

[See comment to Section I(B)(1), concerning the Court's consideration of local rules proposed by the Advisory Group. Supra p. 3.]

a. Local Rule 26.4. Disclosure and Depositions of Expert Witnesses

(a) Disclosure of Expert Witnesses. Each party shall disclose to every other party the name of every expert witness whom the party expects to call at trial pursuant to Rule 702 of the Federal Rules of Evidence. In addition to identifying each expert, the party who may offer that expert shall provide every other party with a curriculum vita containing the expert's qualifications.

(b) Timing of Disclosure. Unless the court designates a different time, experts shall be identified pursuant to subsection (a) at least 90 days before the date the case has been directed to be ready for trial, or, if the expert is intended solely to contradict or rebut an expert identified by another party under subsection (a) of this rule, within 30 days after the identification made by such other party.

(c) Expert Depositions. A party may depose any person identified pursuant to subsection (a) of this rule whose opinions may be presented at trial. Rule 26(b)(4)(C) of the Federal Rules of Civil Procedure shall apply to the fees and expenses incurred in connection with any deposition taken under this rule.

[Advisory Group Recommendation III(C)(2), Report pp. 73-75.]

b. Local Rule 30.1. Deposition Limitations

No party shall be entitled to take more than ten depositions without prior leave of court or to take any single deposition of more than eight hours without prior leave of court or agreement of the parties. In the event a party requests leave to take more than

ten depositions, the request shall be accompanied by a motion for a discovery conference. This motion shall contain (1) a statement of the issues as they then appear; (2) a proposed discovery plan and discovery schedule; and (3) a statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing counsel on the matters set forth in the motion.

[Advisory Group Recommendation III(C)(1), Report pp. 72-73.]

c. Local Rule 33.1. Interrogatories

No party shall be entitled to more than thirty interrogatories without prior leave of court. Any interrogatory that contains subparts shall be counted as one interrogatory as long as each subpart is closely related to the original question. Should it appear to the court, whether by motion or otherwise, that a party has used subparts as a means to circumvent the limitation on number, the party, along with the filing attorney, may be subjected to sanctions. Answers to interrogatories must be supplemented as may be required by the facts and circumstances of the case and by the Federal Rules of Civil Procedure.

[Advisory Group Recommendation III(C)(1), Report pp. 72-73.]

2. Court Operating Policies and Procedures. In order to address the causes of cost and delay stemming from the ways in which litigants and their attorneys approach and

conduct litigation, the Court adopts the following operating policies and procedures.

[See comment to Section I(B)(2), concerning implementation of new operating policies and procedures adopted by the Court. Supra p. 11.]

a. The Court recommends the adoption of the pending proposed amendment to Federal Rule of Evidence 702 that would change Rule 702 so that, in order to qualify as an expert witness, an individual must be able to substantially assist the trier of fact. [Advisory Group Recommendation III(C)(2), Report p. 73.]

b. By September 1, 1993, the Clerk's Office will prepare a brochure describing the Court's Civil Justice Expense and Delay Reduction Plan and existing policies and operating procedures of the Court. The brochure also will provide biographical information concerning the Court's district and magistrate judges and address areas of practice about which attorneys frequently have questions, as well as lawyer cooperation, lawyer professionalism, the manner in which actions by counsel may increase litigation cost and delay, and the attitude of the judges toward such actions. [Advisory Group Recommendation III(C)(3), Report pp. 75-76.]

c. The Court will hold formal swearing-in ceremonies for new attorneys three times per year. These ceremonies will be rotated between Chattanooga, Greeneville, and Knoxville. In connection with these ceremonies, a short orientation to the Court will be

held, during which representatives of the Court, the Clerk's Office, and the bar will participate. [Advisory Group Recommendation III(C)(3), Report pp. 76-77.]

d. Each district and magistrate judge will attempt to participate as a speaker in at least one continuing legal education seminar per year. [Advisory Group Recommendation III(C)(3), Report p. 77.]

e. The Court recommends that the Tennessee Bar Association, the Tennessee Trial Lawyers Association, the Tennessee Association of Criminal Defense Lawyers, and local bar associations within the state increase their focus on federal practice, procedure, and the federal courts by sponsoring continuing legal education programs and devoting articles in their publications to federal practice. The Court encourages attorneys in the district to join or consider forming bar associations with a focus on federal practice. [Advisory Group Recommendation III(C)(3), Report pp. 77-78.]

D. Aspects of the Plan that Address Cost and Delay Caused by Failure to Assess the Impact of New Legislation on the Courts. The Court makes the following recommendations to deal with the causes of cost and delay identified in Section II(D) of the Advisory Group's report: the impact of (a) criminal cases upon the civil docket and (b) newly created, substantially revised, and complex civil causes of action.

1. Except with respect to cases involving organized drug trafficking, federal

prosecuting authorities should limit federal prosecutions to charges that cannot or should not be prosecuted in the state courts and should forge federal-state partnerships to coordinate prosecution efforts. Congress should direct additional funds to the states to help them to assume their proper share of the responsibilities for the war on drugs, including drug crime adjudication. [Advisory Group Recommendation III(D)(1), Report pp. 78-79.]

2. Congress should more carefully consider the impact upon the federal judiciary of proposed legislation. To advise Congress on the effect of proposed legislation on the judicial branch and legislative drafting matters likely to lead to unnecessary litigation, there should be created in the judicial branch an Office of Judicial Impact Assessment. [Advisory Group Recommendation III(D)(2), Report pp. 79-81.]

II. THE PLAN'S COMPLIANCE WITH THE CIVIL JUSTICE REFORM ACT

[In formulating the provisions of its Civil Justice Expense and Delay Reduction Plan, the Court is to consider the six "principles and guidelines of litigation management and cost and delay reduction" set forth in 28 U.S.C. § 473(a) and the five "litigation management and cost and delay reduction techniques" contained in 28 U.S.C. § 473(b). While the Court need not adopt each of these principles, guidelines, and techniques, the Plan should state explicitly that each was considered and explain why each of these was or was not

adopted. This analysis necessarily will depend upon which of the Advisory Group's recommendations are accepted by the Court.

In addition, the Plan explicitly should address the contributions to cost and delay reduction by "the court[ ], the litigants, the litigants' attorneys, and by the Congress and the executive branch." Pub. L. No. 101-650, § 102(3), 104 Stat. 5089, 5089 (1990). This discussion also will depend upon the Advisory Group recommendations accepted by the Court.]

III. CONCLUSION

This Plan shall be sent by the Clerk of Court, along with the brochure described in Section I(C)(2)(b) of the Plan, to all attorneys admitted to practice before the United States District Court for the Eastern District of Tennessee. The Clerk also shall provide the plan to all attorneys admitted to practice before the Court after the Plan's initial distribution.

Within one year after the date of the adoption of this Plan, the Court will, after consultation with the Advisory Group on Litigation Cost and Delay, review the operation of the Plan and the condition of the Court's civil and criminal dockets, as required by 28 U.S.C. § 475.

IT IS SO ORDERED, _____, 1992.

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