REPORT OF
THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR
THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TENNESSEE

TRANSMITTAL LETTER
September 26, 1991

The Civil Justice Reform Act Advisory Group for the United States District Court for the Western District of Tennessee is pleased to present this report to the court. This report is the culmination of many hundreds of hours of work by the twenty-three members of the advisory group since March of this year.

We hope that this report will have an impact outside this district. Because we are a pilot district, our report will be scrutinized by the 84 other districts as they try to develop their reports and plans. We think the fact that our plan is among the first to be submitted means that it may even influence the reports remaining to be filed in the other pilot districts. We welcome a broad distribution of this report because we think we have made some important points that need to be disseminated. We think it's important to get the word out that our judges are working hard but are being inundated by the criminal docket; that we can't expect to keep up with the civil docket without adding more judges, courtrooms and support staff; that increasing resources is not the only issue because the influx of drug and firearm cases is changing the whole character of the federal court system.

We think that many of the recommendations we have made will require significant changes in the way cases are processed, but, hopefully, if these recommendations are adopted we will see significant reductions in the time required to dispose of civil cases in this district. The recommendations call for contributions, and perhaps sacrifices, from everyone. We've asked the judges to surrender some of their autonomy in the interest of efficiency. We've asked them to consider experimental approaches such as a motion day and rotation dockets. We've asked them to turn over total case management responsibility to their courtroom deputies and to release them from most of their courtroom responsibilities. We've asked the Clerk's office to develop specific procedures and to reduce them to writing. We've suggested significant changes in the duties of the courtroom deputies that will require extensive training. We've encouraged full implementation of computerized civil docketing as soon as possible. Attorneys have been asked to support ADR procedures, to cooperate in discovery, to pre-mark exhibits, to comply with deadlines, and to try cases before the magistrate judges.

We think that one of the key things that Congress is hoping to see come out of these reports is a strong endorsement for ADR. We have left that issue somewhat open in that we have recommended that the court consider appointing this committee or another committee to study the alternatives more carefully and to make specific recommendations to the court. We also recommended that the court consider adopting an arbitration program similar to that being used in other districts. We have since received an opinion from the Administrative Office that arbitration is limited to those districts that already have a statutory program in place. The court should, therefore, disregard the recommendation in the report concerning arbitration but continue to consider the remaining forms of ADR.

We will complete the first phase of our charge today as we submit this report. The work of the committee continues, however, for three years as we monitor the implementation of the plan and work with the Rand Committee which will be studying the success of the various plans. We hope that the suggestions we have made will be helpful to the court in developing its plan and that the plan will be effective in reducing the cost and delay associated with civil litigation in this district. If we can be of further help to the court, we think we speak for the entire committee in offering our services.

Respectfully submitted,

W. J. Michael Cody
Chairman

Janet Leach Richards
Reporter

REPORT

OF THE

CIVIL JUSTICE REFORM ACT

ADVISORY GROUP

FOR THE

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF TENNESSEE

SEPTEMBER 26, 1991

ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

THE FOLLOWING PERSONS WERE APPOINTED TO THE ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE BY CHIEF JUDGE ODELL HORTON, PURSUANT TO THE PROVISIONS OF 28 U.S.C. §478:

W. J. MICHAEL CODY,
CHAIRMAN

JANET L. RICHARDS,
REPORTER

MEMBERS

MARK ALLEN
RICHARD H. ALLEN
LARRY BROWN
ED BRYANT
DANIEL CLANCY
WANDA DONATI
ED DUKE
W. HICKMAN EWING
ROBERT L. GREEN
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FRED LEWIS
J. N. RAINES
DR. W. H. SWEET
J. MINOR TAIT, JR.
JERRY F. TAYLOR
RAY TERRY
KNOX WALKUP
ROBERT M. WILLIAMS, JR.
STEVEN XANTHOPOULOS

LIAISON MEMBERS:

HON. JAMES D. TODD, DISTRICT JUDGE
HON. AARON BROWN, JR., MAGISTRATE JUDGE
J. FRANKLIN REID, CLERK

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PREAMBLE

The Civil Justice Reform Act Advisory Group (hereinafter referred to as the advisory group) for the Western District of Tennessee was given an important charge: to make recommendations to the court to assist it in drafting a plan "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."[1] The advisory group was composed of twenty-two attorneys (twenty-one practitioners engaged in diverse areas of federal practice and one law professor) and one non-lawyer, community leader. Well aware of the expense and delay currently associated with federal civil litigation in the Western District of Tennessee, the advisory group was anxious to assist in addressing the problem.

The advisory group diligently performed its task. The Chairman and Reporter spent over 300 and 275 hours respectively, on this report and the members of the group devoted hundreds of additional hours to the project. The advisory group conducted interviews, contacted other groups and other courts, presented two C.L.E. programs in conjunction with the local bar on A.D.R., reviewed docket sheets and surveyed attorneys and litigants in a representative sampling of terminated cases, held subcommittee meetings, steering committee meetings, and full committee

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[1] 28 U.S.C. §471.

meetings and conducted a public hearing, inviting representatives from interested groups[2].

It quickly became evident to the advisory group that the civil docket in the Western District of Tennessee was being completely crowded out by the criminal docket and that if anything meaningful was to be accomplished, it would require either decreasing the criminal docket or increasing the number of judges and courtroom facilities. The undue expense associated with civil litigation in the Western District of Tennessee was determined to result primarily from the delay in getting a case to trial and the duplication of effort thereby incurred. Thus, if undue delay could be eliminated, most undue expense would also be eliminated.

The advisory group began this project in March, 1991, hopeful that if the judges instituted several changes in case management techniques and implemented a variety of ADR programs, a significantly greater percentage of the civil cases would be promptly disposed of than is now the case. A number of changes should be made to streamline the processing of cases and recommendations outlining those changes are included in this report. Those recommendations are not panaceas, however. They will not even result in substantial reductions in the ever increasing civil backlog. They are "mere tinkering" that will relieve some of the pressure temporarily. After carefully examining the inadequate resources being devoted to the district in terms of judges and

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[2]Names of representative groups that were invited to appear are attached hereto as Exhibit A. Several of the groups submitted written comments to the advisory group. Those comments are attached hereto, collectively, as Exhibit B. A transcript of the remarks and questions at the public meeting is attached hereto as Exhibit FF.

courtroom facilities, and more importantly, after appreciating fully the current trend of the Executive and Legislative branches to initiate new criminal laws which must be enforced in the federal courts, we believe that we are swimming against a flood that cannot be stopped without a major re-evaluation of the overall problem by the President and Congress.

The Administrative office of U.S. Courts reported that the case filings in U. S. District Courts rose from 171,074 in 1980 to 217,879 in 1990. The criminal filings in those ten years more than tripled in number. This is a national phenomenon. According to the Federal Court Study Committee established in November of 1988, district court filings trebled and appellate court filings went up by a factor of ten, between 1958 and 1988. The increase in judicial appointments has not kept pace with the increase in filings. The percentage of federal court employees who are judges fell during that same period from 10% to 3%[3]. From 1980 to 1990, the number of federal prosecutors[4] doubled from 1,900 to 3,900; and the number of drug cases increased five fold from 3,100 to 16,400, but the number of district judges increased by only 10% from 516 to 575[5]. Not only are the federal courts shorthanded on allotted positions, but on the average, vacancies stay open for at least a year and in some districts much longer than that.

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[3] See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 1990, pp. 5,31, attached hereto as Exhibit C.

[4] Ten years ago this district had twelve Assistant United States Attorneys and three district judges. Today, there are twenty-seven AUSA's but only four district judges.

[5] Hinds, "Bush Aides Push Gun-Related Cases On Federal Courts", New York Times, p. A1(May 17, 1991).

The overall criminal caseload problem is even more acute in the largest county in this district. Shelby County has a state prison population of 5,347[6] and an average federal prison population of 1,550. Only four of the largest jurisdictions in the United States have more prisoners - Los Angeles, New York, Chicago and Houston[7]. An even more telling statistic is the rate of incarceration. Shelby County's rate of incarceration is 945 per 100,000 residents[8]. This rate is more than twice the national incarceration rate of 426 per 100,000 residents, and "is nearly three times South Africa's rate of 333/100,000, and three and one half times the 268/100,000 rate in the Soviet Union, our nearest international competitors." [9]

In 1986, in Shelby County, drug cases constituted 8.3% of the state felony convictions for a total of 163 cases[10]. Four years later, drug cases constituted 50.5% of the state felony convictions, for a total of 2118 cases[11]. There has also been a tremendous increase in federal drug cases. The Western District of Tennessee ranks nineteenth highest in felony filings per judge in the United States and second in the Sixth Circuit. Almost 75% of these felony filings are drug and firearm cases.

More problematic than the sheer number of criminal cases, is the percentage of criminal cases that go to trial. The judges in this district spend most of their time in court trying criminal cases. One

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6 Bureau of Justice Statistics Bulletin, June, 1991, updated through July 15, 1991.
7 *Id.*
8 Sentencing Project Report, Washington, D.C.
9 *Id.*
10 "Tennessee Sentencing Commission Review", p.6 (April 1991) attached hereto as Exhibit D.
11 *Id.*

judge estimates that 70% of the court's trial time is spent on criminal cases. The 1990 criminal statistics[12], which are summarized in the chart below, show specifically how the criminal cases are impacting our docket and how great a problem this is for our district when compared to others in the Sixth Circuit. The five judges in the Western District of Michigan had only 97 cases and tried 10 of them. The five judges in this district had 280 cases and tried 66 of them. The five judges in the Western District of Kentucky had almost as many cases as we did, 270, but only 12 of those cases were tried. Even more striking are the statistics from the Northern District of Ohio where the thirteen judges there tried only 17 criminal cases out of a total of 337 criminal cases.

CRIMINAL CASE STATISTICS
U.S. SENTENCING COMMISSION, SIXTH CIRCUIT DISTRICTS
SEPT. 1989 - OCT. 1990

	CONVICTIONS			CASES				
	Total	Trial	Percent	Total	Drug	Firearms	D&F Total	D&F Percent
Tennessee, Western *(5 Judges)**	280**	66	23.6%	278**	171	36	207	75%
Michigan, Eastern *(19 Judges)*	436	75	17.2%	419	173	53	226	54%
Kentucky, Eastern *(7 Judges)*	205	34	16.6%	203	107	13	120	59%
Ohio, Southern *(8 Judges)*	423	48	11.3%	412	180	21	201	49%
Tennessee, Eastern *(4 Judges)*	246	26	10.6%	243	122	30	152	66%
Michigan, Western *(5 Judges)*	97	10	10.3%	97	17	12	29	30%
Tennessee, Middle *(4 Judges)*	191	17	8.9%	189	48	13	61	32%
Ohio, Northern *(13 Judges)*	343	17	5.0%	337	168	18	186	55%
Kentucky, Western *(5 Judges)*	270	12	4.4%	265	52	9	61	23%

*Number of Judges includes Senior Judges.
**Data derived from two difference sources (extra month).

12 Statistical information used to compile the chart is attached hereto as Exhibit E.

In 1986, Congress passed laws which established hundreds of mandatory minimum sentences that judges generally must impose on violators, regardless of the circumstances[13]. The minimum sentences provide for five years in prison, without parole, for carrying or using a gun while committing a crime of violence or trafficking drugs[14]. Conviction for a second offense mandates a twenty year sentence[15]. Ten years in prison is mandatory for convicted felons found in possession of a firearm[16]. A career criminal (a defendant with three prior felony convictions for violent crimes) must receive a minimum sentence of fifteen years if he is convicted of possession of a gun[17].

Also, federal policies have played a significant role in increasing the federal criminal docket. The recent initiative called "Operation Triggerlock" directs every United States Attorney in the nation to create teams consisting of federal investigators and state and local police and prosecutors to look for cases that violate federal weapons laws[18].

The "Triggerlock" directive prohibits plea bargaining; and parole is no longer a possibility in federal sentences[19]. Further, the federal law on speedy trials requires the criminal cases to be handled quickly and to take precedence over the civil cases[20]. The

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13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 Hinds, "Bush Aides Push Gun-Related Cases On Federal Courts", The New York Times, p.B11, (May 17, 1991).
19 *Id.* The parole prohibition applies to all crimes committed after November 1, 1987.
20 *Id.*

U.S. Attorney's Office for this district has been aggressively prosecuting these types of firearm cases for the past three years, ranking among the most active districts in the country in numbers of prosecutions.

Currently under consideration is the Violent Crime Control Act which would make many homicides committed with handguns potential federal cases, if the weapon crossed state boundaries.[21] It has been estimated that this legislation could bring as many as 12,000 homicide cases into the federal courts, in comparison to the less than 200 that were heard last year[22].

There is concern that as the character of the federal docket becomes indistinguishable from that of the state criminal courts, "the federal courts will lose their special mission[23]". Until recent years, the majority of violent crimes and drug offenses were tried in state courts, but under the succession of laws passed by Congress since 1986, the federal government has assumed a more active role in prosecuting violent crimes and drug offenses in federal court. Police and prosecutors prefer federal rather than state sanctions because they usually result in greater penalties. Also, most states are already facing severe overcrowding in their prisons and have to release prisoners early to make way for newer inmates.

If the current trend of increasing federal criminal prosecutions of drug and firearm cases continues, and the

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21 The Commercial Appeal, July 21, 1991, p.B1, col.6.

22 *Id.* at B2, col. 5,6. This remark was attributed to David Sellers, spokesman for the Administrative Office of the U. S. Courts, in Washington.

23 Hinds, "Bush Aides Push Gun-Related Cases On Federal Courts", The New York Times, p.B11, (May 17, 1991).

restrictions of the Speedy Trial Act and the Sentencing Guidelines remain unchanged, the criminal docket will take an increasingly larger portion of the court's time. If the decision is made to continue in this direction, the effect of that decision will be to further overload an already overloaded court system.

More judges, facilities and support personnel must be provided to keep pace with this increased burden or the federal civil court system will simply cease to function. One judge in the Eastern District of New York reported that he had tried only one civil case in a period of two years[24]. In the District court of Massachusetts, almost a third of the civil cases have been pending for more than three years[25]. The Southern District of California tries fewer than 60 of the 1925 civil cases filed each year[26], and spends more than 70% of its time on routine drug and gun cases[27]. The Middle District of Florida has instituted a moratorium on civil cases[28]. It is unrealistic to increase the laws, the penalties, and the prosecutors without a commensurate increase in the judges, courtrooms and support personnel expected to process the additional defendants created thereby. The federal court system is fast approaching its capacity with the result that the civil docket is backing up and quickly grinding to a halt. The Chief Justice has warned against "'an

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24 The National Law Journal, p.13,(July 22, 1991).

25 1990 FEDERAL COURT MANAGEMENT STATISTICS(hereinafter Mgmt Rep), at 38, attached hereto as Exhibit F.

26 *Id.* at 130. See also chart of civil trials for Southern District of California, attached hereto as Exhibit G.

27 Hinds, "Bush Aides Push Gun-Related Cases On Federal Courts", The New York Times, p.B11, (May 17, 1991).

28 Statement made at the meeting of advisory group chairmen in Naples, Florida, May, 1991.

hour-glass-shaped law enforcement system'. It will have increased prosecutorial and correctional resources; 'but without the judge-power to handle the added workload there will be a bottleneck in the middle of the system substantially lessening our ability to win the war on drugs.'"[29]

The advisory group heard from attorneys who used to practice almost exclusively in federal court, representing plaintiffs with Title VII, civil rights and constitutional claims. Because of the civil backlog, the attorneys had to turn clients away, telling them that it would be several years before their case would be heard. The private attorneys could not afford to continue to take such cases and survive financially. Consequently, there is an increase in the number of pro se cases being brought by these plaintiffs who cannot get representation. Many of these plaintiffs are now being denied the benefit of full protection of the laws passed for their benefit, protection that they would receive if the civil cases could be heard timely.

The federal court system is nearing a state of crisis with respect to the civil docket. The traditional role of the federal court in handling complex contract, antitrust, property, tort, labor, civil rights, and intellectual property cases is in jeopardy. The criminal docket is steadily increasing and threatens to consume the federal docket.

Despite this gloomy prognosis, the advisory group proceeded to study carefully all facets of the court system in this district. There

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[29] See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 1990, p.36, attached hereto as Exhibit C.

was a strong consensus among the advisory group that the district is fortunate to have a very able bench. The task was to determine what changes might be recommended to give the judges more time to administer justice. We use that term to emphasize that the Western District of Tennessee should continue to handle cases with the degree of care, deliberation, professionalism, and high quality that characterizes its jurisprudence. The advisory group fully concurs with the court in *L.H. Rutter Rex Mfg. Co. v. NLRB*, "[W]e would not substitute one hour of efficiency for one moment of justice."

This report contains many recommendations that, in the judgment of the advisory group, will decrease costs and delays. Several of the recommendations are thought to be particularly significant. The most effective solution, aside from decreasing the criminal caseload, is to increase the number of judges and courtroom facilities. The creation of more judgeships is essential to effect any meaningful solution. However, that is a recommendation that must be made to Congress and is beyond the scope of the charge to this advisory group.

The only group that has recently addressed, on a national scale, the problem of the federal courts' inability to handle timely its civil docket is the Federal Courts Study Committee. Its report recommends, among other things that: 1) Congress should repeal mandatory minimum sentence provisions, whereupon the United States Sentencing Commission should reconsider the guidelines applicable to the affected offenses. 2) Federal prosecuting authorities should limit federal prosecutions to charges that cannot or should not be prosecuted in the state courts. 3) 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.

Others have suggested that Congress, like many present state legislatures, should conduct a "judicial impact inquiry" each time it passes a law that has the potential to increase the criminal workload of the federal courts and should make appropriate funds available to provide adequate judicial resources to address the increased demand on the court.

These recommendations are not within the power of the court to implement. They are listed only because the advisory group is convinced that any meaningful solution to the crisis in the federal civil docket lies within the power of the legislative and executive branches, rather than the judicial branch of our government.

The court does have the power to implement several important recommendations. The judges are urged to implement a system of case management that will provide close supervision of each case and keep it moving toward a firm trial date or settlement. Being able to assign a trial date certain is the most effective way to move a case to settlement. We urge hands on case involvement by the judges at the Rule 16 conference and the final pretrial conference. Judges are also urged to conduct settlement conferences in all cases and to act promptly on motions to the extent the court is able to do so, within the constraints of the criminal docket. The court is urged to experiment with a motion day practice. In order to carve out some time in the trial docket for civil matters, the advisory group recommends a rotation system that will periodically free each judge

of responsibility for the criminal trial docket. Rotation would assure that some civil cases would be tried.

The advisory group recommends that the judges give their courtroom deputies major case management responsibilities and lessen their time in the courtroom. The courtroom deputies and docket clerks will be able to monitor time limits closely with the implementation of ICMS, a computerized case management system that will be installed by the end of this year. To rid the docket of particularly old matters, visiting judges should be brought in to address motions that have been pending for six months or longer. Visiting judges should also be called upon to assist with cases more than three years old. Since there is no courtroom available for visiting judges, someone in the clerk's office should be given responsibility for locating additional temporary space.

The range of ADR procedures should be studied and made available for the court's use. The courts should consider, for example, the implementation of court-annexed arbitration based on the model that is being used successfully in some district courts in Oklahoma, North Carolina and Pennsylvania. The judges should take an active role in urging settlement of cases through the use of the settlement conference and other ADR procedures.

It is hoped that the court will adopt and implement many of the recommendations contained in this report. It is, however, the considered opinion of this advisory group that even if this report is adopted and implemented in its entirety, it will not substantially affect the delay and expense in the civil docket so long as the President and Congress continue to impact the criminal docket with

new legislation and continue to provide inadequately for new judges and courtroom facilities. This district will go backward rather than forward in terms of delay and expense in the civil docket, if the present trend continues.

This trend has already " greatly reduced the ability of Federal courts to practice their traditional specialty: resolving complicated interstate crimes, including white-collar fraud, and settling constitutional issues like civil rights and antitrust cases"[30]. One commentator has suggested that what is needed is "a national debate on our priorities in the federal courts, one that will reach into Congress and the Administration. We must not mindlessly lose the use of our federal courts for civil cases."[31]

Neither must we stop the war on crime. The President, Congress, and prosecutors are reacting to a public that is fed up with the rampant crime caused by the illegal use of drugs and guns and they want it to stop. The advisory group is sympathetic to that need but someone needs to be concerned that in the process we are changing the very historical fabric of our federal courts.

Citizens want and need access to the federal courts to address violations of constitutional rights and other civil grievances. Congress and the states need to recognize the importance of preserving the ability of the federal courts to hear civil cases.

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30 Hinds, "Citing Caseload, Judges Oppose Crime Proposals", The New York Times (July 13, 1991).

31 The National Law Journal, p.14,(July 22, 1991).

I. INTRODUCTION

A. THE CIVIL JUSTICE REFORM ACT OF 1990

Pursuant to the Civil Justice Reform Act of 1990, each United States District Court is required to implement a civil justice expense and delay reduction plan. The purpose of each plan is 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."[32] The plan implemented by each district court must be developed or selected, as the case may be, after consideration of the recommendations of the advisory group appointed in that district.[33]

This plan has to be developed and implemented by December 31, 1991, in ten pilot districts around the country. In addition to the Western District of Tennessee, the pilot projects involve courts in the federal districts embracing San Diego, Wilmington, Delaware, Atlanta, New York City, Oklahoma City, Philadelphia, Houston, Milwaukee and Salt Lake City.

B. THE ADVISORY GROUP REPORT

The advisory group must submit to the court a report, which shall be made available to the public.[34] Section 472(b) requires that the report include:

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32 23 U.S.C. §471 (1990).
33 *Id.* at §472.
34 *Id.*

(1) A thorough assessment of the state of the court's civil and criminal docket.

(2) The basis for the committee's recommendation.

(3) Recommended measures, rules and programs.

(4) An explanation of the manner in which the plan complies with § 473.

In performing the assessment required in §472(b)(1), the advisory group shall:

A. Determine the condition of the civil and criminal dockets.

B. Identify trends in case filings and in the demands being placed on the court's resources.

C. Identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation.

D. Examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts.

In developing its recommendations, the advisory group must take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys[35]. The advisory group shall ensure that its recommended actions include significant contributions to be made by the court, the litigants and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts[36].

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35 *Id.*

36 *Id.*

As one of ten pilot districts, our plan must include[37] (for at least 3 years[38]) the following 6 principles and guidelines of litigation management and cost and delay reduction identified in §473(a):

> (1) systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case.
>
> (2) early and ongoing control of the pretrial process through involvement of a judicial officer in-
>
> A) assessing and planning the progress of a case;
>
> B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months of the filing of the complaint, unless a judicial officer certifies that-
>
> i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or
>
> ii) the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases;
>
> C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; and
>
> D) setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

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[37] Section 105(b)(1) of the Act provides: "In addition to complying with all other applicable provisions of chapter 23 of title 28, United States Code (as added by section 103(a)), the expense and delay reduction plans implemented by the Pilot Districts shall include the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a) of title 28, United States Code".

[38] Section 105(b)(3) of the Act provides: "The expense and delay reduction plans implemented by the Pilot Districts shall remain in effect for a period of 3 years. At the end of that 3-year period, the Pilot Districts shall no longer be required to include, in their expense and delay reduction plans, the 6 principles and guidelines of litigation management and cost and delay reduction described in paragraph(1)".

(3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer-

A) explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;

B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;

C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to-

i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and

ii) phase discovery into two or more stages; and

D) sets, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

(4) encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices;

(5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion; and

(6) authorization to refer appropriate cases to alternative dispute resolution programs that-

A) have been designated for use in a district court; or

B) the court may make available, including mediation, mini trial, and summary jury trial.

Further, §473(b) requires that the court in consultation with the committee consider the following litigation management and cost and delay reduction techniques:

(1) a requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;

(2) a requirement that each party be represented at each pretrial conference 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;

(3) a requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request;

(4) a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation;

(5) a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference; and

(6) such other features as the district court considers appropriate after considering the recommendations of the advisory group.

Recommendations of the advisory group that are copied from the Act are so indicated by the appropriate section number at the end of the recommendation. All of the recommendations are listed at the end of the report.

II. ASSESSING THE COURT'S DOCKET

A. DETERMINING THE CONDITION OF THE CIVIL AND CRIMINAL DOCKET

The increasing criminal case load is the single most significant factor contributing to the current delay in the civil docket in the Western District of Tennessee. According to data supplied by the Federal Judicial Center[39], the Western District of Tennessee was sixth among all the circuits in 1990 (and first in the Sixth Circuit), in number of cases tried per judge - 56[40]. Of these 56 trials, approximately 60% were criminal trials[41] and only 40% were civil trials[42]. The percentages were the same in 1989 when each judge averaged 50 trials[43]. In 1985, however, civil cases accounted for 60% of the trials[44], with criminal cases filling out the other 40%[45]. The judges averaged 45 completed trials each in 1985[46]. The judges in this district are trying more cases, but the great bulk of the cases are criminal. The situation is getting worse instead of better. In the first six months of this year, the judges have averaged only 7.5 civil trials each. Those civil cases that are being tried do not include the hard, protracted cases that take two to three weeks to try.

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39 Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990(hereinafter Guidance Memo), Federal Judicial Center, Feb. 28, 1991, attached hereto as Exhibit H.

40 *Id.* at 8.

41 *Id.* at 19.

42 *Id.* at 14.

43 *Id.* at 14, 19.

44 *Id.* at 14.

45 *Id.* at 19.

46 *Id.* at 8.

This shift in the percentage of the court's time devoted to the criminal docket is reflected in the "median time for civil cases from issue to trial" which rose from 21 months in 1985 to 30 months in 1990. This district ranks 89th among the 94 districts[47] in the median time required to move civil cases from issue to trial.

The number of total filings for the district have remained generally stable over the past five years, ranging from a high of 454 per judge in 1985 to a low of 369 per judge in 1987[48]. Total filings per judge in 1990 were 403 which placed the district 60th in the nation and seventh in the Sixth Circuit[49]. These figures suggest that the judges in the Western District of Tennessee are not overburdened, in that there are 59 other districts with heavier caseloads in terms of total filings. However, these figures alone do not tell the true story. The judges in the Western District of Tennessee are overburdened with the criminal caseload. When the total filings figure is broken down into criminal felony cases per judge, this district jumps to 19th place nationally[50] and second place in the Sixth Circuit[51], again reflecting the disproportionate criminal docket and the resulting delay in the civil docket.

While it is true that the Eastern District of Tennessee had more criminal felony cases than the Western District in 1990, the reverse was true in 1985 through 1989. The total criminal felony cases per judge in the Eastern District of Tennessee for the years

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47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.*

1985-1990 was 313[52]. The same figure for the Western District was 461[53]. Both districts have four judges. Thus, the Western District had 592 more criminal felony filings than did the Eastern District over the past five years. Because of the priority afforded criminal cases under the Speedy Trial Act, the civil docket in the Western has fallen further and further behind.

The total number of criminal defendant filings have steadily increased in the Western District from approximately 400 in 1981 to 520 in 1990 with a peak of 680 in 1989[54]. Of these criminal defendants, the percentage who were drug defendants rose from 12% in 1981 to 55% in 1989. This district has tried a number of criminal cases that have taken two to four months to try. This is not reflected in the statistics because there is no weighting formula applicable to criminal cases.

During this same six year period, the Western District of Tennessee has endured a judicial vacancy intermittently for a total of 24.7 months[55]. During that time, the criminal docket had to be carried by the remaining three judges, causing their own civil dockets to suffer further delays. In addition, the civil cases assigned to the vacant judgeship laid dormant. This district had 256 civil cases (14.5%) over three years old in 1990, placing it 79th in the nation and last in the Sixth Circuit[56].

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52 Mgmt Rep, *supra*, note 25, at 95.
53 *Id.* at 97.
54 Guidance Memo, *supra,* note 39, at 18.
55 Mgmt Rep, *supra*, note 25, at 8.
56 *Id.*

Most of the civil cases filed in the past three years fell into four categories: prisoner (29%), contract (19%), personal injury (13%), and civil rights (12%)[57]. In terms of the court's time spent on these cases, however, the prisoner and civil rights categories were reversed: civil rights (30%), contract (21%), personal injury (14%), and prisoner (12%)[58]. The prisoner cases include habeas corpus, death penalty habeas corpus, mandamus, and prisoner civil rights claims[59]. The civil rights cases include all but prisoner cases, i.e., civil rights: voting, jobs, accommodations, welfare and other[60]. The number of prisoner cases, most of which are pro se, have increased dramatically over the last ten years from 243 in 1981 to 473 in 1990[61]. With the proposed 1000 bed prison to be built, the trend of rapidly increasing pro se cases promises to get worse. Most of the pro se cases are filed by state and local, rather than federal, prisoners. Shelby County has the fifth highest prison population in the country and an incarceration rate that is more than twice the national average.

Although some changes can be made to improve overall efficiency in handling the civil docket, based upon these statistics, it is obvious that the major solution to a substantial reduction of the civil backlog is the creation of more judgeships in this district and the prompt appointment of new judges.

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57 Guidance Memo, *supra* note 39, at 11.
58 *Id.* at 13.
59 *Id.*, append.B at 1.
60 *Id.*, append.B at 2.
61 *Id.* at 12.

B. IDENTIFYING TRENDS IN THE DEMANDS PLACED ON THE COURT'S RESOURCES [§ 472(C)(1)(B)]

1. JUDICIAL OFFICERS

The judicial workload as measured by the number of filings in the Western District of Tennessee during the period 1985-1990 did not fluctuate significantly. The number of active judgeships remained at four, three in the Western Division in Memphis, and one in the Eastern Division in Jackson. A fifth district judgeship has been approved and someone has been nominated. The Western District of Tennessee also has one senior judge who took assignment of approximately three-fourth of the number of criminal cases and one-half of the number of civil cases assigned to the other three judges in the Western Division in 1988-90.

The total number of all filings ranged from a low of 1,475 in 1987 to a high of 1,814 in 1985[62]. The total number of terminations ranged from a low of 1,530 in 1987 to a high of 1,802 in 1986[63]. The total number of pending cases ranged from a low of 1,875 in 1988 to a high of 2.105 in 1985[64]. Weighted filings were lowest in 1990, but highest in 1989[65].

The filings per judgeship during the period 1985-1990 also did not fluctuate significantly since there was a constant number of judges during this entire period. The trial output of those judges increased significantly, however. The total number of trials

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62 Mgmt Rep, *supra*, note 25, at 97.
63 *Id.*
64 *Id.*
65 *Id.*

completed per judge increased from a low of 44 in 1987 and 1988 to a high of 56 in 1990[66].

There was a noticeable upward trend in the median length of time from filing to disposition. Criminal felonies ranged from a low of 4.5 months in 1986 to a high of 5.8 months in 1990[67]. Civil cases ranged from a low of 9 months in 1985 to a high of 14 months in 1990[68]. Also, the median time from issue to trial in civil cases ranged from a low of 21 months in 1985 and 1986 to a high of 30 months in 1990[69].

The number and percentage of civil cases over three years old steadily increased from 252 (12.9%) in 1985, to a high of 306 (17.6%)[70]. Those figures dropped significantly, however, in 1990 to 256 (14.5%)[71]. The drop reflects increased attempts by the court to dispose of older cases as well as the assistance of visiting judges.

The number of triable defendants in pending criminal cases increased significantly from a low of 85 in 1985 to a high of 259 in 1989[72]. The latter is a major trend discernible during 1985-90 in the demands on judges in the Western District of Tennessee. This very significant increase in the number of triable criminal defendants has caused the judges to have to devote a steadily increasing portion of their trial and in chambers time to resolving criminal matters, to the detriment of the civil docket.

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66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*

The total number of hours spent by the individual judges in and out of trial and the total number of trials by each judge varied. Some judges consistently spent more time in trial than other judges, but there were fluctuations from year to year by each judge and establishing a trend is difficult[73].

Over a five year and ten month period, the total terminations per judge appear to be similar, taking into account the length of time each judge has been on the bench[74]. There was a clear trend, however, in the total number of civil trials versus the total number of criminal trials. For the twelve month period ending June 30, 1986, there were 122 civil trials and 71 criminal trials[75]. In contrast, for the twelve month period ending June 30, 1990, there were only 86 civil trials and the criminal trials had increased to 147, more than double the 1986 figures[76].

2. SUPPORTING PERSONNEL - CLERK'S OFFICE

The docketing of cases and the management of cases in the Western District of Tennessee has remained unchanged for a number of years. The procedure employed is set forth in the local rules[77].

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73 See listing of total hours spent in court for years 1988, 1989 and 1990 by each judge attached hereto as Exhibit I.

74 See "Statistics Per Judge For The Last 5+ Statistical Years" attached hereto as Exhibit J.

75 See "Quarterly Trial and Trial Hours Report" for 1986, attached hereto as Exhibit K.

76 *Id.* at 1990.

77 The clerk of the court is charged with the responsibility of assigning cases to a specific judge. The local rules further state that once a case is assigned to a judge, the judge will handle the case throughout. Criminal cases, however, are docketed in another manner. A copy of the local rules are attached hereto as Exhibit L.

There are no internal operational procedures which are standardized and utilized by the court system. Essentially, each courtroom develops its own operational rules which includes the flow of cases and the docketing of civil cases. Although there is a deputy clerk from the clerk's office assigned to each judge and present in the courtroom at all times when cases are heard, the clerk has no authority to docket cases without the judge's instructions. In other words, case management is handled exclusively by each individual judge, and each individual judge employs a system unique to his or her court. Therefore, there is a great variety with respect to when and how cases are docketed.

As a general rule, this is a paper system and is not at all what one would call highly automated. Nor is the paper system centralized. Essentially, functions are performed in a manual manner much as they were years ago.

However, before the end of 1991, the district court will become fully computerized and automated and will begin to utilize the Integrated Case Management System (ICMS). This is an electronic docketing and case management system that can, and should, be used to replace outmoded paper systems[78]. Further, it will be administered, in part, by the deputy clerk.

The ICMS provides for centralization and unification of a docketing system which could insure that all cases are docketed and set according to some unified plan. Further, the ICMS allows for case management functions. This means that cases can be routinely

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78 See "Overview of District Court ICMS" attached hereto as Exhibit M.

docketed for trial and that cases can be monitored and tracked so as to insure that they are docketed and dealt with in a prompt manner. For example, current Local Rule 13 provides for dismissal of cases by the court when there is a failure in service of process or of a failure to answer. The ICMS would provide an accurate means of applying this local rule.

As it now stands, the courtroom deputies set all civil cases while in the courtroom with the judge. The jury civil cases are set on Monday and the civil, non-jury cases are set on Wednesday. However, it is not uncommon for cases to go months, or even years, without being given a trial date.

There also appears to be a lack of staff to carry out the functions of the clerk's office. There has been very little in the way of hiring in recent years.

Many jurisdictions have written operation procedures and/or rules to assist in case management. The Western District of Tennessee has not done this and it is possible that more centralized management control in case docketing and case management could resolve many of the problems faced by this court. For example, The United States District for the Northern District of Georgia has a written internal operating procedure that outlines the role of the various members of the judicial support staff[79]. See also, court rules from Michigan, Pennsylvania and Mississippi[80]. The operating procedures set forth, in conjunction with the local rules, exactly

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[79] See "Internal Operating Procedures for United States District Court, Northern District of Georgia", attached hereto as Exhibit N.

[80] See local rules for E.D. Michigan, E.D. Pennsylvania and Mississippi, attached hereto as Exhibits O, P, and Q, respectively.

how criminal and civil procedures will be organized and docketed and how work will flow and who is responsible for movement of the work. The 1991 auditors recommended that this district establish uniform procedures[81].

RECOMMENDATION

THE CLERK'S OFFICE SHOULD DEVELOP SPECIFIC PROCEDURES FOR ALL OFFICE FUNCTIONS AND REDUCE THEM TO WRITING SO THEY CAN BE FOLLOWED UNIFORMLY.

3. BUILDINGS AND FACILITIES

Lack of adequate courtroom facilities, both for the past five years and at present, pose a significant problem for this jurisdiction. As a consequence, it is a major problem impeding the movement and flow of civil litigation in this jurisdiction. One magistrate judge does not have a court of his own and is borrowing the tax court on a full time basis. The tax court wants him to vacate. Construction has started on a courtroom for the new district judge but it is sometime from completion. Further, there is no proper courtroom in Memphis for the new magistrate judge or for Judge Todd. Also, there is no proper courtroom for a magistrate judge in Jackson.

Three of the four judges and two full-time magistrate judges are housed in the federal building in Memphis, Tennessee, along with

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81 Exit Interview by Management Audit Team, May 24, 1991 (hereinafter "1991 Exit Interview") at 9, attached hereto as Exhibit R. The auditors state that the basis for the recommendations they make is simply that the procedures are those that have proved to be successful elsewhere. *Id.* at 18.

one Senior judge with a very high case load. Consequently, there are four judges and two magistrates in the Memphis location and, as indicated by the criminal trial statistics, they are each actively involved in civil and criminal litigation necessitating constant utilization of four courtrooms and two courtrooms attached to chambers of the U.S. Magistrates.

The jury facilities, as well as the prisoner facilities appear to be inadequate and, in fact, jurors often wait in the hallways.

There is simply no extra courtroom space in the federal building in Memphis. This means the judge and the magistrate from the Jackson area, as well as other judges of senior status and judges from other jurisdictions who are available to try the backlog of civil cases, do not have a courtroom available. Statistics indicate that the case loads can be, and will be, lowered if space is available for judges from other areas to try cases[82].

Capital improvements and allocation of space must be set forth in the court's yearly budget and approved by the Sixth Circuit Court of Appeals. Plans for providing additional courtroom space have been submitted in the budget and the plans have been approved by the Sixth Circuit Court of Appeals. However, it is anticipated that the needed space will not become available for another two years, due to funding priorities and construction. During this period of time, the backlog of civil cases will continue to grow.

One of two temporary solutions are possible but they would pose certain impositions on court staff, litigants, and lawyers. One

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[82] See chart of "Civil Cases Pending" attached hereto as Exhibit S.

possible solution is to try cases in Jackson, Tennessee when a space and judge are available. Secondly, there are smaller courtrooms in the Memphis area, such as the courtrooms available at the National Labor Relations Board, which could be used temporarily to try civil bench trials. It may be possible to use a state courtroom if one is available, particularly during vacation time, etc. There may be significant problems with security outside the federal building. Any temporary solution seems preferable to increasing the civil backlog.

A temporary solution would necessitate the appointment of an employee from the clerk's office to coordinate fully any and all problems associated with procuring a temporary space for trying cases. A specific person would also be needed to coordinate any staffing problems by and between the clerks, judges and office of the U. S. Magistrate.

The 1991 auditors made a suggestion concerning calendar coordination that may provide better utilization of existing space. The judges currently "schedule their matters individually and there is no coordination among the judges and magistrates as to when courtroom space is being utilized"[83]. The auditors suggest that, at a minimum, the magistrates should be apprised of the judges' calendars so they will know when the courtrooms will be free for them to schedule matters[84]. The auditors also encouraged the judges to schedule scheduling and pretrial conferences in chambers in order to make the courtroom available[85].

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83 1991 Exit Interview, 68, attached hereto as Exhibit R.
84 *Id.*
85 *Id.*

RECOMMENDATION

ADDITIONAL SPACE SHOULD BE PROVIDED FOR TWO ARTICLE III COURTROOMS AND ONE MAGISTRATE COURTROOM.

RECOMMENDATION

A PERSON IN THE CLERK'S OFFICE SHOULD BE GIVEN THE RESPONSIBILITY FOR LOCATING ADDITIONAL TEMPORARY COURT SPACE FOR BENCH TRIALS AND FOR COORDINATING THE SCHEDULING OF TRIALS IN THAT TEMPORARY SPACE.

4. AUTOMATION AND OTHER TECHNICAL SUPPORT

Integrated Case Management System (ICMS) is an electronic docketing and case management system that entirely replaces and integrates the paper system currently used by the court[86]. ICMS provides a common software base upon which docketing and case management applications have been developed for each type of federal court: Civil and Criminal for district courts, AIMS for circuit courts and BANCAP for bankruptcy courts. This district is scheduled to begin implementing ICMS, with respect to the civil docket only, by the end of the year. While ICMS is not able to support all of the case management functions that are needed, it is the best program currently available. ICMS provides the following capabilities for processing both civil and criminal cases:

a. Automates maintenance of the case record and production of the docket sheet.

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86 See "Overview of District Court ICMS", attached hereto as Exhibit M.

b. Promotes standardized docket entries.

c. Provides case status, documents, and deadline tracking.

d. Serves as a central, up-to-date information resource throughout the court or wherever a terminal is linked to the computer (in the clerk's office, judges' chambers, courtrooms, public areas, divisional offices, etc.).

e. Automates production of notices and other standard correspondence.

f. Provides status reports to assist judges and court administrators in monitoring case activity.

Civil, the software for civil case management, is now operational in over 35 courts. Once it is operational in this district, it will be possible to monitor deadlines and the status of cases with relative ease.

At present, there are some docket sheets that are incomplete and that do not give needed information. The 1991 Exit Interview noted that, "the docket clerks are responsible only for making entries on the docket sheets They have no real tracking or monitoring responsibilities at all"[87]. They will have this capability with ICMS. The 1991 auditors suggested that the docket clerks should monitor service of process, answers, issues joined or ready

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[87] 1991 Exit Interview at 11, attached hereto as Exhibit R.

for trial, and motions, including the filing of the motions, the responses, and the ruling on the motions[88].

In conjunction with implementation of ICMS, detailed procedures for handling docket matters need to be reduced to writing and adhered to by all clerks. If procedures change, the written procedures should be updated to reflect those changes so that everyone will be processing cases in the same way. There should be a plan about how to handle setting letters, docket assignments, Xerox copies, what goes in the judge's box, when, etc.

RECOMMENDATION

FULL IMPLEMENTATION OF ICMS SHOULD BE COMPLETED AS EXPEDITIOUSLY AS POSSIBLE.

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88 *Id.*

III. IDENTIFYING THE PRINCIPAL CAUSES OF COST AND DELAY IN CIVIL LITIGATION [§472(c)(1)(C)]

A. ANALYSIS OF COURT PROCEDURES TO IDENTIFY PROBLEMS OF COST AND DELAY

The advisory group conducted a study of 80 closed cases selected somewhat randomly with the assistance of John Shapard of the Federal Judicial Center[89]. Nineteen of the cases had gone to trial on the merits. Our purpose in studying actual cases that had made their way through the system was to "breathe life" into the overall statistics that reflect the delay in processing federal civil litigation. The selections were made from three categories of cases: I. Civil Rights and Labor; 2. Torts and 3. All Other[90]. Twenty seven (27) cases were chosen by computer from each category. The time from filing to disposition on the cases ranged from 12 months to 42 or more months. Differing lengths of time from filing to disposition were chosen in order to lend balance to the study. With the cooperation of Frank Reid and his staff in the clerk's office, docket sheets were obtained for all 80 cases. Forms were developed

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89 Through an apparent clerical error or oversight the Committee did not receive the docket sheet on one of the cases from the tort group: Lineberry v. Mills C.A. No. 8502156. We deemed this to be harmless error. Thus we actually analyzed only 80 of the 81 identified cases and will use that figure in our analysis where applicable. Information relevant to this project and charts summarizing the results are attached hereto as Exhibit T.

90 The first two categories were chosen because they represent statistically the largest number of closed cases for the time frames selected. (Thus, although overall the Western District has more contract than torts cases, there are a larger number of the latter among the closed cases in the time frames chosen). The miscellaneous category was chosen to provide diversity.

and sent with a cover letter from Chairman Cody to all counsel and parties in each case, soliciting their judgment and views about issues pertaining to delay and costs[91].

Summaries of the docket sheets along with responses, if any, from the attorneys and litigants were compiled and reviewed. Several observations were drawn from this exercise. There was a pattern of delay in most of the cases[92]. There were notable exceptions to be sure. One case, for example, was resolved in nine months. Of the cases selected, the longest took 91 months to process. The average was about 39 months. The reported effects of delay ranged from irritation to disaster[93]. Over 65% of the cases reviewed were deemed to have taken too long to resolve[94].

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[91] We received responses from 97 attorneys in 62, or 77%, of the cases. Thus, we received replies in all but 18, or 23%, of the cases. More often than not, when we received replies from only one side, it was the side that either prevailed outright or appeared to have had the "best of it" in terms of the outcome. Only responses that gave substantive replies were counted.

The returns from the parties, as expected, were not as great as those from the attorneys. Forty-four parties in 33, or 41%, of the cases responded. Thus there were 47, or 59%, of the cases in which there was no reply.

[92] Perhaps the most candid appraisal came from an attorney with a nationwide practice who does not reside in Tennessee. Speaking of the delay in our federal court, he stated: "Our firm does a considerable amount of litigation in federal courts throughout the country. We have also done a considerable amount of litigation in the Memphis federal courts and have found that by far, they are the worst.... In fact, the situation has gotten so bad that our firm has decided to start turning down cases which would end up in Memphis federal court." (Case Management Committee number 59).

[93] In a case in which plaintiff alleged a civil fraud, it took 59 months to resolve. The case was decided on a motion for summary judgment for the defendant. The attorneys stated independently that the case should have been disposed of in a maximum of 18 months. The winning attorney stated in reply to the inquiry as to the effect, if any, of delay on this litigation: "Disastrous on client. Cloud of alleged fraud hanging over his head for 4 years directly related to the loss of his business. The result (i.e. defendant prevailing) should have been the same I and 1/2 years earlier". (i.e. the decision of the court granting summary judgment.) (Case Management Committee Number 68).

[94] These figures are not statistically significant since we deliberately selected, proportionally, cases that were processed sooner as well as older cases. Further, they do not represent a large sample. An accurate statistical picture could be more meaningfully generated by the computer working with larger and, thus, more statistically significant numbers.

The most significant causes of the delay are the criminal docket and a shortage of judges in our district. Each of our reviewers and 31 of the 97 attorneys who replied, volunteered this opinion. The advisory group members were unanimous about the high caliber of the judges who serve in this district.

Notwithstanding the criminal docket and the shortage of judges, it is clear that judicial case management and the active involvement of the court makes a difference in bringing cases to final resolution. A common theme flowed throughout the analyses and discussions among the reviewers, other members of the advisory group, and counsel for the parties who responded: Substantive, meaningful and informed involvement by the judges themselves in the cases makes a difference. In 63 or about 80% of the cases, the reviewer's judgment was that lack of judicial case management contributed to the delay in the disposition of cases. On the other hand, in 13 or about 16% of the cases, the court's case management was deemed "excellent".

It is the meaningful involvement of the judges in the cases that really makes a difference in the disposition of the case. The reviewers and attorneys conclude that conferences with law clerks, for example, serve no significant purpose. Conferences with a magistrate judge who is not going to try the case, likewise, is often an exercise in futility. On the other hand, a case was adjudicated within 26 months primarily because the magistrate ruled on all the motions and, with consent of the parties, tried the case[95]. The

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[95] Case Management Committee Case Number 25.

reviewer noted that not only was this case processed expeditiously but that as a result "(litigation) expenses were kept low."

The single most effective inducement to meaningful settlement discussions is a firm trial date. Trial dates that the parties and their attorneys are reasonably sure are not "firm" do not, by and large, foster serious settlement discussions. For example, one case which took 34 months to resolve settled on the eve of trial as a result of the presence of a visiting judge[96].

Too much time is taken in many cases to rule on motions and render decisions. With exceptions, this was a common problem in the cases studied[97].

Much is being done correctly by the judges in this district. The quality of the opinions and decisions of the court is excellent. The members of the advisory group strongly believe that the quality component should not be lost in the process of attempting to reduce delays. In this regard, while the "rocket docket" disposed of a large number of older cases quickly, a number of adverse comments were

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96 The reviewer commented: "Visiting judge plus 'trial date certain' equals settlement on the eve of trial." See also Case Management Committee Number 35 which settled after almost 8 years on the eve of the trial date set because of the presence of a visiting judge. All previous settlement conferences were not taken seriously. One of the litigants labeled the delay "ridiculous". Case Management Committee Number 37 settled on the eve of trial after 48 months under the same circumstances. The reviewer characterized both cases as taking "much too long" to process.

97 There was over a two year delay in one case between the trial and the issuing of the court's opinion. (Case Management Committee Number 53) Both attorneys' estimate of the length of time it should have taken to process this case ranged from 12 to 36 months. It took 69 months to bring the case to a conclusion with a trial on the merits. Inadequate case management and the court's taking too long to rule on motions were cited by counsel on both sides as reasons for the excessive delay. (Note on Attachment 7, contained in Exhibit T, that this reason is not cited elsewhere as often as might have been expected). Both the winning and the losing parties in the case believed it took much too long to resolve this case. The prevailing plaintiff's attorney who recovered fees in the six figure range stated in response to a question asking the effect of the delay: "It severely hurt my client's career. Increased fees, costs and damages."

received by the advisory group concerning the procedure. Overall, the complaints charged that judicial quality was being lost in order to gain expedience. Some attorneys felt they were forced to settle cases because they could not get ready to try the several cases they had set during that short time frame. Some litigants felt that they were being deprived of their "day in court" after having waited patiently for several years to get a chance to go to trial. Some attorneys said it was prohibitively expensive to keep a "live expert" on call for weeks at a time.

Each judge has a unique approach to case management. The advisory group does not suggest that the judges should try to adopt completely uniform procedures. Even allowing for individual differences in judges, however, it appears that the other judges could benefit from utilizing the techniques and systems of case management employed by one of the judges in this district. That judge practices active case management and conducts settlement conferences that are meaningful attempts to move the parties toward settlement.

While arbitration is not a device appropriate for all cases for several reasons--expense among others--one judge utilized it quite effectively, to the satisfaction of all involved, in a case involving a labor dispute[98]. That judge tried another case in less than a year; the order denying a motion to dismiss was ruled on within about a month. Another case was processed in 17 months[99].

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[98] Case Management Committee Case Number 44.

[99] Case Management Committee Case Number 20. One reviewer noted: "the judge's meaningful settlement conference resolved (this) case." (Emphasis the reviewer's). He rated the time it took to resolve the case as "about right". Only one lawyer responded and

The final observation based on the case studies pertains to service of process. In some cases, it took an undue amount of time to secure service of process which, of course, extends the entire process. One of the more glaring examples was Case Management Committee Case Number 61 where it took 16 months to effectuate service on defendant's director. The 1991 auditors stated that the "major monitoring tracking should be service of process to make sure that the plaintiff is serving the complaint"[100].

In addition to undertaking the case studies,interviews were held with each of the four judges in the district to ascertain their procedures. While there was some uniformity among the responses of the judges, there was also a great deal of diversity. Each judge is unique and has tailored the operation of his or her court to an individual judicial style. The advisory group tried to balance the need for flexibility with the desire for judicial economy to be gained from more uniformity.

RECOMMENDATION

THE COURT SHOULD ADOPT PROCEDURES DESIGNED TO PROVIDE SYSTEMATIC, DIFFERENTIAL TREATMENT OF CIVIL CASES THAT TAILORS THE LEVEL OF INDIVIDUALIZED AND CASE SPECIFIC MANAGEMENT TO SUCH CRITERIA AS CASE COMPLEXITY, THE AMOUNT OF TIME REASONABLY NEEDED TO

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he characterized the court's level of case management as "high". See also Case Number 26 which took 36 months to resolve but in which the reviewer noted: "The judge's settlement conferences (and intensive monitoring of the progress of this case) were the only reason(s) this case settled."

[100] 1991 Exit Interview at 14, attached hereto as Exhibit R.

PREPARE THE CASE FOR TRIAL, AND THE JUDICIAL AND OTHER RESOURCES REQUIRED AND AVAILABLE FOR THE PREPARATION AND DISPOSITION OF THE CASE. [§473(a)(1)]

RECOMMENDATION

THERE SHOULD BE EARLY AND ACTIVE INVOLVEMENT BY THE JUDGE IN PLANNING THE PROGRESS OF THE CASE, CONTROLLING THE DISCOVERY PROCESS, AND SCHEDULING HEARINGS, TRIALS, AND OTHER LITIGATION EVENTS. [§102(5)(B)]

1. ASSIGNMENT PROCEDURES

Cases are initially assigned by the clerk's office, which follows a practice of alternating new cases among the judges on an equal basis, except for Judge McRae who is on senior status and receives one-half as many civil cases as each of the other judges. No consideration is given to the type or complexity of the case at the time of assignment, nor is an individual judge's schedule, administrative duties or backlog taken into account.

With respect to reassigning cases, the clerk's office has little control over reassignment. The district's Local Rules provide only for reassignment between judges by mutual consent. The judges apparently tend to regard cases assigned to them as "their own" and there is relatively little reassignment of cases among the judges.

A procedure should be established for reassignment of cases among judges based on their current workloads and trial schedules. Some accommodation should be made when a judge has an extended

trial to prevent that judge's civil calendar from falling further behind. Reassignments could be the responsibility of the chief judge, or the role of "assignment judge" could be rotated among the judges. A quarterly or semi-annual meeting conducted by the chief judge or "assignment judge" would be helpful in determining which cases should be reassigned and to whom. It is likely that the judges would concur in suggested reassignments; however, the question of reassignment ultimately should remain with the individual judges.

RECOMMENDATION

CASES SHOULD BE REASSIGNED AMONG JUDGES BASED ON THEIR CURRENT WORKLOADS, TRIAL SCHEDULES, AND ADMINISTRATIVE DUTIES, PARTICULARLY THOSE OF CHIEF JUDGE.

2. TIME LIMITS

The clerk's office presently does no monitoring of the various steps in litigation. Some monitoring is done by the judges' secretaries, law clerks and courtroom deputies. Each judge has a different system and none are as effective as they could be. There are no uniform time targets set, and individual judges determine scheduling. Given the backlog in cases that exists in the district, deadlines and trial dates for civil cases are commonly ignored. Extensions of time are almost universally permitted, either by agreement of counsel or upon application to a judge. Similarly, scheduling orders are routinely revised to extend deadlines. Deadlines should be fairly and carefully set, based on the complexity

of the case, and then those deadlines should be closely adhered to. Extensions should not be granted lightly[101]. Only by requiring the case to move steadily forward, can it be settled or otherwise disposed of in a timely fashion.

The clerk's office is in the process of installing a computer system that will allow tracking of time limits in various cases. If the judges were to establish uniform time targets applicable to the various stages of a "normal" case and permit deviations only for good cause, cases would be ready for trial much more quickly. Such a procedure could substantially assist in moving cases toward trial or settlement and would also allow the court to identify those cases that should be dismissed for non-action[102]. However, the lack of judge availability would probably prevent cases from being tried as soon as they were ready for trial.

The suggestion has been made that an "expediter" from the clerk's office work with the docket clerks and the courtroom deputies of individual judges to monitor and assure compliance with time targets. The expediter or overall docket coordinator could be

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101 The 1991 Exit Interview noted that" frequent extensions of time and continuances are requested and often granted." The auditors recommended tightening time limits based on " a number of studies conducted by the judiciary, particularly the federal judiciary, that indicate that termination rates are higher and disposition times are faster when certain preliminary steps are utilized to expedite cases. These steps included establishing and enforcing strict time limits at the very outset and significantly restricting extensions of time and continuances....", 1991 Exit Interview at 8, attached hereto as Exhibit R.

102 The 1991 auditors suggested adopting internal procedures to provide for "automatic dismissal by the clerk if there has been no service within 90 days or if there has been service and there has been no answer 60 days after the service or even, like a lot of our prisoner cases, if they change their address and don't notify us within 30 days." 1991 Exit Interview at 12, attached hereto as Exhibit R.

someone already in the Clerk's office, such as the deputy clerk, or an additional position might be needed.

RECOMMENDATION

MONITORING OF CASE TIME LIMITS SHOULD BE ASSIGNED TO THE DOCKET CLERKS AND COURTROOM DEPUTIES AS OUTLINED IN THEIR PRESENT JOB DESCRIPTIONS, WITH GENERAL OVERSIGHT BY AN EXPEDITER IN THE CLERK'S OFFICE. DOCKET CLERKS AND COURTROOM DEPUTIES SHOULD BE INSTRUCTED TO FORWARD ROUTINE ORDERS TO THE JUDGE WHEN AN ORDER CAN BE ENTERED BASED ON NON-ACTION.

RECOMMENDATION

THE COURT SHOULD REQUIRE THAT ALL REQUESTS FOR POSTPONEMENT OF THE TRIAL BE SIGNED BY THE ATTORNEY, AFTER COMMUNICATION WITH THE PARTY MAKING THE REQUEST.

3. RULE 16 CONFERENCES

The judges utilize scheduling conferences and/or scheduling orders. A scheduling conference is normally conducted shortly after a case is filed unless a consent scheduling order has previously been entered. The dates contained in scheduling orders are unrealistic given the current state of affairs in the Western Division of Tennessee, and are commonly ignored as a result. Realistic deadlines should be set and enforced by the court in order to push the parties toward settlement, if possible, and if not, to

establish a reasonable limit on discovery, thus containing costs to some degree.

Scheduling conferences/orders are typically limited to establishing deadlines. The judges do not use scheduling conferences to establish control over the case or to actively encourage settlement, generally speaking. Only one judge routinely uses a magistrate judge in scheduling conferences, and another judge usually permits a law clerk to conduct such conferences.

Scheduling conferences in which a judge participates obviously demand time that could be spent on other matters. However, additional judicial time spent in learning about and establishing control over a case through scheduling conferences may pay large dividends in terms of time saved by forcing the parties to reveal their real positions on the issues, and then either making rulings or providing deadlines for additional briefs and a quick decision on the issues that can be resolved pretrial. These goals cannot be accomplished through consent orders or conferences conducted by a law clerk. On the other hand, scheduling conferences that consist of nothing more than establishing dates do not justify the time of a judge.

Routinely holding pretrial conferences and covering as many of the subjects included in Rule 16 as is feasible, should assist in the early resolution of issues and cases. Counsel for each party to a case should be required jointly to present a discovery-case management plan for the case at the scheduling conference, or to explain the reasons for their failure to do so. If insufficient judge time is available to conduct such conferences, utilizing magistrate

judges to conduct the conferences in some or all cases may be worthwhile.

RECOMMENDATION

EACH JUDGE, WHENEVER POSSIBLE SHOULD CONDUCT HIS OR HER OWN SCHEDULING CONFERENCE AND SHOULD USE THAT OPPORTUNITY TO:

A) ASSESS AND PLAN THE PROGRESS OF A CASE;

B) SET EARLY, FIRM TRIAL DATES, SUCH THAT THE TRIAL IS SCHEDULED TO OCCUR WITHIN EIGHTEEN MONTHS OF THE FILING OF THE COMPLAINT, UNLESS THE JUDGE CERTIFIES THAT-

i) THE DEMANDS OF THE CASE AND ITS COMPLEXITY MAKE SUCH A TRIAL DATE INCOMPATIBLE WITH SERVING THE ENDS OF JUSTICE; OR

ii) THE TRIAL CANNOT REASONABLY BE HELD WITHIN SUCH TIME BECAUSE OF THE COMPLEXITY OF THE CASE OR THE NUMBER OR COMPLEXITY OF PENDING CRIMINAL CASES;

C) CONTROL THE EXTENT OF DISCOVERY AND THE TIME FOR COMPLETION OF DISCOVERY, AND ENSURE COMPLIANCE WITH APPROPRIATE REQUESTED DISCOVERY IN A TIMELY FASHION; AND

D) SET, AT THE EARLIEST PRACTICABLE TIME, DEADLINES FOR FILING MOTIONS AND A TIME FRAMEWORK FOR THEIR DISPOSITION. [§473(a)(2)]

IF THE JUDGE IS NOT AVAILABLE, THE CONFERENCE SHOULD BE CONDUCTED BY A MAGISTRATE JUDGE.

RECOMMENDATION

THE COURT SHOULD REQUIRE THAT COUNSEL FOR EACH PARTY TO A CASE JOINTLY PRESENT A DISCOVERY-CASE MANAGEMENT PLAN FOR THE CASE AT THE SCHEDULING CONFERENCE, OR EXPLAIN THE REASONS FOR THEIR FAILURE TO DO SO. [§473(b)(1)]

4 DISCOVERY PROCEDURES

The judges set cutoff dates for discovery in all cases. The dates are routinely ignored, and discovery deadlines are extended as a matter of course. The judges permit discovery depositions to be taken up to and during trial. Accordingly, attorneys have relatively little concern with complying with discovery deadlines.

The district has a local rule limiting the number of interrogatories to 30, unless previous approval for additional interrogatories is obtained from the court. The rule is unclear in its application as to written discovery other than interrogatories.

The district has no limitations on the number or length of depositions. However, there does not appear to be a need for such a rule at present.

The judges do not involve themselves with the scope and volume of discovery in a typical case, except as the result of a motion. Motions with respect to discovery are normally referred to

a magistrate judge for a recommended order. The parties usually are not given the opportunity to argue discovery issues orally, either before the magistrate judge or the judge assigned to the case.

Discovery conferences pursuant to Rule 26(f) are rarely conducted in the district. Given the fact that the judges are not normally involved in discovery issues, it is unlikely that they would favor requiring discovery conferences as a normal step. However, such conferences might be very useful in reducing cost and time expended in discovery in more complex cases. Also, the parties could be given an abbreviated chance to be heard. Providing judicial guidance to the parties as to the scope of discovery, etc., at an early stage of the case via discovery conferences should be helpful and result in savings of both time and expense.

There is relatively little informal or voluntary discovery conducted in the district, nor is there likely to be. A procedure calling for "initial disclosures" of basic discovery information to be made without a discovery request (and without counting toward the 30 interrogatories permitted) should expedite discovery.

Discovery conferences, either called by the court or set at request of a party due to a discovery dispute, should also expedite discovery. Since magistrate judges typically rule on discovery issues, logically they could be used to conduct discovery conferences as well. Periodic discovery conferences, conducted as a part of pretrial conferences pursuant to Rule 16 or otherwise, might prove the single most effective means of expediting the pretrial process.

Sanctions are not normally imposed in response to discovery disputes in this district. While sanctions should be reserved for instances of egregious behavior, they could serve as a more effective threat if parties perceived them to be a real possibility in appropriate situations.

RECOMMENDATION

THE COURT SHOULD ENCOURAGE COST-EFFECTIVE DISCOVERY THROUGH VOLUNTARY EXCHANGE OF INFORMATION AMONG LITIGANTS AND THEIR ATTORNEYS AND THROUGH THE USE OF COOPERATIVE DISCOVERY DEVICES. [§473(A)(4)]

5. MOTION PRACTICE

Motions are not scheduled for hearing as a matter of course. Instead, the judges receive memoranda filed by the parties in connection with motions, and issue written rulings on motions as their work loads permit. There is no generally applicable system for monitoring or calendaring the filing of motions, responses, and replies. As a result, the parties may wait months or even years without receiving a ruling on motions. Usually, the judges are responsive to a request for a ruling on a potentially dispositive motion at a time which will still allow discovery to be taken within the time period set; however, this is not always the case.

The current procedures, or lack of them, mean that the parties are frequently required to proceed with stages of a case which might have been mooted or severely limited by a timely ruling on a motion. The delay in ruling on motions is a major issue as it results

in needless expenditures of time and money by the parties. Accordingly, time targets should be established for resolution of motions taken under advisement. All time limits regarding filings and rulings on motions should be monitored by the courtroom deputy. Appropriate action should be taken when filing deadlines are past and the judge should be kept advised, periodically, of the matters under advisement and the length of time that they have been under advisement. Motions under advisement for more than six months should be given priority over other civil matters.

While the judges are reluctant to conduct hearings on motions because of the demands on their time, a procedure calling for motions either to be ruled on or argued orally within a given period of time (the time period could vary according to the nature of the motion but should normally be no more than 30 days) might go a long way toward expediting the progress of cases and avoiding needless attorneys' fees. The judges should also consider utilizing motion days, such as the local state courts do, in conjunction with or in lieu of this process. Bench rulings could be issued on most discovery issues, and the prevailing attorney could be required to draw the order incorporating bench rulings on matters that do not involve major legal issues. All of the judges have expressed skepticism at the utility of a motion day practice. There is, however, strong support for same among the bar. Perhaps one judge would be willing to experiment with a motion day practice for a trial period of six months or more to determine its efficacy.

Frequently, motions are not responded to timely in civil cases. Sometimes they are a few days late, but many times they are months

late. Local rule 8 provides for a ten day limit in which to respond and further provides that failure to respond timely may be grounds for granting the motion. Only one judge in this district, maybe two, routinely uses this rule to the advantage of his/her civil docket. Some judges entertain responses to motions which are filed months after the motion was filed. The rule should be routinely enforced. Judges should grant exceptions only where the ten day limit would work a hardship, i.e., motions for summary judgment.

Other suggestions that may help alleviate the delay in ruling on motions include: I) requiring the attorneys for the parties to discuss the subject of the motion in an effort to resolve the issue prior to filing the motion (similar to Local Rule 9(f) which applies only to discovery procedures). The motion should also indicate whether the motion will be opposed, to alert the court to those situations in which opposing counsel will not consent but won't actively oppose the motion; 2) imposing a limitation on the number of pages in supporting and reply memoranda filed in conjunction with motions, unless previous permission has been obtained from the court for a specific number of additional pages; 3) placing strict limitations on the time period for oral argument on motions, if any; and 4) adding to the local rules a ten day limit on the time within which motions for rehearing or reconsideration may be filed. None of these additional suggestions appear to be controversial.

In varying degrees, the judges utilize magistrate judges to assist in ruling on motions. In cases where testimony is required to be taken in connection with a motion, or in other situations where

involved factual determinations must be made prior to a ruling on a motion, use of magistrate judges should be encouraged.

The local rules (Rule I3) provide that a case may be dismissed if "it appears that failure to get service on a party or failure timely to answer is unduly delaying the setting of a case for trial." The rule should be amended to authorize the judge also to dismiss a complaint where no action has been taken to prosecute the case within a reasonable period of time.

RECOMMENDATION

ONE OR MORE JUDGES SHOULD INSTITUTE A MOTION DAY PRACTICE ON A TRIAL BASIS FOR A PERIOD OF SIX MONTHS OR MORE TO DETERMINE WHETHER THIS PRACTICE IS MORE EFFICIENT THAN THE CURRENT PROCEDURE.

RECOMMENDATION

TIME TARGETS SHOULD BE ESTABLISHED FOR RESOLUTION OF MOTIONS TAKEN UNDER ADVISEMENT. ANY MATTER UNDER ADVISEMENT MORE THAN SIX MONTHS SHOULD AUTOMATICALLY BE FLAGGED AND GIVEN TOP PRIORITY OVER ALL OTHER CIVIL MATTERS BY THE JUDGE ASSIGNED TO THE CASE.

RECOMMENDATION

LOCAL RULES SHOULD BE AMENDED TO:

A) MAKE RULE 9(F), WHICH APPLIES ONLY TO DISCOVERY PROCEDURES, APPLICABLE TO ALL MOTIONS AND

PROHIBIT THE CONSIDERATION OF MOTIONS UNLESS ACCOMPANIED BY A CERTIFICATION THAT THE MOVING PARTY HAS MADE A REASONABLE AND GOOD FAITH EFFORT TO REACH AGREEMENT WITH OPPOSING COUNSEL ON THE MATTERS SET FORTH IN THE MOTION. THE MOTION SHOULD ALSO INDICATE WHETHER THE MOTION WILL BE OPPOSED. [§473(a)(5)];

B) IMPOSE A PAGE LIMITATION ON MEMORANDA;

C) PROVIDE FOR EXCEPTIONS TO THE TEN DAY RESPONSE DEADLINE FOR MOTIONS ONLY FOR GOOD CAUSE SHOWN;

D) PLACE TIME LIMITATIONS ON ORAL ARGUMENTS;

E) ADD A TEN DAY LIMITATION FOR FILING MOTIONS TO REHEAR OR RECONSIDER;

F) AUTHORIZE THE COURT TO DISMISS A COMPLAINT WHERE NO ACTION HAS BEEN TAKEN TO PROSECUTE THE CASE WITHIN A REASONABLE PERIOD OF TIME AND

G) REQUIRE MOTIONS AND RESPONSES TO BE ACCOMPANIED BY A PROPOSED ORDER, COMPLETE WITH CITATIONS TO AUTHORITY.

6. SETTLEMENT CONFERENCES

Most judges in this district tend to stay aloof from settlement discussions far more than is the case in other districts. The final pretrial conference may be the first inquiry by the judge into the possibility of settlement.

Based upon a review of randomly selected docket sheets of civil actions and responses of litigants to questionnaires, it appears that the type of settlement conference conducted by one judge in this district is extremely effective in prompting the settlement and final resolution of civil cases. That judge actively participates in the settlement conference by becoming knowledgeable of the strengths, weaknesses and issues pertinent to each of the parties; by requiring the presence of the parties and all individuals who have final settlement authority at the conference; by communicating to the various parties the strengths and weaknesses of their cases, in addition to their potential for significant exposure, if any; and by conducting private meetings with each of the parties and their attorneys regarding the status of negotiations and the potential obstacles to settlement.

The comments and viewpoint of the court are taken seriously by the parties in deciding whether or not a particular case should be settled. It appears that the type of settlement conference conducted by this particular jurist is the most effective device for the settlement of cases in this district.

Some attorneys expressed reluctance to have a settlement conference conducted by the judge who would be trying the case, particularly in a bench trial. In the Middle District of Tennessee two judges routinely conduct settlement conferences for each other. They require each party to prepare statements specifying their settlement position, to assess the strengths and weaknesses of both sides of the case candidly, and to appraise liability. A sample copy

of the Settlement Conference Order used by these judges is attached[103].

The Northern and Western Districts of Oklahoma[104] follow similar procedures but also provide for the settlement conferences to be held by a magistrate judge[105] or an attorney[106] not involved in the case. While there is an increasing utilization of magistrate judges in the settlement process as the result of requests by the parties for a settlement conference, serious consideration should be given to making settlement conferences with a district judge routine, if possible.

Participation by representatives of each party who have full settlement authority, in addition to the attorneys, should be a standard requirement. Some concern has been expressed concerning the application of such a requirement to cases by or against the United States or the State of Tennessee. The Act at §473(c) addresses the concerns of the United States Attorney and protects against any conflict with the authority of the Attorney General to represent the United States. These concerns are explored more fully in section III D 2, *infra*. The special requirements of the State of

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[103] See sample order for the Middle District of Tennessee attached hereto as Exhibit U.

[104] See procedures attached hereto as Exhibit V.

[105] According to the 1991 auditors, that district uses the settlement work to justify the authorization of another magistrate judge position. The role of the magistrate judge is to supervise the program and "to coordinate the program for the different cases to see which attorney is there." 1991 Exit Interview at 86, attached hereto as Exhibit R.

[106] This program was endorsed by the 1991 auditors, noting that " they have adjunct settlement judges, judges on a panel that they get to come in and set and hold settlement conferences in a particular area of expertise, a contract lawyer, securities lawyer....", 1991 Exit Interview at 86, attached hereto as Exhibit R.

Tennessee has also been recognized in litigation in this district in the past[107].

RECOMMENDATION

SETTLEMENT CONFERENCES SHOULD BE ROUTINELY SCHEDULED AFTER THE RULE 16 CONFERENCE AND BEFORE THE FINAL PRETRIAL CONFERENCE, UNLESS BOTH PARTIES CERTIFY THAT IT WOULD NOT BE HELPFUL TO DO SO. ADDITIONAL SETTLEMENT CONFERENCES SHOULD BE HELD IN THE COURT'S DISCRETION. UPON NOTICE BY THE COURT, REPRESENTATIVES OF THE PARTIES WITH AUTHORITY TO BIND THEM IN SETTLEMENT DISCUSSIONS SHOULD BE REQUIRED TO BE PRESENT OR AVAILABLE BY TELEPHONE DURING ANY SETTLEMENT CONFERENCE. [§473(b)(5)]

(NOTE: NOTHING IN THIS RECOMMENDATION SHALL ALTER OR CONFLICT WITH THE AUTHORITY OF THE ATTORNEY GENERAL TO CONDUCT LITIGATION ON BEHALF OF THE UNITED STATES, OR ANY DELEGATION OF THE ATTORNEY GENERAL.) [§473(C)]

7. FINAL PRETRIAL CONFERENCES

There apparently is no local rule establishing the procedure for conducting pretrial conferences or the subjects to be addressed at final pretrial conferences. The judges have a fairly uniform method of conducting final pretrial conferences that should

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[107] Settlement of litigation involving the State of Tennessee must, by statute, be approved by the Governor and Comptroller as well as the Tennessee Attorney General. Certain settlements must also be approved by the speaker of both houses of the legislature. Tenn. Code Ann. § 20-13-103.

be set forth in detail in a local rule. Additionally, the local rules should address the submission of a joint final pretrial order by the parties prior to the final pretrial conference. Again, the practice of the judges is fairly uniform, but it should be codified.

Local practice relies heavily on the final pretrial conference to define the issues and restrict trial evidence. Delaying these matters to the final pretrial conference, which typically is the first opportunity for the parties and the court to have a meaningful discussion of the case, is a cause of delay and expense that should be addressed.

Judges should also consider conducting (either in person or through a magistrate judge) periodic pretrial conferences to determine the complexity of the case, set time targets for the various stages of the case, and explore the possibility of settlement. The court should require that each party be represented at each pretrial conference 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. Some concern has been expressed concerning the application of such a requirement to cases brought by or against the United States. These concerns are explored more fully in section III D 2, *infra*.

Lengthy trials are relatively rare in this district; however, consideration should be given to means of reducing in-court presentation of evidence in lengthy trials. Greater use of stipulations, narrowing presentation of proof to the issues which are actually in dispute, and eliminating witnesses whose testimony is purely cumulative or directed to non-material issues should be

accomplished. The final pretrial conference could serve as an excellent vehicle for so doing if the judges were prepared to discuss the proof to be presented by the parties, witness by witness if necessary. As a part of the same process, the pretrial conference could be used to structure the sequence of issues in appropriate cases.

Greater use of bifurcation of trials would save time, particularly in non-jury employment discrimination cases where proof on damages issues may be unnecessary, either because the liability finding is in favor of the defendant or because in most employment cases the parties are able to agree on damages once liability is established.

RECOMMENDATION

THE PROCEDURE FOR CONDUCTING A FINAL PRETRIAL CONFERENCE AND THE REQUIREMENT FOR PRIOR SUBMISSION OF A JOINT FINAL PRETRIAL ORDER SHOULD BE ADDRESSED IN THE LOCAL RULES.

RECOMMENDATION

JUDGES SHOULD CONDUCT, EITHER IN PERSON OR THROUGH A MAGISTRATE JUDGE, PERIODIC PRETRIAL CONFERENCES TO DETERMINE THE COMPLEXITY OF THE CASE, TO SET TIME TARGETS FOR THE VARIOUS STAGES OF THE CASE, AND TO EXPLORE THE POSSIBILITY OF SETTLEMENT.

RECOMMENDATION

THE COURT SHOULD REQUIRE THAT EACH PARTY BE REPRESENTED AT EACH PRETRIAL CONFERENCE 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. [§473(b)(2)]

RECOMMENDATION

IN LENGTHY TRIALS, IN-COURT PRESENTATION OF EVIDENCE SHOULD BE REDUCED BY GREATER USE OF STIPULATIONS, AND BY NARROWING PRESENTATION OF PROOF TO THE ISSUES WHICH ARE ACTUALLY IN DISPUTE, AND ELIMINATING WITNESSES WHOSE TESTIMONY IS PURELY CUMULATIVE OR DIRECTED TO NON-MATERIAL ISSUES.

RECOMMENDATION

JUDGES SHOULD BIFURCATE CASES WHERE IT IS EFFICIENT AND APPROPRIATE SO TO DO.

8. JURY TRIALS

The selection of jurors is controlled by the Jury Selection and Service Act of 1968, now found at 28 U.S.C. §1861, et.seq. The Western District of Tennessee has developed a written plan to assure all citizens the opportunity to be considered for jury

service as a grand or petit juror. The plan applies to both the Eastern and Western Divisions of the Western District of Tennessee.

In accordance with the plan, the clerk of the court administers the jury selection process, and there is no jury commissioner appointed for that process. The district uses voter registration lists as the source for jurors. The voter registration lists appear adequate to achieve the policy of assuring that no group of citizens is excluded from jury duty. No screening is made from the names contained on the voter lists, and prospective jurors are selected at random from the lists for either grand or petit jurors.

Each Monday, the deputy clerk responsible for juries determines what cases are expected to go to trial the following week. She draws the proper number of prospective jurors from the wheel and notifies them to appear the following Monday. If there are several juries to be picked, the starting time for the various judges is staggered so that each judge can have access to all prospective jurors. This process holds down the number of prospective jurors notified to appear.

Jurors not used are excused until further notice. Any prospective juror who is called and not selected on three separate occasions is excused from further service until all other prospective jurors have been drawn from the wheel. When all of the names in the wheel have been used, the process of selecting prospective jurors begins anew.

This jury selection process appears to be both efficient and expedient. It also appears to conform to all legal requirements.

The judges conduct voir dire of prospective jurors, but allow a limited amount of voir dire by the attorneys for the parties. (This practice is more lenient than is the wording of Local Rule 12, respecting voir dire examination.) The limited nature of attorney voir dire prevents it from being a major concern in terms of time required for voir dire. Obviously, a minor time saving could be accomplished by eliminating attorney voir dire. Weighing the limited time permitted for attorney voir dire against the desire of practicing attorneys that they be allowed expanded voir dire, it appears that the balance struck by the existing practice is appropriate and no change is recommended.

Pre-screening questionnaires or other jury selection aids are utilized by the clerk's office only in trials that are expected to be involved and lengthy. Utilizing an appropriate questionnaire to provide basic information (such as age, education, work history, marital status, spouse's occupation, criminal record, previous experience in litigation or jury service, etc.) on each prospective juror in each case could save time on voir dire. It would be helpful to the attorneys if this information were provided in advance of the beginning of the trial, and probably would shorten the time required for attorney voir dire. Perhaps jurors could, on arrival, complete a questionnaire that contained several carbon copies. The copies could then be given to the attorneys. An alternative suggestion would be to have standardized questions typed on a card for each prospective juror to respond to as his turn comes. However, at least the basic information made available to the clerk's office should be provided to attorneys prior to the time of jury selection.

Local Rule 6(b) provides that costs may be assessed by the court against one or both of the parties in the event that the clerk's office is not notified of a settlement by 1:00 p.m. on the last business day prior to the date the trial is scheduled. The rule is seldom, if ever, invoked. It is available, however, should circumstances warrant its application. Attorneys should be reminded of this requirement at the final pretrial conference, if not before.

RECOMMENDATION

A SYSTEM SHOULD BE EXPLORED TO OBTAIN BASIC JUROR INFORMATION IN ADVANCE OF A TRIAL AND TO MAKE THAT INFORMATION AVAILABLE TO THE ATTORNEYS.

9. CRIMINAL TRIALS

Even if nothing can be done to decrease the number of criminal trials in this district, perhaps some things can be done to shorten the trial time of the cases. Routine motions should be ruled upon promptly and without argument. Judges should be encouraged to rule promptly on evidentiary matters without lengthy arguments, when possible. Much time is spent during the sentencing phase under the Sentencing Reform Act. Perhaps ways could be explored to shorten the time of sentencing hearings.

The statistics that report on the dispatch with which criminal matters are resolved, in some instances, work at cross purposes to the efficient administration of justice. The conflict occurs when cooperation is sought from a convicted defendant. The defendant is

convicted and the judge is ready to sentence, but the U. S. Attorney wants to wait to see if he can get cooperation. The defendant also wants to wait because he may receive a less severe sentence if he cooperates. The result is that the district has a number of defendants who have been tried and convicted but who appear, on paper at least, to be languishing in jail without having been sentenced. This situation makes the statistics for the district look bad but the advisory group does not think that the current practice should be changed just to improve our statistics if there is no real benefit to be gained in the administration of justice.

10. TRIAL SETTING

In the United States District Court for the Western District of Tennessee, the courtroom deputies for each particular judge are responsible for the setting of civil cases for trial, with varying levels of supervision from the judges and their staff. In criminal matters, the docket clerk sets the cases for trial. It appears that in other jurisdictions, the Clerk of Court (and not the individual judges or their courtroom deputies) are responsible for the setting of all civil and criminal trials. When a computerized system takes effect in the Western District of Tennessee in the near future, it is likely that all cases, including civil and criminal, could be set by the office of the Clerk of Court.

Usually, trial settings in civil matters are assigned in a prompt and timely manner by the various courts in this district. However, due to the combination of the significant backlog of civil cases, the priority given to criminal matters and the limited number

of jurists in the Western District of Tennessee, strict adherence to trial dates in civil cases is the rare exception, rather than the rule. Thus, the Speedy Trial Act and its requirements of affording priority to criminal cases have been primarily responsible for the disruption of the civil docket and the inability of the courts to try and/or resolve civil cases.

Typically, several criminal matters are set for trial on a particular date. Because criminal cases must take priority under the Speedy Trial Act, civil cases that are set for trial on the same date have to be continued and reset for trial on another date. Frequently, the result is the eleventh hour or last minute continuance of civil cases and the resetting of civil matters as many as seven or more times.

The resettings substantially increase the cost to litigants because of the duplication of effort in having to get the matter ready more than once. The resettings also create frustration and disillusionment on the part of litigants who eventually begin to lose faith in the system. This conclusion is supported by the response to questionnaires by various attorneys, who have litigated civil cases in the Western District of Tennessee, and by a review of various docket sheets of randomly selected cases in this district.

There is little incentive for defendants to settle a case in the absence of a trial date certain. While a case is pending, the following unforeseen occurrences can result in its dismissal: plaintiff's lack of interest in prosecuting a case; death of the plaintiff; unavailability of key witnesses. Also, during the period of delay prior to trial and/or prior to the final resolution of a matter,

defendants can earn additional interest on funds available for payment of a judgment. Because significant delays usually advantage the defendant, early settlements are infrequent.

An early trial date certain, however, will result in the prompt settlement and/or resolution of more than ninety percent of all civil cases[108]. According to an analysis of the aforementioned questionnaires, the utilization of visiting judges from other districts, who advised the litigants and their attorneys of the certainty of the trial setting, resulted in the prompt settlement of the vast majority of civil cases heard by the special judges. Thus, the uncertainties related to trial settings result in significant delays in the final resolution of civil matters.

Perhaps, the most effective system for clearing the calendar that has been utilized in the Western District of Tennessee in recent years was the so-called "rocket docket." By virtue of this system, all of the judicial resources within this district were mobilized in order to afford trial dates certain to numerous pending civil cases. The assistance of visiting judges also was obtained for the resolution of these cases. As a result of the mobilization of judicial forces and the certainty of trial settings, the vast majority of cases subject to the "rocket docket" were settled and/or otherwise resolved during that brief period.

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[108] The 1991 auditors stated that the most important factor in expediting cases is "establishing early firm trial dates". 1991 Exit Interview at 8, attached hereto as Exhibit R. This point was confirmed in the public meeting held by the advisory group. Mr. Bruce Kramer, representing the A.C.L.U., said," You get ready when you have a trial setting."

The "rocket docket" was not favorably received, however, by a number of the parties and attorneys who were subjected to it. Complaints concerning the "rocket docket" were discussed in section IIIA, *supra*. The advisory group, while recognizing the effectiveness of the "rocket docket", suggests that certain modifications be considered in future accelerated dockets. Cases should be screened at the scheduling conference to determine whether they are suitable for an accelerated docket. The accelerated docket should extend over a shorter period of time and be scheduled more often, perhaps one week every quarter, to compensate for the shorter time period. Consideration should also be taken of the number of cases involving the same attorney subject to the accelerated docket in any given week.

The accelerated docket can be utilized periodically, but it is not a long term solution. One suggestion that could be employed routinely was advanced by Mr. Al Harvey, representing the Memphis Bar Association. Mr. Harvey urged freer transfer of cases between the judges to avoid any down time in the trial schedules.

Another idea that should be explored further is a rotation docket for the Western Division. Under this system, cases would continue to be routinely assigned to the various judges. The judges, however, would rotate the criminal trial docket. One judge or possibly two, depending on the number of cases, would try all of the routine criminal trials in a given month. The other judges would then be able to schedule civil trials and work on matters taken under advisement. In chambers time to address complex matters taken under advisement should be scheduled in the court's calendar along

with other matters. Otherwise, there is never a sufficient amount of time available to devote to these matters and they remain unresolved for long periods of time.

The rotation system would apply only to routine criminal matters. Each judge would retain and try all complex criminal cases assigned to him or her. The rotation system might have to be abandoned temporarily when one judge begins trying a protracted criminal case. This system would probably require centralized oversight of the entire criminal docket for the Western Division to ensure compliance with the Speedy Trial Act.

RECOMMENDATION

THE COURTS SHOULD SET EARLY, FIRM TRIAL DATES, SUCH THAT THE TRIAL IS SCHEDULED TO OCCUR WITHIN EIGHTEEN MONTHS OF THE FILING OF THE COMPLAINT, UNLESS A JUDICIAL OFFICER CERTIFIES THAT-

A) THE DEMANDS OF THE CASE AND ITS COMPLEXITY MAKE SUCH A TRIAL DATE INCOMPATIBLE WITH SERVING THE ENDS OF JUSTICE; OR

B) THE TRIAL CANNOT REASONABLY BE HELD WITHIN SUCH TIME BECAUSE OF THE COMPLEXITY OF THE CASE OR THE NUMBER OR COMPLEXITY OF PENDING CRIMINAL CASES. [§473(a)(2)]

RECOMMENDATION

THE COURT SHOULD INSTITUTE A TRAILING DOCKET FOR ROUTINE CIVIL CASES AND SHOULD CONTINUE TO USE A

MODIFIED ACCELERATED DOCKET ON A PERIODIC BASIS AS NECESSARY TO GET AND KEEP THE CALENDAR CURRENT. CASES SHOULD BE SCREENED AT THE SCHEDULING CONFERENCE TO DETERMINE WHETHER THEY WOULD BE APPROPRIATE FOR THE TRAILING OR ACCELERATED DOCKETS.

RECOMMENDATION

THE COURT SHOULD SEEK VISITING JUDGE ASSISTANCE IN IMPLEMENTING AN ACCELERATED DOCKET.

RECOMMENDATION

THE COURT SHOULD CONSIDER, IF ONLY ON A TRIAL BASIS, A ROTATION DOCKET IN WHICH THE ROUTINE CRIMINAL CASES ARE ROTATED AMONG THE JUDGES ON A MONTHLY BASIS.

RECOMMENDATION

THE COURTS SHOULD PROVIDE FOR FREE TRANSFER OF TRIALS TO JUDGES WHOSE SCHEDULED TRIALS GET RESOLVED EARLY.

11. REVIEW AND DISMISSAL OF INACTIVE CASES

Periodic monitoring of civil cases by the court, including the scheduling of frequent status conferences with the attorneys, is absolutely essential to the orderly resolution of such actions. The practice of periodically presiding over status conferences and monitoring cases enables the court to become aware of the progress of trial preparations, to respond promptly to developing problems and to recognize inactive cases. According to a review of various

docket sheets of randomly selected civil cases in the Western District of Tennessee, it appears that some of the judges have adopted a system of periodically monitoring their cases, whereas the other judges have not adopted such a system.

The need for monitoring and dismissing inactive cases was described by one veteran of the clerk of court's office as follows: "People pack junk in Federal Court and leave it!" Thus, judges who have adopted a system for the periodic monitoring of cases seem to recognize inactive cases in a timely manner and take action to dismiss such cases, where appropriate. On the other hand, those judges who have not adopted such a system and who do not periodically monitor their civil docket, are unable to identify inactive cases and respond accordingly. Under those circumstances, inactive cases stagnate and linger on the docket indefinitely.

For example, one civil action (case management committee number 33) was dismissed, pursuant to motion for lack of jurisdiction, sixty-one months after filing. The dispositive motion had been pending for approximately three and one half years. A review of the docket sheet reveals the absence of periodic, regular monitoring and/or close scrutiny by the court. Moreover, a review of the docket sheet reflects that after approximately seventeen months, the court suspected a lack of interest on the part of the plaintiff in prosecuting the action. However, the action remained on the court's docket for an additional forty-four months before it was dismissed. Perhaps the adoption of a system for periodic status conferences and for the continuous monitoring of the civil docket

would have resulted in an earlier dismissal of case number 33 for lack of jurisdiction.

12. USE OF MAGISTRATE JUDGES

In the Western District of Tennessee, magistrate judges are used, primarily, in civil cases for the handling of discovery disputes and for the resolution of motions from time to time. Although matters can be expedited where the parties consent to trial by the magistrate, the practice is seldom adopted in this district. Perhaps the parties do not consent because it is almost always in one party's interest to avoid going to trial.

By the consent of all parties, case management committee number 25 was tried by the magistrate. According to a review of the docket sheet and responses to questionnaires submitted to the attorneys and parties in that cause, trial by the magistrate resulted in a timely and inexpensive resolution. Because the magistrates in this district already have a full schedule of other duties and responsibilities and because the consent of all parties is required as a prerequisite, trial by the magistrate may be a theoretical solution, but not a practical one.

Oftentimes, the district judges refer settlement conferences to the magistrates for handling. It appears, however, that a settlement conference conducted by the district judge usually is more effective and meaningful in the ultimate resolution of a civil action.

After studying the role of the magistrate judges, the advisory group concluded that the concept of magistrate judges may be

inefficient. As a result of the federal magistrate judge system, the federal district court has become a two tier court system with the Article III district judges functioning both as trial judges and appellate judges. Most of the decisions of a magistrate judge, who is a non-Article III judge appointed for an eight year term, are appealable to, or reviewable by, a district judge. This two tier judiciary within the federal trial court has substantially decreased the efficiency of the court. In some cases, it probably requires less time for the district judge to review the record and the report of the magistrate judge than it would take to hold the hearing and rule from the bench, but the cost in total judicial time is far more than if the person who had the authority to decide the issue heard the matter in the first place.

If we view the district court as having just so much total judicial time available, including the time of the district judges and the magistrate judges, the current system is not designed for the best and most efficient use of that time. There is a large duplication of effort and increase in paper work as a consequence of the two tier system.

A solution to this problem is to abolish the position of magistrate judge and create a new district judge for every magistrate judge. It would be more costly, but not a great deal more so in the scheme of the total judicial budget. A magistrate judge's salary is 92% of a district judge's, and the other benefits are similar. If such a change were made there would be eight Article III district judges rather than five district judges and three magistrate judges in this district. With the addition of judges who could hear

felony cases and actually rule on dispositive matters, and with the elimination of the other inefficiencies inherent in the two tier system, the total workload of the court could be handled with dispatch. Admittedly, this is an extreme position to take, as it would eliminate jobs for all magistrate judges who do not receive nominations for Article III Judgeships. Unfortunately, the civil docket is in real jeopardy, necessitating extreme solutions.

13. USE OF SENIOR AND VISITING JUDGES

The use of visiting judges from other jurisdictions has been an extremely useful "stop gap," temporary solution to assist the court in the alleviation of the considerable backlog of civil cases. Forty-five cases were disposed of in this district by visiting judges between the fall of 1989 and the summer of 1990. Also, the active participation of a senior judge, the Honorable Robert McRae, Jr., has been of great assistance in confronting the backlog of civil cases.

Visiting judges have been very effective in helping to reduce the backlog of cases more than three years old. However, it appears that the lack of available courtrooms and other needed facilities will limit the use of visiting judges as a solution to problems relating to the considerable backlog of civil cases in this district. For example, the Honorable Harry Wellford generously offered to hear cases in this district to assist in alleviating the civil backlog; however, there was a question as to whether or not a courtroom would be available to accommodate Judge Wellford.

Assuming that additional courtrooms can be obtained, the use of visiting judges is probably the most effective means (besides the appointment of additional full-time judges) of combating the backlog of civil cases. Apparently, there are judges from other jurisdictions who are willing and able to assist. According to the responses of litigants to questionnaires, the parties and their attorneys were pleased, for the most part, that visiting judges were assigned to handle their cases, because the matters were resolved expeditiously and inexpensively.

The Act requires that semi-annual reports be made available to the public listing, by individual judge : 1) motions pending for more than six months, 2) bench trials submitted for more than six months, and 3) civil cases pending for more than three years. According to a recent directive from the Sixth Circuit, the first report for this district will be compiled on the basis of matters pending on September 30, 1991. Efforts should be made to enlist the assistance of visiting judges to help reduce the number of motions pending for more than six months and the cases pending for more than three years. This would allow the judges in this district to concentrate on the bench trials submitted for more than six months.

RECOMMENDATION

VISITING JUDGES SHOULD BE USED TO RESOLVE ALL MOTIONS THAT HAVE BEEN PENDING FOR MORE THAN SIX MONTHS, AS WELL AS ALL CASES THAT HAVE BEEN PENDING FOR MORE THAN THREE YEARS.

14. USE OF COURTROOM DEPUTY CLERKS AND OTHER PERSONNEL TO ASSIST JUDGE

This district does not utilize the courtroom deputies to their fullest potential. The courtroom deputies are required to be in the courtroom during trials and have rather limited responsibility for case management. The management audit of 1983[109] and the management team of 1991[110] each recommended that the court centralize the scheduling function completely with the courtroom deputies. They should be charged with responsibility of docket control and case management for both civil and criminal cases and should be called case managers[111] rather than courtroom deputies. The 1991 auditors emphasized the importance of having one person primarily responsibility for moving cases[112].

The courtroom deputy, although an employee of the clerk's office, should maintain the closest possible relationship with the judge. According to the 1991 auditors, there has to be a close rapport between the courtroom deputy and the judge whose calendar he or she is controlling[113]. The courtroom deputy should be the very hub of the judge's case management system. Each courtroom deputy

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109 Management Audit, United States District Court, Western District of Tennessee, February, 1983, p.24,25, attached hereto as Exhibit W.

110 1991 Exit Interview, 14, attached hereto as Exhibit R.

111 The 1991 auditors recommended the change in title, suggesting that it would help focus on the kind of responsibilities that are expected from someone in this position. 1991 Exit Interview, 39, attached hereto as Exhibit R.

112 1991 Exit Interview, 19, attached hereto as Exhibit R.

113 1991 Exit Interview, 20, attached hereto as Exhibit R. They stated further that,"This is supervision that develops over time. It is nothing that happens overnight. This is a major one that will take time.... There is extensive training involved. You don't just take an existing person and say, 'Here, control it all'". *Id.*

should have a separate office and computer. A buzzer or intercom system[114] can be installed to summon them when they are needed in the courtroom. Sound boxes could be placed in their offices so that they could hear and monitor the courtroom activities in those cases where they are anticipated to have some need to be present at times. This would be a system similar to that used in the executive offices of state officials to monitor legislative proceedings. The sound could be turned off when monitoring is not necessary.

Some of their present courtroom responsibilities can be reassigned in order to give them more time for case management. For example, attorneys can be required to pre-mark exhibits before trial (and during recesses, if necessary).

Comprehensive case management responsibilities are already within the existing job description[115] of the courtroom deputy and are being performed by courtroom deputies in other districts. Rather than simply mandate that the current job description be adhered to, the clerk's office should send the courtroom deputies in this district for on-site training in those districts where courtroom deputies are being utilized fully.

RECOMMENDATION

THE COURT SHOULD CENTRALIZE THE SCHEDULING FUNCTION COMPLETELY WITH THE COURTROOM DEPUTIES WHO SHOULD PERFORM COMPREHENSIVE CASE MANAGEMENT

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[114] Both of these systems where endorsed by the 1991 auditors. 1991 Exit Interview, 16, attached hereto as Exhibit U.

[115] See job description of "Courtroom Deputy (Article III Judge), attached hereto as Exhibit U.

RESPONSIBILITIES AS OUTLINED IN THEIR CURRENT JOB DESCRIPTIONS.

RECOMMENDATION

THE JOB TITLE OF THE COURTROOM DEPUTY SHOULD BE CHANGED TO CASE MANAGER.

RECOMMENDATION

THE CLERK OF COURT SHOULD CONTACT THE CLERK'S DIVISION FOR ASSISTANCE IN SCHEDULING ON-SITE TRAINING OF THE COURTROOM DEPUTIES.

RECOMMENDATION

ALL REQUESTS FOR SCHEDULING CHANGES INVOLVING THE JUDGE'S CALENDAR SHOULD BE REFERRED DIRECTLY TO THE COURTROOM DEPUTY.

RECOMMENDATION

THE COURT SHOULD TRY TO LESSEN THE TIME SPENT IN THE COURTROOM BY THE COURTROOM DEPUTY IN ORDER TO MAXIMIZE CASE MANAGEMENT.

RECOMMENDATION

THE COURTROOM DEPUTY SHOULD BE AN INTEGRAL PART OF THE JUDGE'S CASE MANAGEMENT SYSTEM.

15. USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

The advisory group is of the view that the primary reason that non-binding alternative dispute resolution procedures (ADR) need to be considered is the shortage of courts and judges. It may also prove to be the case that ADR procedures actually benefit the litigants in lower litigation costs[116] and faster and better resolutions. It is manifestly obvious, however, that the recommendation of the advisory group is driven principally by the failures and shortcomings brought on by a lack of priority for funding for Article III Courts. The advisory group has considered a number of ADR procedures, including arbitration, even though it was not specifically listed in the Civil Justice Reform Act, §473(a)(6). A description of each of the procedures under consideration is attached hereto as Exhibit Y.

Some ADR procedures have already been tried in this district on a limited basis. While it is recommended that the authority for ADR be formalized in the local rules, the advisory group is unable to recommend at this time all the procedures necessary for the full implementation of an operational program. However, the range of ADR procedures should be studied and made available for the court's use. The courts should consider, for example, the implementation of court-annexed arbitration based on the model that is being used

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[116] Bifurcation as a cost saving device was endorsed by Mr. Ron Gilman, representing the Tennessee Bar Association, at the public meeting held by the advisory group. Mr Gilman suggested its use in ADR proceedings, stating that if an ADR procedure could render an impartial judgment on liability, for example, the parties could save the expense of proving damages. In the commercial context, Mr Gilman suggested that in complex, multiparty litigation, only the issues between the two main parties might be addressed in an ADR proceeding. If a resolution could be reached between those two parties, it might cause the others to settle.

successfully in some district courts in Oklahoma, North Carolina and Pennsylvania[117]. The judges should also take an active role in urging settlement of cases through the use of the settlement conference (which is discussed more fully in section III A6, *supra*.) and other ADR procedures. Other districts have reported that summary jury trials have not been effective and their use is being discontinued[118].

It is critical, in the design of procedures that fundamentally impact on the civil processes, that care be taken to acquire the confidence of the bar and litigants. The procedures for ADR must be accepted as an enhancement in resolving disputes. The procedures will not be accepted as a viable alternative to the adjudicatory process without this confidence. The advisory group, in conjunction with the Memphis Bar Association presented two C.L.E. programs to introduce the bar to ADR, including a video of a mock summary jury trial and a panel discussion by the parties involved in an evaluation by a neutral panel of attorneys in this district.

If ADR is viewed as granting a tactical advantage to one side in the litigation, or simply an additional burden of cost and time, the procedures will fail to serve any purpose. It is, therefore, recommended that the advisory group continue with its effort to educate the bar concerning ADR and attempt to secure the support of the trial bar. The participation of the judges and magistrate judges in these efforts is critical. If the bar perceives that the judiciary is

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117 The Act provides that pilot plans shall provide authorization to use ADR programs that "have been designated for use in a district court " as this arbitration plan has been. §473(a)(6)(A). A copy of the Oklahoma Arbitration Handbook is attached hereto as Exhibit AA.

118 Remarks made at the meeting for Civil Justice Advisory Group Chairs in Kansas City, Mo., August, 1991.

not committed to the success of ADR, it is not likely that the procedures will be accepted.

Many public policy areas must be considered in detail. A sample of such policy issues is attached hereto as Exhibit Z. These should be taken up by the advisory group or another committee appointed by the court for that purpose.

RECOMMENDATION

THE LOCAL RULES SHOULD BE AMENDED TO AUTHORIZE THE COURT TO REFER APPROPRIATE CASES TO ALTERNATIVE DISPUTE RESOLUTION PROGRAMS THAT-

A) HAVE BEEN DESIGNATED FOR USE IN A DISTRICT COURT; OR

B) THE COURT MAY MAKE AVAILABLE, INCLUDING MEDIATION, MINITRIAL, AND SUMMARY JURY TRIAL.

RECOMMENDATION

A FURTHER STUDY SHOULD BE CONDUCTED BY THE ADVISORY GROUP OR SOME OTHER COMMITTEE APPOINTED BY THE COURT TO REVIEW ADR PROCEDURES IN DEPTH AND TO MAKE FURTHER RECOMMENDATIONS TO THIS COURT.

RECOMMENDATION

ONE ADR PROGRAM THAT SHOULD BE EXPLORED FURTHER IS A NEUTRAL EVALUATION PROGRAM FOR THE PRESENTATION OF THE LEGAL AND FACTUAL BASIS OF A CASE TO A NEUTRAL COURT REPRESENTATIVE SELECTED BY THE COURT AT A NON-

BINDING CONFERENCE CONDUCTED EARLY IN THE LITIGATION. [§473(b)(4)]

16. EFFICACY/DEFICIENCIES OF LOCAL RULES

The general presentation of the local rules is important to give the impression to all litigants that the court has seriously considered the content of the rules and plans to enforce them. The local rules of this district should be revised in light of the court's plan, type-set, and bound with the court seal on the cover.

A number of changes to the local rules have been addressed in other parts of this report. There are a few additional areas that the court might consider addressing in the local rules. The first involves motions for summary judgment. Current rule 8(f) allows parties to wait until 30 days before the trail date to file the motion. The filing of a summary judgment motion, like any other motion, should not be permitted after the motion cut-off date; and the motion cutoff date should be well in advance of the trial date. In most cases in which a summary judgment motion is filed 30 days before trial, the trial will have to be continued; the opposing party will need time to respond, the moving party will need time to reply, and the court will need time to decide the motion. This rule leaves open the possibility in every case that the trial date will have to be continued.

Motions for rehearing or reconsideration should be required to be filed within 10 days after the entry of the judgment or order of which reconsideration is sought. No response should be permitted, as a general rule. This saves time for the court and the opposing

side since motions for reconsideration usually do not raise new or important issues and are seldom granted. The court should grant a motion for reconsideration only under very limited circumstances.

Rule 13 permits the court to dismiss a complaint without prejudice if "it appears that failure to get service on a party or failure timely to answer is unduly delaying the setting of a case for trial." This rule should be amended to authorize the court to dismiss a complaint if no action has been taken by a party for a reasonable period of time[119]. The rule could be implemented automatically by the docket clerk or courtroom deputy when ICMS is online as discussed under Time Limits at section III A2, *supra.*

The court should consider adopting rules regarding attorney conduct and discipline. While it is not expected that they would be used often, they would prove helpful when needed.

RECOMMENDATION

THE COURT SHOULD REVISE, TYPE-SET AND BIND THE LOCAL RULES.

RECOMMENDATION

LOCAL RULE 13 SHOULD BE AMENDED TO PERMIT THE COURT TO DISMISS A COMPLAINT WITHOUT PREJUDICE IF NO ACTION HAS BEEN TAKEN BY A PARTY FOR A REASONABLE PERIOD OF TIME.

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[119] The 1991 auditors noted the lack of a formal system of dismissal for failure to prosecute, "Right now it is done on kind of an ad hoc basis as to when people from the clerk's office will suggest there hasn't been action taken and a judge will have a show cause order or something."

RECOMMENDATION

THE FILING OF A SUMMARY JUDGMENT MOTION SHOULD NOT BE PERMITTED AFTER THE MOTION CUT-OFF DATE, WHICH SHOULD BE WELL IN ADVANCE OF THE TRIAL DATE.

RECOMMENDATION

THE COURT SHOULD ADOPT A LOCAL RULE LIMITING THE TIME FOR FILING A MOTION TO RECONSIDER AND SETTING OUT VERY LIMITED CIRCUMSTANCES IN WHICH THE MOTION SHOULD BE GRANTED.

RECOMMENDATION

THE COURT SHOULD ADOPT THE FOLLOWING LOCAL RULES CONCERNING ATTORNEY MISCONDUCT AND DISCIPLINE:

A. IMPOSITION OF SANCTIONS

UPON NOTICE AND OPPORTUNITY TO BE HEARD AND IN THE SOUND DISCRETION OF ANY JUDGE OF THIS COURT, SANCTIONS MAY BE IMPOSED FOR FAILURE OF COUNSEL TO COMPLY WITH THESE RULES WITHOUT JUST CAUSE.

B. SANCTIONS AFFECTING THE OUTCOME OF THE LITIGATION (CIVIL ONLY)

ABANDONMENT, FAILURE TO PROSECUTE, OR FAILURE TO DEFEND DILIGENTLY MAY BE FOUND SHOULD COUNSEL FOR ANY PARTY FAIL TO APPEAR BEFORE THE COURT AT PRETRIAL CONFERENCE OR SHOULD COUNSEL FAIL TO COMPLETE THE NECESSARY PREPARATION FOR PRETRIAL OR TRIAL.

JUDGMENT MAY BE ENTERED AGAINST THE DEFAULTING PARTY EITHER WITH RESPECT TO A SPECIFIC ISSUE OR ON THE ENTIRE CASE. ALTERNATIVELY, THE FAILURES OF COUNSEL LISTED IN THIS SECTION MAY RESULT IN THE IMPOSITION OF SANCTIONS AUTHORIZED BY RULE C BELOW. AFTER THE CASE IS AT ISSUE AS TO THE PARTY SUFFERING THE DISMISSAL OR DEFAULT PURSUANT TO THIS RULE , THE COURT SHALL DIRECT THAT NOTICE SHALL BE GIVEN THE AFFECTED LITIGANT OF THE SANCTION AND THE BASIS FOR ITS IMPOSITION.

C. SANCTIONS AFFECTING COUNSEL

FOR FAILURE OF COUNSEL FOR ANY PARTY TO COMPLY WITH ANY OF THESE RULES, ANY JUDGE OF THIS COURT MAY, UPON FINDING THAT THE FAILURE HAD OBSTRUCTED THE EFFECTIVE ADMINISTRATION OF THE COURT'S BUSINESS, ASSESS COSTS DIRECTLY AGAINST COUNSEL, HAVE CONTEMPT PROCEEDINGS INITIATED AGAINST COUNSEL OR MAY ORDER SUCH OTHER SANCTION OR COMBINATION OF SANCTIONS AS IS APPROPRIATE TO THE CIRCUMSTANCES OF THE CASE.

17. COMMUNICATION AND COORDINATION AMONG JUDGES' CHAMBERS, MAGISTRATE JUDGES' CHAMBERS, AND CLERK'S OFFICE

It was recommended, in the 1983 management audit of this district, that the court make optimal use of the clerk of court's services as court administrator[120]. The report stated, "To

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[120] 1983 Audit , *supra*, note 109, at 4.

implement court policy, the chief judge must be willing to delegate all nonjudicial administrative responsibilities to the clerk of court.[121]" The report was fairly specific regarding the proper role of the clerk of court:

> The clerk of court should be given considerable discretion in executing broad policy decisions as determined by the judges. He should be responsible for implementing court directives. In addition to management responsibilities, the clerk of court also should function as staff officer to the chief judge, conducting special studies and analyses, implementing research and development projects and coordinating development of budgetary requirements for judges and other offices[122].

The 1983 report also noted that regular meetings of the judges, the clerk of court, the chief probation officer and the magistrates would improve communication and coordination among court activities. Each group needs to understand what is expected of them and how their contribution affects the overall operation of the court. Finally, there seems to be a need for greater overall supervision of all court functions to assure that each group is functioning smoothly and contributing to the efficient administration of justice.

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121 *Id.*
122 *Id.*

RECOMMENDATION

THE COURT SHOULD MAKE OPTIMAL USE OF THE CLERK OF COURT'S SERVICES AS COURT ADMINISTRATOR.

RECOMMENDATION

THE COURT SHOULD HOLD PERIODIC MEETINGS WITH THE HEADS OF ALL COURT UNITS, AND WITH THE FEDERAL PUBLIC DEFENDER, UNITED STATES ATTORNEY, AND UNITED STATES MARSHALL.

B. ANALYSIS OF LITIGANT AND ATTORNEY PRACTICES-PRIVATELY REPRESENTED LITIGANTS

1. PRE-FILING PRACTICES-SCREENING CASES

The bar can play a significant role in promoting the use of ADR procedures, to the extent they are made available by the court. It will be the responsibility of the attorney to inform his or her client about the types of ADR and its advantages and disadvantages. Clients will not accept ADR unless the bar accepts it.

RECOMMENDATION

ATTORNEYS SHOULD INFORM THEMSELVES ABOUT THE VARIOUS TYPES OF ADR AND SHOULD DISCUSS ADR WITH THEIR CLIENTS AT THE EARLIEST OPPORTUNITY.

2. DISCOVERY PRACTICES

Costs of litigation can be reduced significantly through voluntary exchange of information. Voluntary disclosure by all parties of discoverable information in the early stages of the proceedings, occurring simultaneously so as to avoid any unfair advantage, should be seriously considered. Exchanges should be ongoing. Attorneys can minimize costs by attempting to be as cooperative as possible, while still representing one's client zealously. Many matters can and should be resolved by a phone call without first resorting to a written motion.

RECOMMENDATION

ATTORNEYS AND LITIGANTS SHOULD MAKE EVERY EFFORT TO ENGAGE IN COST-EFFECTIVE DISCOVERY THROUGH THE VOLUNTARY EXCHANGE OF INFORMATION. [§473(a)(4)]

3. TRIAL PRACTICE

In order to assume greater case management responsibilities, the courtroom deputy must be relieved of the obligation to remain in the courtroom. Thus, the duties traditionally performed by the courtroom deputy must be assumed by others. Attorneys can provide a great service in this regard by pre-marking trial exhibits. When a case is set for trial, the attorneys should meet approximately one week prior to the trial date for the purpose of stipulating and marking of exhibits, and stipulating as to testimony or facts and any other reasonable matters that will shorten and reduce the time of trial. Counsel should be required to

estimate the time needed to present their proof and should make every effort to confine the trial of the case to that estimated time.

To the extent that magistrate judges are available, attorneys should be encouraged to consent to having their case tried by the magistrate judges. It appears that Magistrate Judge Breen in the Eastern Section may have time to try cases currently.

RECOMMENDATION

ATTORNEYS SHOULD BE REQUIRED TO PRE-MARK EXHIBITS AND TO ESTIMATE THE TIME NEEDED TO PRESENT THEIR PROOF.

RECOMMENDATION

ATTORNEYS SHOULD BE ENCOURAGED TO CONSENT TO HAVING CASES HEARD BY THE MAGISTRATE JUDGES.

4. COMPLIANCE WITH TIME LIMITS AND LOCAL RULES AT ALL STAGES OF THE LITIGATION

It is crucial that attorneys make every effort to comply with time limits and local rules at all stages of the litigation. Cases must be moved toward trial in a timely and orderly fashion. Cases won't settle and can't be tried if they are not being actively developed by both sides.

The Memphis Bar Association has published a Code of Ethics entitled, " Guidelines for Professional Courtesy and Conduct". Cases should progress more smoothly if the attorneys involved adhere to

t be helpful for the court to give its imprimatur Ethics. A copy is attached as Exhibit DD.

RECOMMENDATION

SHOULD REVIEW AND CONSIDER ENDORSING OR HE MBA CODE OF ETHICS.

C. ANALYSIS OF SPECIAL PROBLEMS RELATING TO PRO SE LITIGATION

1. THE PROBLEM

The Western District of Tennessee had approximately 550 pro se cases filed in 1990. The court is currently receiving 2 1/2 new pro se prisoner cases each day. The cases, in large part, cover habeas corpus, Title VII, and U.S.C. § 1983 civil rights cases. A vast majority of the pro se cases are prisoner cases.

The number of civil rights cases filed nationally under 42 U.S.C. §1983 by state prisoners in federal courts increased from 218 in 1966, to 9,730 in 1978, and 15,639 in 1981[123]. Most involve challenges regarding the conditions of their confinement. An additional 2,103 decisions from §1983 cases were appealed in 1983 to the U.S. Circuit Courts of Appeals[124]. Of the thousands of prisoner conditions of confinement suits filed each year, a very high

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[123] Admin. Office of the U.S. Courts, Annual Report of the Director 211 (Table 21) (1981); Admin. Office of the U.S. Courts, Annual Report of the Director 207 (Table 24) (1975).

[124] Admin. Office of the U.S. Courts, Annual Report (1982).

proportion are deemed "frivolous" by the judiciary and are dismissed for failure to state legitimate claims[125].

Justice Warren E. Burger, noting that the court was an overly complex forum for the resolution of many prisoner petitions, stated, "Federal judges should not be dealing with prisoner complaints which, although important to a prisoner, are so minor that any well-run institution should be able to resolve them fairly without resort to federal judges"[126].

In 1982, 91 percent of the cases terminated by the courts ended at screening or after issue was joined but before pretrial conference[127]. Although some may think, therefore, that there is no real problem with prisoner petition cases, it must be remembered that significant judicial, legal, and correctional resources are expended during the pretrial period[128].

In 1991, the Federal Judicial Center selected from the Federal Court for the Western District of Tennessee, 81 random cases that were terminated between July, 1989 and June, 1990. Of these 81 cases, 9 cases (or 10 percent) were pro se law suits[129]. The average time for disposition (from filing to trial, or the granting of a motion for summary judgment or an order for dismissal) took 35 months[130].

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125 Turner, "When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts", 92 Harvard L.R. 610, 611 (1979).

126 Burger, "Chief Justice Burger Issues Year end Report", 62 A.B.A.J. 190 (1976).

127 U.S. Administrative Office of the Courts, "Annual Report", 1982.

128 "Alternative Dispute Resolution Mechanisms in Prisoner Grievances", U.S. Dept. of Justice, National Institute of Corrections (1984), p. 6.

129 Prisoner petitions were purposely excluded from the randomly selected group by the Federal Judicial Center.

130 There was only one case lasting more than 48 months (it took 86 months from filing to the first trial). If one would exclude that from the calculations, then average for the remaining 8 cases drops to 29 months on average.

2. THE ESTABLISHMENT OF A CASE MANAGEMENT SYSTEM

No agency or organization, or even the court system itself, has statistics on:

a) What percentage of pro se litigation are prisoner petitions

b) The correlation between prisoner petitions that are civil claims and those that are criminal collateral complaints

c) The percentage of pro se cases, which are not prisoner petitions, that involve Title VII or Social Security appeals

More information is needed on the type of pro se cases that are filed in this district in order to evaluate fully the reforms needed. In order to be effective, the case management system should accomplish at least three things:

a) Provide the number of civil and criminal cases coming into the court system

b) Track and list the different types of cases coming into the courts (i.e. civil, criminal, pro se, prisoner petitions, bankruptcy, social security appeals, Title VII, corporate issues etc.)

c) Organize information concerning where the cases originate (i.e., prisons, county jails, etc.)

This information would assist in identifying trends and facilitating a better understanding of what reform is needed and where resources should be placed.

RECOMMENDATION

A CASE MANAGEMENT SYSTEM SHOULD BE IMPLEMENTED TO PROVIDE INFORMATION ON THE TYPE OF PRO SE CASES BEING FILED IN THIS DISTRICT.

3. ADDITION OF A PRO SE ATTORNEY

According to Administrative Office guidelines, the court is entitled to two pro se staff attorneys if there are more than 600 pro se filings each year. With the proposed 1000 bed prison to be built, the likely increase in pro se cases (which is already at 550) will allow the district to increase its current staff (from one pro se staff attorney) to two pro se staff attorneys.

RECOMMENDATION

THE COURT SHOULD APPLY FOR ANOTHER PRO SE STAFF ATTORNEY POSITION AT THE EARLIEST OPPORTUNITY.

4. EXHAUSTION OF ADMINISTRATIVE REMEDIES IN THE PRISONER CONTEXT

There should be a requirement that all administrative requirements are exhausted before cases are heard by the federal bench. However, for this to become a reality, all jails and correctional facilities within the state (including county facilities[131]) need to have grievance procedures functioning.

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131 This becomes especially important when one realizes that approximately 93 percent of American prisoners are in state and local, rather than federal, institutions,

The Tennessee Department of Corrections has a grievance procedure approved by the U. S. Department of Justice. Unfortunately, the Shelby County Jail and the Shelby County Correctional Center have no formal administrative grievance procedures. Information needs to be obtained on grievance procedures within all the county jails within the Western Tennessee Federal Court District[132]. A copy of the administrative remedies procedures of the Tennessee Department of Correction should be sent to any jail that has no procedures.

RECOMMENDATION

UNIFORM FORMAL GRIEVANCE PROCEDURES SHOULD BE ENCOURAGED IN ALL COUNTY CORRECTION FACILITIES WITHIN THE WESTERN TENNESSEE FEDERAL COURT DISTRICT.

5. CHOICES IN ALTERNATIVE DISPUTE RESOLUTIONS IN THE PRISONER CONTEXT

The advisory group is opposed to any requirement that all prisoner pro se cases be submitted to arbitration. However, the advisory group thinks there may be some cases that could profit from ADR procedures. The cases would have to be carefully screened in order to identify appropriate cases.

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and "because, historically, conditions in the former institutions have been harsher, the great bulk of litigation has focused on state correctional practices." "Alternative Dispute Resolution Mechanisms for Prisoner Grievances", Dept. of Justice, National Institute of Corrections (1984), p. 4.

[132] Uniformity is important among even state and county jails as a means of managing pro se litigation, since 93% of all American prisoners are in state and local institutions Dept. of Justice, National Institute of Corrections," Alternative Dispute Resolution Mechanisms for Prisoner Grievances" (1984).

Alternative Dispute Resolution may be helpful in some prisoner pro se cases because it allows the inmate to have an opportunity to present his grievance or claim before an impartial decision maker[133]. To be effective an alternative dispute resolution must: a) encourage the prompt and thorough investigation of complaints, b) provide the plaintiff with a reasoned response, c) allow for review of the decision, d) provide for implementation even if a finding favors the inmate, and e) deter non-meritorious cases from proceeding.

There may be cases where a type of ADR would be appropriate and would expedite the process of resolution of the grievances. This is an area that the advisory group thinks should be studied further to determine whether ADR in the pro se area is working in other jurisdictions and how those districts screen the cases to determine which ones are appropriate for ADR.

ADR procedures are sometimes useful for early case disposition and an incentive for the just, efficient, and economical resolution of disputes by informal procedures. The court may mandate arbitration, or other ADR procedures, while preserving the right of the litigant to a full trial on demand[134]. The court has found the authority to impose arbitration and other alternative dispute resolutions upon litigants under the Federal Rules of Civil Procedure.

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[133] In the adversarial process of the courts, the inmate and warden are legally and symbolically equal, a fact that does not go unnoticed by those whom the warden must supervise. This is perhaps why some would rather go to trial than settle out of court with a compromise that may bring greater benefits for the inmate.

[134] "Arbitration Handbook", United States District Court, Western District of Oklahoma, 1990, p. I.

RECOMMENDATION

ALTERNATIVE DISPUTE RESOLUTION PROCEDURES SHOULD BE STUDIED FURTHER IN THE CONTEXT OF PRO SE LITIGATION.

6. WRITTEN HANDBOOKS FOR PRO SE LITIGANTS

It may be helpful for pro se litigants to have, for instructive purposes, a handbook listing what is expected of them before the federal court. The handbook may include specific instructions on what documents need to be filed for different suits and where these need to be filed. It could be organized according to topic or type of suit, but its goal should be to cover briefly some of the time deadlines and rules that must be followed when bringing a federal law suit. The Legal Service Corporation for New York City[135] and a professor at the Brooklyn Law School[136] have prepared pro se handbooks.

RECOMMENDATION

THE PRO SE STAFF ATTORNEY SHOULD COMPILE WRITTEN HANDBOOKS FOR PRO SE LITIGANTS.

7. LAWYER REFERRAL SYSTEM

In 1969, the Supreme Court held that prisoners must have access to legal resources so that they may seek post-

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[135] See "For Claimants: How to Appeal a Social Security/SSI Case in the United States District Court.", attached hereto as Exhibit BB.

[136] See "Federal Civil Litigation Handbook: A Guide for Pro Se Litigants in the United States District Court.", attached hereto as Exhibit CC.

conviction relief[137]. However, budget cuts have greatly restricted the operations of legal services programs to aid prisoners[138]. Rule 2 of the proposed draft of the Local Rules for the Western District of Tennessee establishes a voluntary panel of attorneys who are willing to accept appointment to represent pro se parties in civil actions. Attorneys wishing to serve on the panel would be required to file an application stating past civil trial experience, the attorney's preference for appointment, and the number of cases per calendar year the attorney is willing to accept. Appointments would be made by the clerk unless the judge appoints someone specifically. Compensation for attorney fees would only be available if provided for in the statute, regulation rule, or other provision of law being addressed. Perhaps the court or the rules would allow the attorneys who are willing to sit on the panel to take cases on a contingency fee basis. If this rule is enacted, it may provide for increased legal services on a pro bono basis which may increase the efficiency of adjudication of pro se cases through the federal courts.

Even if the attorneys are willing to provide pro bono representation, there is no fund established to assist the attorney in covering discovery fees or any other fee encountered during the filing and adjudication of a law suit. One source of funding that may be available for this type of pro se litigation is the Tennessee Bar Foundation. The Bar Foundation recently gave money to the Eastern District of Tennessee to assist pro bono attorneys.

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137 Johnson v. Avery, 393 U.S. 483 (1969).

138 "Alternative Dispute Resolution Mechanisms for Prisoner Grievances", U.S. Dept. of Justice, National Institute of Corrections (1984), p. 47.

The Utah Federal Courts requires all attorneys licensed to practice before the federal bar, to accept a certain number of pro se cases each year. The Federal Court in Utah has based its authority to impose such conditions on attorneys on the language of the professional responsibility code that all attorneys have a responsibility to accept pro bono cases[139]. The Tennessee Code of Professional Responsibility also contains this language[140] which may help facilitate the establishment of a requirement that all attorneys practicing before the federal courts in Western Tennessee must accept a certain number of pro se cases each year.

With Memphis State within the Western Tennessee District, the courts may want to encourage the establishment of clinical law programs where law students would have the opportunity to represent prisoner cases for academic credit. Thus, the bar might be relieved of some pro se cases being thrust upon it, the students would receive valuable experience, and the costs of representation would be reduced[141]. Of course, prisoner cases may take a long time

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[139] As Congress stated in the Uniform Civil Justice Act of 1990, "The courts, the litigants, the litigants' attorneys, and the Congress and the executive branch, share responsibility for cost and delay in civil litigation and its impact on access to the courts, adjudication of cases on the merits, and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties." (emphasis added) Sec. 102.

[140] Canon 2 states, "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." More specifically Ethical Consideration 2-25 states, "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Every lawyer should support all proper efforts to meet this need for legal services." EC 2-24, Tennessee Rules of Court, Tennessee Supreme Court Rules, p. 461 (1990).

[141] The U.S. Department of Justice warns, however, "The student's educational needs may be inconsistent with the goal of averting litigation. Because law students seek experience, they may "encourage a solution through the courts, thus neglecting existing

to dispose of, and the students in the clinic program may only be present for a semester or two. To deal with this problem some type of permanent faculty member would be required to oversee the cases and distribute the work, as needed, to students. Just such a model is working at the University of Iowa Legal Clinic.

RECOMMENDATION

THE COURT SHOULD ADOPT PROPOSED LOCAL RULE 2 PROVIDING FOR A PRO BONO PANEL FOR PRO SE LITIGANTS.

RECOMMENDATION

THE COURT SHOULD EXPLORE THE POSSIBILITY OF A CLINIC AT MEMPHIS STATE TO REPRESENT PRO SE LITIGANTS.

D. ANALYSIS OF SPECIAL PROBLEMS RELATING TO U.S. LITIGATION

I. CRIMINAL PRACTICES

a. CHARGING PRACTICES

It is the policy of the Department of Justice to charge in a single indictment all charges and all defendants relating to a single criminal transaction or enterprise. The department also has a policy to prosecute federally many cases involving guns and drugs that would also constitute local offenses.

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alternative mechanisms." Alternative Dispute Resolution Mechanisms for Prisoner Grievances", National Institute of Corrections (1984), p. 50.

b. PLEA NEGOTIATION PRACTICES

Historically, the United States Attorney's Office for the Western District of Tennessee would enter into plea agreement procedures contemplated by Rule ll(e) (l) (A) and (a) Federal Rules of Criminal Procedure in appropriate cases. Rarely was a specific sentence agreed upon as contemplated by Rule ll(e) (1) (C) F.R.Cr.P. This procedure has now been sharply curtailed by the Sentencing Reform Act. It is the policy of the Department of Justice never to consent to a plea of *nolo contendere* to an offense charged.

One advisory group member and Federal Public Defender, contends that a more manageable criminal docket could be obtained through adjustments to policies and procedures of the U.S. Attorney's Office. As examples, he cites more extensive use of pretrial diversion and plea bargaining. However, there is legitimate disagreement from the U.S. Attorney's Office, which submits that these practices are already being used in appropriate cases. As an example, potential pretrial diversion cases are simply not indicted, rather than indicted and diverted.

c. DISCOVERY PRACTICES

A suggestion was made during the course of the judges' interviews that quicker responses to requests for discovery would help to expedite criminal trials.

2. CIVIL PRACTICES

EXERCISE OF AUTHORITY

There are special considerations which should be addressed in a district court plan relating to pretrial and settlement conferences and procedures. Section 473 (b) (2) of the Act directs the district courts to consider requiring that an attorney representing a party at a pretrial conference have authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters. Such a mandate as applied to the United States could conflict with the Department of Justice's chain of command and policy implementation functions in handling its huge caseload, despite the provision in the Act at §473(c), protecting the authority of the United States with respect to settlement authority provisions. Matters might arise that don't specifically relate to settlement authority. For example, a pretrial conference on discovery could raise issues of attorney-client or executive privilege which are matters frequently requiring decisions by the highest officials of the Department of Justice, and only after consultation with the affected agencies. While such a requirement might be imposed on private counsel and their clients, the United States clearly should be exempted from the possibility of imposition of a requirement inconsistent with the Justice Department's need to maintain centralized control over litigation.

E. ANALYSIS OF SPECIAL PROBLEMS RELATING TO COMPLEX CASES

This report considers the special problems relating to complex cases. We conclude this term refers to multidistrict litigation and we have expanded the definition to include large and complicated cases that do not necessarily require the use of the Manual for Complex Litigations but are, nonetheless, unique.

The Western District of Tennessee is infrequently selected by litigants as a forum for complex class action litigation or multidistrict litigation that is regional or national in scope. From time to time, class actions are filed that are essentially local in nature, but these actions are not the type that would dominate the court's docket to the exclusion of all other cases. Obviously, the potential exists at all times for this district to become a forum for regional or national class action litigation or multidistrict litigation as the district is centrally located and reasonably accessible from all areas of the country.

The District Court Clerk's Office had no specific instruction on the assignment of class action cases or multiparty litigation that could be described as large or complicated and requiring an inordinate amount of the court's time. All cases are assigned randomly to the various courts without regard to size or complexity. There are no standardized or district-wide procedures establishing the manner in which the various courts adjudicate the large or complicated cases that are randomly assigned.

Upon inquiring, the judges' comments on individual procedures were that the judges attempted to involve themselves through scheduling conferences to insure an orderly progress of these cases.

Obviously, the large or complicated cases have the potential to demand an inordinate amount of the court's time to deal with extensive motion practice and discovery disputes. Two judges indicated difficulty in promptly attending to the many motions that a large case generates. They also noted that many discovery disputes referred to the magistrate are appealed, resulting in further delays.

The statistical data available does not identify any particular impact that large or complicated litigation may have on the docket status. It is assumed that the weighted case statistics accurately captures the impact of the large or complicated cases that are adjudicated in the district.

In conclusion, there are no specific rules or procedures published relating to complex litigation for coordination, pretrial procedures, discovery procedures, motion practice or trial scheduling. It was suggested by two judges that consideration should be given to a separate docket rotation for those lengthy and complex cases that can be identified early on.

RECOMMENDATION

A SEPARATE DOCKET ROTATION SHOULD BE CREATED FOR LENGTHY AND COMPLICATED CASES. CASES SHOULD BE PUT ON THIS ROTATION AS SOON AS THEY ARE IDENTIFIED. IF THE CASE HAS ALREADY BEEN ASSIGNED TO A JUDGE, THAT JUDGE SHOULD GET CREDIT AGAINST THE NEXT ASSIGNMENT.

RECOMMENDATION

FOR ALL CASES THAT THE COURT OR AN INDIVIDUAL JUDICIAL OFFICER DETERMINES ARE COMPLEX AND ANY OTHER APPROPRIATE CASES, THERE SHOULD BE CAREFUL AND DELIBERATE MONITORING THROUGH A DISCOVERY-CASE MANAGEMENT CONFERENCE OR A SERIES OF SUCH CONFERENCES AT WHICH THE PRESIDING JUDGE OR MAGISTRATE JUDGE-

A) EXPLORES THE PARTIES' RECEPTIVITY TO, AND THE PROPRIETY OF, SETTLEMENT OR PROCEEDING WITH THE LITIGATION;

B) IDENTIFIES OR FORMULATES THE PRINCIPAL ISSUES IN CONTENTION AND, IN APPROPRIATE CASES, PROVIDES FOR THE STAGED RESOLUTION OR BIFURCATION OF ISSUES FOR TRIAL CONSISTENT WITH RULE 42(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE;

C) PREPARES A DISCOVERY SCHEDULE AND PLAN CONSISTENT WITH ANY PRESUMPTIVE TIME LIMITS THAT A DISTRICT COURT MAY SET FOR THE COMPLETION OF DISCOVERY AND WITH ANY PROCEDURES A DISTRICT COURT MAY DEVELOP TO-

i) IDENTIFY AND LIMIT THE VOLUME OF DISCOVERY AVAILABLE TO AVOID UNNECESSARY OR UNDULY BURDENSOME OR EXPENSIVE DISCOVERY; AND

ii) PHASE DISCOVERY INTO TWO OR MORE STAGES; AND

D) SETS, AT THE EARLIEST PRACTICABLE TIME, DEADLINES FOR FILING MOTIONS AND A TIME FRAMEWORK FOR THEIR DISPOSITION. [§473(a)(3)]

IV. EXAMINING THE IMPACT OF NEW LEGISLATION ON THE COURT[§472(c)(1)(D)]

A. CRIMINAL LEGISLATION

Criminal cases dominate court time in the Western District of Tennessee. The reasons for this, obvious to all, are the (I) sheer number of cases, and (2) priorities over civil cases fixed by statutes. The perception of the public, as represented by the lay member of the advisory group[142], is that this emphasis on criminal law enforcement is appropriate. Congress and the President have responded and continue to respond to this public demand for stronger law enforcement by passing laws and instituting policies that tremendously increase the criminal workload of the federal court.

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[142] Advisory group member Dr. William H. Sweet, a lay person, states:

> It is felt the public sector overwhelmingly approves and supports a justice system that protects society and metes out the appropriate penalties to those who willfully and deliberately violate the laws. There is a growing concern that violent crimes and/or drug-related crimes are spiraling at an astronomical rate. Closely aligned with that concern is the creeping fear that criminals are not being imprisoned quickly enough nor long enough. The daily news brings vivid accounts of criminal activities occurring in this community. Residents are becoming more fearful of life and property because of the frequency of the violations. citizens want to feel that their lives, homes and streets are safe. Citizens also feel that if the criminals are taken off the streets and put into prison; this action will deter non-criminals from entering into that realm.
>
> The public is sometimes discouraged by the length of time it takes to get a criminal off the streets after an arrest. It is felt that once a violent person or a drug runner has been apprehended, then that person should be required to pay his/her debt to society. In many cases, the public does not come forward because of the seeming inability of the system to keep the criminal in custody. The arrogance and disdain displayed by these criminals place an extraordinary amount of pressure on the perceived defenseless public, i.e., the very young, females, elderly. This segment is aware and appreciative of efforts by law-enforcement agencies but feels that all is for naught if the criminals cannot be contained.

This district includes Shelby County which has a prison population of 5,347[143]. Only four of the largest jurisdictions in the United States have more prisoners - Los Angeles, New York, Chicago and Houston[144]. An even more telling statistic is the rate of incarceration. Shelby County's rate of incarceration is 945 per 100,000 residents[145]. This rate is more than twice the national incarceration rate of 426 per 100,000 residents. It is nearly three times South Africa's rate of 333/100,000, and three and one half times the rate in the Soviet Union - 268/100,000[146].

1. ADOPTION OF GUIDELINE SENTENCING AND IMPACT OF PARTICULAR ASPECTS OF THE SENTENCING GUIDELINES

It is the view of some members of the advisory group that the adoption of guideline sentencing has eliminated most of the incentive to plead guilty because there is very little difference between what the government can offer and what the defendant will receive if convicted. The result is that most drug and firearm cases now go to trial and the judges are spending virtually every Monday trying drug and firearm cases.

Former United States Attorney General Richard Thornburgh expressed the view in 1989[147], that any disincentive to plea bargain

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143 Bureau of Justice Statistics Bulletin, June, 1991, updated through July 15, 1991.

144 *Id.*

145 Sentencing Project Report, Washington, D.C.

146 *Id.*

147 Former U. S. Attorney General Thornburgh, on March 6, 1989, stated:

> A commitment to guideline sentencing in the context of plea bargaining may have the temporary effect of increasing the proportion of cases that go to trial, until defense counsel and defendants understand that the Department is committed to the statutory sentencing goals and

would only be temporary and would be eliminated when the parties became more familiar with the flexibility within the guidelines. Whether this flexibility, in fact, is being used effectively in this district to encourage plea bargaining is a matter of debate among advisory group members.

According to the 1990 Report of the Federal Courts Study Committee[148], "More than 70 percent of the judges surveyed stated that the guidelines had reduced the incentives to induce a defendant to plead guilty, and half stated that the guidelines had decreased the percentage of guilty pleas in their caseload." Last year, this district spent 60% of its trial time on criminal cases[149]. Five years ago, that figure was 40%[150]. According to the judges, the trial time devoted to criminal cases is steadily increasing. The Chief Probation Officer for this district has stated that the guidelines have greatly increased the amount of time needed to handle criminal cases[151].

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procedures. Prosecutors should understand, and defense counsel will soon learn, that there is sufficient flexibility in the guidelines to permit effective plea bargaining which does not undermine the statutory scheme.

For example, when a prosecutor recommends a two level downward adjustment for acceptance of responsibility (e.g., from level 20 to level 18), judicial acceptance of this adjustment will reduce a sentence by approximately 25%. If a comparison is made between the top of one level (e.g., level 20) and the bottom of the relevant level following the reduction (e.g., level 18), it would show a difference of approximately 35%. At low levels, the reduction is greater. In short, a two level reduction does not mean two months. Moreover, the adjustment for acceptance of responsibility is substantial, and should be attractive to defendants against whom the government has strong cases. The prosecutor may also cooperate with the defendant by recommending a sentence at the low end of the guideline range, which will further reduce the sentence.

148 See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, at p.137, (1990), attached hereto as Exhibit L.

149 Guidance Memo, *supra*, note 39, at 19.

150 *Id.*

151 See the letter from Jim McKinley, Chief U.S. Probation Officer, attached hereto as Exhibit EE.

Sentencing hearings in U.S. District Court now take, as a general rule, longer than pre-guidelines sentencings required. According to the 1990 report of the Federal Court Study Committee, ninety percent of the district judges said the guidelines had increased the time needed in the sentencing phase[152]. Half reported a time increase of 25% and a third reported a time increase on sentencing of 50%[153].

Additionally, the sentencing guidelines have impacted the courts of appeal. Not only are there sentencing guidelines issues raised in almost every criminal appeal from a jury conviction, but also defendants are entitled to appeal their sentences on guilty pleas, if they contend the guidelines were not applied correctly.

2. MANDATORY MINIMUM SENTENCING STATUTES

In 1986, Congress passed laws which established hundreds of mandatory minimum sentences that judges generally must impose on violators no matter what the circumstances. These laws provide for minimum sentences of five years in prison for anyone convicted of carrying or using a gun while committing a crime of violence or trafficking drugs. The second offense carries a mandatory twenty year term. Convicted felons found in possession of a firearm face ten years in prison. A career criminal (anyone with three prior felony convictions) faces a mandatory minimum sentence of fifteen years if he is found with a gun.

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152 *Id.*
153 *Id.*

The mandatory minimum sentencing statutes operate as a disincentive to plea bargain. While it is understandable that society demands minimum sentences for certain crimes, it is also reasonable to conclude that society must pay the price of minimum sentences. The cost is not limited to building more prisons and hiring more prosecutors. The effect of minimum sentencing is more criminal trials. Society must pay the price of increasing the number of judges, courtrooms and support personnel necessary to process these additional criminal trials. If judicial resources are not adequately increased, society will pay the cost through the loss of access to the federal courts for civil suits.

3. NEW STATUTORY DRUG AND GUN OFFENSES

Gun and drug offenses already constitute almost 60% of the criminal cases in this district. Because so many of these cases also carry mandatory minimum sentencing, most will be tried. Any new statutes in this area will directly and substantially impact on the court's trial docket which is already primarily a criminal rather than civil docket - a complete reversal from five years ago.

The Violent Crime Control Act has passed the Senate and probably will not be considered by the House before fall. If adopted in its present form the legislation would, according to David Sellers, spokesman for the Administrative Office of the U.S. Courts, make "many homicides committed with handguns potential federal cases, provided the weapon at some point crossed state or foreign

boundaries.[154]" Sellers estimates that the legislation has the potential to bring 12,000 homicide cases into the federal courts, in comparison to the less than 200 that were heard last year[155]. The impact of new legislation on the already overburdened federal courts cannot be ignored. At a minimum, the courts must be funded adequately to handle the increased caseload. Increasing judgeships will allow the cases to be handled but it does not address the larger problem of the distortion of the federal system. The federal system should be returned to its former limited role in dealing with crime. Funds should be directed instead to the states to assist them in handling cases that traditionally have been matters of state jurisdiction.

4. EXPANSIONS OF FEDERAL CRIMINAL JURISDICTION

This district seems to have taken the lead in prosecuting state drug and firearm cases when the decision to do so was discretionary. Under the new initiative called "Operation Triggerlock", discretion will be removed and other districts will begin to experience a significant increase in these cases. Operation Triggerlock directs every United States Attorney in the nation to create teams of federal investigators and state and local police and prosecutors to look for cases involving individuals and drug gangs that violate federal weapons laws. No plea bargaining is permitted under the Triggerlock program.

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154 The Commercial Appeal, July 21, 1991, p.B1, col.6.
155 *Id.* at B2, col. 5,6.

The advisory group is well aware of the strong public support for the executive directives aimed at securing tougher penalties for drug and firearm crimes. Nevertheless, it is the opinion of some members of the advisory group that some of these cases, involving small amounts of drugs, should not be tried in federal court. The advisory group has been advised that this matter is not negotiable under the new directives. Perhaps the directives should be reexamined with a view toward eliminating the mandate with respect to "street corner dealers".

B. CIVIL LEGISLATION

Since the docket of the United States District Court for the Western District of Tennessee has been backlogged for a considerable period of time, the adoption of new civil legislation by congress has a significant impact upon an already crowded judicial system. Expanding the jurisdiction of the federal courts to add new causes of action by virtue of legislation, such as the Civil Rights Acts, Americans with Disabilities Act and Environmental Legislation, increases the number of cases and compounds the problems related to the backlog within this district. This is because an increasing demand is thrust upon a judicial system, whose resources available to confront that demand remain relatively static. Thus, the delay in the resolution of pending litigation and the cost associated with said delay are markedly increased and exacerbated whenever new legislation is enacted that creates additional causes of action and increased demands upon the court system.

C. LEGISLATIVE INACTION

1. LEGISLATIVE RECONCILIATION OF DEMANDS AND RESOURCES

Legislative inaction in failing to provide additional judicial resources necessary to confront the continuing demands of new legislation upon the court system is a major factor that contributes to the increased cost and delay of pending litigation. Although by virtue of new legislation Congress has created additional causes of action, which have flooded the courts with an increasing number of lawsuits, congress has not provided judicial resources sufficient to confront those increased demands. Despite the fact that new legislation has resulted in the filing of a multitude of actions, judicial resources in this district have remained relatively static during the past two decades. Upon the confirmation of the Honorable Harry Wellford in December 1970, the Western District of Tennessee had three district judges as of that date; a fourth judge, the Honorable James Todd, was not confirmed until the mid-l980's. Although a fifth judge will be appointed for confirmation in the near future, the Western District of Tennessee still has only four full-time district judges, in addition to the Honorable Robert McRae, Jr., who has taken senior status.

An analysis of the judicial resources available to hear cases in Tennessee state courts exemplifies the significant shortage of judges in federal court. Although four full-time district judges preside over criminal, civil and equitable matters in the Western District of Tennessee, the State of Tennessee has provided a total of

twenty judges (excluding General Sessions Court Judges) to hear civil, criminal and chancery cases in Shelby County.

In the Western District of Tennessee, additional judges, courtrooms, office space for the Clerk of Court and support personnel are needed at the present time to reduce the backlog of cases and to handle newly filed lawsuits. Although, periodically, judges from other jurisdictions have volunteered to provide assistance in this district, adequate facilities and/or courtrooms have not been available to accommodate the visiting judges, on occasion. Moreover, the office of the Clerk of Court is in need of additional personnel; however, sufficient space for new personnel is unavailable. Until adequate judicial resources are provided, new legislation will continue to impact the Western District of Tennessee by increasing the delay and cost of litigation.

2. APPROVAL OF NOMINEES FOR JUDICIAL VACANCIES

Legislative inaction and delay in the approval of nominees for judicial vacancies have contributed to the backlog of cases in the United States District Court for the Western District of Tennessee and, therefore, have resulted in delay in the resolution of pending matters and in the increased cost of litigation. The fact that the number of sitting judges in the Western District was reduced from three to two on two separate occasions during the early 1980's, due to the elevation of judges to the United States Court of Appeals, has compounded the problem.

Typically, the process of appointing, investigating and confirming a federal judge requires at least a full year and has taken

as long as several years, on occasion. Although the congressional action that provides funding for the appointment of judges to a particular district implies a recognition of the prompt need for additional jurists, immediate assistance is not provided due to the delay associated with the appointment, investigation and confirmation of a federal judge. While awaiting the confirmation of an additional judge, resources in a particular district can become exhausted when the caseload exceeds the availability of judicial manpower; such a situation can result in a backlog under the best of circumstances. However, when the process results in the reduction of judges within a judicial district, an unmanageable backlog is certain to result. For example, the Western District of Tennessee was reduced from three judges to two during the early 1980's upon the elevation of the Honorable Bailey Brown to the United States Court of Appeals for the Sixth Circuit. The seeds of the backlog were planted, as the judiciary of this district was short-handed for more than a year while awaiting the confirmation of Judge Brown's replacement, the Honorable Odell Horton. Shortly thereafter, the Western District of Tennessee, again, was reduced from three judges to two upon the elevation of the Honorable Harry Wellford to the Court of Appeals. Once again, the judiciary of this district was short-handed for more than a year while awaiting the confirmation of Judge Wellford's replacement, the Honorable Julia Gibbons.

Thus, legislative inaction in the approval of nominees for judicial vacancies and the reduction in the number of district judges caused by the elevation of jurists to the Court of Appeals have had a significant impact upon the unmanageable backlog within the

Western District of Tennessee. Such a backlog has resulted in delay in the resolution of pending matters and in the increased cost of litigation.

SUMMARY OF RECOMMENDATIONS

The Civil Justice Reform Act of 1990 provides that "The courts, the litigants, the litigant's attorneys, and the Congress and the executive branch share responsibility for cost and delay in civil litigation and its impact on access to the courts, adjudication of cases on the merits, and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties"[156]. The charge to this advisory group was limited to making recommendations to the district court for consideration in drafting its delay and expense reduction plan. Thus, no recommendations to Congress or the executive branch are included as they are outside the scope of our charge.

The advisory group believes that this district is indeed fortunate to have very capable, dedicated and hard working judges. They are diligently trying to handle an overwhelming caseload and their efforts should be applauded. It is hoped that the recommendations of this group will assist the court in its attempt to reduce the expense and delay that threatens the civil docket. The advisory group's recommendations are listed below, along with a page reference to their location in the text of the report:

FACILITIES

1. Additional space should be provided for two Article III courtrooms and one magistrate courtroom. (p.31)

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156 Civil Justice Reform Act of 1990, P.L. 101-650, §102(2).

2. A person in the clerk's office should be given the responsibility for locating additional temporary court space for bench trials and for coordinating the scheduling of trials in that temporary space. (p.31)

CLERK'S OFFICE

3. The Clerk's Office should develop specific procedures for all office functions and reduce them to writing so they can be followed uniformly. (p.28)

4. Full implementation of ICMS should be completed as expeditiously as possible. (p.33)

5. The court should centralize the scheduling function completely with the courtroom deputies who should perform comprehensive case management responsibilities as outlined in their current job descriptions. (p.74)

6. The job title of the courtroom deputy should be changed to case manager. (p.75)

7. Monitoring of case time limits should be assigned to the docket clerks and courtroom deputies as outlined in their present job descriptions, with general oversight by an expediter in the Clerk's Office. Docket clerks and courtroom deputies should be instructed to forward routine orders to the judge when an order can be entered based on non-action. (p.43)

8. The Clerk of Court should contact the Clerk's Division for assistance in scheduling on-site training of the courtroom deputies. (p.75)

9. The courtroom deputy should be an integral part of the judge's case management system. (p.75)

10. The court should make optimal use of the clerk of court's services as court administrator. (p.84)

11. The court should hold periodic meetings with the heads of all court units, and with the Federal Public Defender, United States Attorney, and United States Marshall. (p.84)

12. A case management system should be implemented to provide information on the type of pro se cases being filed in this district. (p.90)

CASE ASSIGNMENTS

13. Cases should be reassigned among judges based on their current workloads, trial schedules, and administrative duties, particularly those of Chief Judge. (p.41)

14. A separate docket rotation should be created for lengthy and complicated cases. Cases should be put on this rotation as soon as they are identified. If the case has already been assigned to a judge, that judge should get credit against the next assignment. (p.100)

PRETRIAL PROCEDURES

15. The court should adopt procedures designed to provide systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case. [§473(a)(1)] (p.39)

16. There should be early and active involvement by the judge in planning the progress of the case, controlling the discovery process, and scheduling hearings, trials, and other litigation events. [§102(5)(B)] (p.40)

17. Local Rule 13 should be amended to permit the court to dismiss a complaint without prejudice if no action has been taken by a party for a reasonable period of time. (p.80)

18. The court should require that all requests for postponement of the trial be signed by the attorney, after communication with the party making the request. (p.43)

19. Each judge, whenever possible should conduct his or her own scheduling conference and should use that opportunity to:

A) assess and plan the progress of a case;

B) set early, firm trial dates, such that the trial is scheduled to occur within eighteen months of the filing of the complaint, unless the judge certifies that-

i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or

ii) the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases;

C) control the extent of discovery and the time for completion of discovery, and ensure compliance with appropriate requested discovery in a timely fashion; and

D) set, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition. [§473(a)(2)]

If the judge is not available, the conference should be conducted by a magistrate judge. (p.45)

20. The court should require that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so. [§473(b)(1)] (p.46)

21. The court should encourage cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices. [§473(a)(4)] (p.48)

22. All requests for scheduling changes involving the judge's calendar should be referred directly to the courtroom deputy. (p.75)

23. One or more judges should institute a motion day practice on a trial basis for a period of six months or more to determine whether this practice is more efficient than the current procedure. (p.51)

24. Time targets should be established for resolution of motions taken under advisement. Any matter under advisement more than six months should automatically be flagged and given top priority over all other civil matters by the judge assigned to the case. (p.51)

25. Local rules should be amended to :

A) make rule 9(F), which applies only to discovery procedures, applicable to all motions and prohibit the consideration of motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matter set forth in the motion. The motion should also indicate whether the motion will be opposed. [§473(a)(5)];

B) Impose a page limitation on memoranda;

C) Provide for exceptions to the ten day response deadline for motions only for good cause shown;

D) Place time limitations on oral arguments;

E) Add a ten day limitation for filing motions to rehear or reconsider;

F) Authorize the court to dismiss a complaint where no action has been taken to prosecute the case within a reasonable period of time and

G) Require motions and responses to be accompanied by a proposed order, complete with citations to authority. (p.51)

26. The filing of a summary judgment motion should not be permitted after the motion cut-off date, which should be well in advance of the trial date. (p.81)

27. Judges should conduct, either in person or through a magistrate judge, periodic pretrial conferences to determine the complexity of the case, to set time targets for the various stages of the case, and to explore the possibility of settlement. (p.57)

28. Settlement conferences should be routinely scheduled after the Rule16 conference and before the final pretrial conference, unless both parties certify that it would not be helpful to do so. Additional settlement conferences should be held in the court's discretion. Upon notice by the court, representatives of the parties with authority to bind them in settlement discussions should be required to be present or available by telephone during any settlement conference. [§473(b)(5)]
(Note: Nothing in this recommendation shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, or any delegation of the Attorney General.) [§473(c)] (p.55)

29. The local rules should be amended to authorize the court to refer appropriate cases to alternative dispute resolution programs that

A) have been designated for use in a district court; or

B) the court may make available, including mediation, minitrial, and summary jury trial. (p.78)

30. A further study should be conducted by the advisory group or some other committee appointed by the court to review ADR procedures in depth and to make further recommendations to this court. (p.78)

31. One ADR program that should be explored further is a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a non-binding conference conducted early in the litigation. [§473(b)(4)] (p.78)

32. ADR procedures should be studied further in the context of pro se litigation. (p.93)

33. The procedure for conducting a final pretrial conference and the requirement for prior submission of a joint final pretrial order should be addressed in the local rules. (p.57)

34. The court should require that each party be represented at each pretrial conference 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. [§473(b)(2)] (p.58)

35. For all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, there should be careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judge or magistrate judge-

A) explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;

B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;

C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to-

i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and

ii) phase discovery into two or more stages; and

D) sets, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition. [§473(a)(3)] (p.101)

TRIALS

36. The court should institute a trailing docket for routine civil cases and should continue to use a modified accelerated docket on a periodic basis as necessary to get and keep the calendar current. Cases should be screened at the scheduling conference to determine whether they would be appropriate for the trailing or accelerated dockets. (p.66)

37. The court should seek visiting judge assistance in implementing an accelerated docket. (p.67)

38. The court should consider, if only on a trial basis, a rotation docket in which the routine criminal cases are rotated among the judges on a monthly basis. (p.67)

39. The courts should provide for free transfer of trials to judges whose scheduled trials get resolved early. (p.67)

40. The court should try to lessen the time spent in the courtroom by the courtroom deputy in order to maximize case management. (p.75)

41. In lengthy trials, in-court presentation of evidence should be reduced by greater use of stipulations, and by narrowing presentation of proof to the issues which are actually in dispute, and eliminating witnesses whose testimony is purely cumulative or directed to non-material issues. (p.58)

42. Judges should bifurcate cases where it is efficient and appropriate so to do. (p.58)

43. A system should be explored to obtain basic juror information in advance of a trial and to make that information available to the attorneys. (p.61)

44. The courts should set early, firm trial dates, such that the trial is scheduled to occur within eighteen months of the filing of the complaint, unless a judicial officer certifies that

A) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or

B) the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases. [§473(a)(2)] (p.66)

45. Visiting judges should be used to resolve all pending motions that have been under advisement for more than six months, as well as all cases that have been pending for more than three years. (p.72)

ATTORNEYS

46. Attorneys should inform themselves about the various types of ADR and should discuss ADR with their clients at the earliest opportunity. (p.84)

47. Attorneys and litigants should make every effort to engage in cost-effective discovery through the voluntary exchange of information. [§473(a)(4)] (p.85)

48. Attorneys should be required to pre-mark exhibits and to estimate the time needed to present their proof. (p.86)

49. Attorneys should be encouraged to consent to having cases heard by the magistrate judges. (p.86)

50. The court should adopt a local rule limiting the time for filing a motion to reconsider and setting out very limited circumstances in which the motion should be granted. (p.81)

PRO SE STAFF ATTORNEY

51. The pro se staff attorney should compile handbooks for pro se litigants. (p.93)

52. Uniform Grievance procedures should be encouraged in all county correction facilities within the Western Tennessee Federal Court District. (p.91)

COURT - GENERAL

53. The court should revise, type-set and bind the local rules. (p.80)

54. The court should adopt the following local rules concerning attorney misconduct and discipline:

A. Imposition of Sanctions

Upon notice and opportunity to be heard and in the sound discretion of any judge of this court, sanctions may be imposed for failure of counsel to comply with these rules without just cause.

B. Sanctions Affecting the Outcome of the Litigation (Civil only)

Abandonment, failure to prosecute, or failure to defend diligently may be found should counsel for any party fail to appear before the court at pretrial conference or should counsel fail to complete the necessary preparation for pretrial or trial. Judgment may be entered against the defaulting party either with respect to a specific issue or on the entire case. Alternatively, the failures of counsel listed in this section may result in the imposition of sanctions authorized by rule C below. After the case is at issue as to the party suffering the dismissal or default pursuant to this rule , the court shall direct that notice shall be given the affected litigant of the sanction and the basis for its imposition.

C. Sanctions Affecting Counsel

For failure of counsel for any party to comply with any of these rules, any judge of this court may, upon finding that the failure had obstructed the effective administration of the court's business, assess costs directly against counsel, have contempt proceedings initiated against counsel or may order such other sanction or combination of sanctions as is appropriate to the circumstances of the case. (p.81)

55. The court should review and consider endorsing or adopting the MBA Code of Ethics. (p.87)

56. The court should adopt Proposed Local Rule 2 providing for a pro bono panel for pro se litigants. (p.96)

57. The court should explore the possibility of a clinic at Memphis State to represent pro se litigants. (p.96)

58. The court should apply for another pro se staff attorney position at the earliest opportunity. (p.90)

EXHIBITS

The combined exhibits referred to throughout this report total over a thousand pages in length are, therefore, too numerous to reproduce as actual attachments. The exhibits are available, however, in the office of the Clerk of the United States District Court for the Western District of Tennessee. They are appropriately indexed and identified as exhibits to the report and may be reviewed by contacting the Federal Court Clerk, J. Franklin Reid (901-544-3315).

SUPPLEMENT

The Court Administrative Division of the Administrative Office of the United States Courts made a study of this district from May 20 through 24, 1991, and issued a report containing certain specific recommendations as to case management procedures. The advisory group thinks that these recommendations are generally consistent with the recommendations in the advisory group report and will be of assistance to the court in drafting its plan. The report of the Court Administration Division, dated August, 1991, is attached as a supplement to this advisory group report.

REPORT ON CASE MANAGEMENT PROCEDURES

WESTERN DISTRICT OF TENNESSEE

AUGUST 1991

COURT ADMINISTRATION DIVISION

ADMINISTRATIVE OFFICE OF THE U.S. COURTS

WASHINGTON, D.C. 20544

I. INTRODUCTION

At the request of the Circuit Executive for the Sixth Circuit, James Higgins, and with the concurrence of Chief Judge Odell Horton, a study of the case management operations of the Western District of Tennessee was performed from May 20-24, 1991. An exit conference with the chief judge, other judicial officers and the clerk of court was held on May 24, 1991. The study and debriefing were a follow up to a preliminary review on October 2-3, 1990, conducted by a member of the Court Administration Division and the clerk of court from the Eastern District of North Carolina.

The team conducting the study consisted of two representatives from the Administrative Office: David Williams, Senior Programs Specialist from the Court Administration Division and Mark Braswell, Senior Attorney from the Magistrate Judges Division. Three representatives from the district courts also comprised the team: Robert Shemwell, Clerk of Court for the Western District of Louisiana; Joseph Skupniewitz, Clerk of Court for the Western District of Wisconsin; and Barbara Quartulli, Courtroom Deputy from the District of Massachusetts.

II. OVERVIEW

The district has four active judges and one senior judge. Three active judges, including the chief judge, and the senior judge sit in Memphis. One active judge sits in Jackson. Two full-time magistrate judges sit in Memphis and one full-time magistrate judge sits in Jackson. (In March 1990 the Judicial Conference converted the part-time magistrate judge position at Jackson to full-time status. The full-time magistrate judge was appointed on July 1, 1991.)

The headquarters clerk's office is located in Memphis and a staffed divisional office is located in Jackson. The members of the team conducted interviews with all judicial officers in Memphis and Jackson (except for the new full-time magistrate judge at Jackson, who had not been appointed yet) and with the judges' and clerk's office staff in Memphis responsible for case management and docketing functions.

For the year ended June 30, 1990, the number of criminal felony filings per judgeship was 78 as compared to the national average of 58. The median time from filing to disposition in criminal felony cases was 5.8 months as compared to the national average of 5.3 months. During this period, 83 percent of the total number of jury trials completed were criminal.

Due to the heavy criminal caseload, the district was experiencing a substantial civil case backlog. Minimizing the civil backlog and preventing the development of an even greater one may be achieved without sacrificing any of the court's tradition of justice by redesigning the court's civil caseflow management system after models other districts have found to be productive and fair. To achieve this goal, however, will require a major change in the philosophy of the judges, the clerk of court and his staff, and the local bar. Even taking into consideration that the district has been approved the addition of a fifth judgeship and a third full-time magistrate judge has recently been appointed, the court must take steps to implement effective case management techniques in order to refine and strengthen their procedures to maximize the available resources of the court.

For the year ended June 30, 1990, the median time from issue to trial for civil cases in the district was 30 months as compared to the national average of 14 months. The district had 256 civil cases pending three years or more. This number represented 14.5 percent of the total pending civil caseload as compared to the national percentage of 10.4. A number of factors contributed to the backlog and constrained the setting of civil trial settings, such as priorities in favor of trials and hearings in criminal cases, many criminal cases going to trial rather than being plea bargained, pretrial and trial management and scheduling practices, and in-chambers work (e.g., deciding motions).

The judges stated that they spend much of their time in court handling various civil and criminal matters, and this time impacted on their ability to expedite pending motions and perform other chambers work. Exhibit One, attached, shows the summary of trial hours and other court activity for the judges and senior judge for each month for a previous year. The information in this exhibit, compiled from the JS-10 "Monthly Report of Trials and Other Court Activity," suggests that the judges are not spending a majority of their time conducting proceedings.

There is little court supervision of case development in this district. Courts with fast disposition and high termination rates generally have routine, automatic procedures to assure that answers in every civil case are received promptly, discovery begins promptly and is completed expeditiously, and a trial is scheduled early if needed. Mismanagement or nonmanagement of cases can cause considerable delay. The Western District of Tennessee could achieve greater efficiency in case management and processing by tightening controls during the various stages of civil litigation.

The clerk's office performs virtually no monitoring of the progress of case events as filings are received or of the timeliness of responses. The gathering of case

information is fragmented among chambers staff, the courtroom deputies, and the clerk's office staff, thereby creating the situation where the level of support provided to the district judges and magistrate judges is not at an optimum. A reorganization of the job functions among these groups, coupled with additional responsibilities assigned to the staff of the clerk's office, would enable a greater degree of effective case management to be performed by all concerned.

For the clerk's office to provide the necessary tools to effectuate efficient caseflow management, the clerk of court and the chief deputy should develop and structure an effective case processing and monitoring system. This need is particularly acute because the court is scheduled to receive the Integrated Case Management System (ICMS) in October, and the district has been designated as one of the ten pilot courts pursuant to the Civil Justice Reform Act of 1990 (CJRA).

To a great extent, bar practices in the district affect the efficiency of the court. Extensions of time and continuances of trials are requested frequently and often granted. The court should encourage greater efficiency in case processing by tightening time limits and implementing a more restrictive pleadings practice. Modification of the court's system should be accompanied by discussion with the local bar on the need for tighter judicial controls and the advantages that can be gained by all--counsel, clients, and the court--through more efficient case processing and quicker case disposition.

The recommendations in the report suggest ways to increase the efficiency and effectiveness of the case management practices and procedures of the court. Many of the suggested changes are interrelated while others are free-standing. Certain changes cannot be made until other steps have been accomplished.

The recommendations for the court's consideration are based on statutory requirements; the Federal Rules; Judicial Conference and Administrative Office policies, guidelines, and recommendations; and successful methods currently in use by other courts. The Administrative Office is available to assist in the implementation.

III. CIVIL CASE MANAGEMENT

Court supervision of case development should be instituted at the earliest feasible point. Many courts have developed case control systems with each case set for action on a specific date. Such a management practice serves to shorten the median case disposition time and also to identify inactive cases. In addition, the exercise of case control by the court has a discernible impact on bar practice by

creating the expectation that a case will be tried at the earliest possible date. The following are recommendations and suggestions to achieve these goals.

A. Pretrial Procedures

1. *The court should develop by local rule a stricter enforcement policy for dismissal of civil cases pursuant to Rule 4(j) of the Federal Rules of Civil Procedure.*

   [Cases are dismissed on an ad hoc basis for failure to prosecute. The present local rules have a provision (Local Rule 13) to dismiss "dormant civil claims." The proposed revisions to the local rules do not contain either this rule or a similar provision.]

   Reference: Contact Robert Shemwell, Clerk, Western District of Louisiana (FTS-493-5273) for information about developing a system of automatic dismissal of civil cases for failure to prosecute.

2. *The clerk of court should adopt a system of monitoring all due dates and immediately following up on overdue pleadings.*

   [The monitoring function includes events such as service of process, answers, motions practice, deadlines imposed by the court, and deadlines established in orders to show cause. With the court scheduled to receive ICMS in October, it is imperative that the docket clerks be fully trained to track various pleadings. The system is designed to perform many case management functions, but depends upon data being entered correctly.]

3. *Trial dates should be set in consultation with counsel at the initial scheduling conference.*

   [Presently, the courtroom deputy sets the trial date independently after the scheduling conference has been held. The likelihood of a continuance may be significantly reduced if the judge consults with counsel at the time of the conference to set a realistic trial date. Also, setting trial dates early can minimize conflicts with state court proceedings and other counsel commitments.]

4. *The court should consider implementing a policy to restrict extensions of time and continuances by stricter enforcement of the time limits imposed by the court, the local rules, and the Federal Rules of Civil Procedure.*

5. *The court could impose sanctions for failure to comply with court orders, the local rules, and the Federal Rules of Civil Procedure.*

Reference: Robert E. Rodes Jr., Kenneth F. Ripple, and Carol Mooney, Sanctions Imposable for Violations of the Federal Rules of Civil Procedure, (Federal Judicial Center, 1981)

B. Motions

6. *The judges could establish guidelines for effective management of motions that can help expedite the disposition of cases.*

[The judges could establish target dates or block a certain amount of time for ruling on dispositive motions. Routine motions could be acted upon expeditiously. Discovery motions need not be considered by the court unless counsel have certified that they tried to resolve the matter between themselves first. The bar could be trained as to how to prepare proposed findings of fact and conclusions of law for dispositive motions.]

Reference: Paul Connolly, and Patricia A. Lombard, Judicial Controls and the Civil Litigative Process: Motions, (Federal Judicial Center, 1980)

C. Final Pretrial/Settlement Conference Procedures

7. *An administrative order could be issued by the clerk's office to close out a case in the event of settlement.*

[Presently, when a case is reported settled by the parties without filing a stipulation of dismissal or consent decree, the case remains open until the appropriate papers are filed. In many instances, a substantial period of time has passed and the courtroom deputy has to call counsel to remind them to file these papers. An administrative order closing or dismissing the case will help to avoid any delay. If the settlement falls through, the case can always be reopened. Attached as Exhibit Two is a sample order used in the District of Massachusetts.]

8. *The court could consider using alternative dispute resolution (ADR) techniques such as mediation and the use of third parties as settlement judges.*

[A procedure could be established whereby a settlement conference would be conducted by a magistrate judge (or adjunct settlement judge) who will not be trying the case. The Western District of Oklahoma has a settlement magistrate judge. In the Northern District of Oklahoma, the assigned judge may refer any case for a settlement conference before any other judge or magistrate judge. Members of the local bar can also preside over settlement conferences. Both courts can be contacted for further information.]

References: Marie D. Provine, Settlement Strategies for Federal District Judges, (Federal Judicial Center, 1986). Contact Jack Silver, Clerk, Northern District of Oklahoma (FTS-745-7183) about the adjunct settlement judge training program.

Additional References: Steven Flanders, Case Management and Court Management in United States District Courts, (Federal Judicial Center, 1977); Robert F. Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 Cal. L. Rev. 770 (1981).

IV. CIVIL TRIALS AND SCHEDULING

An effective calendaring system requires setting early, firm trial dates. See Section 473(a)(2)(B) of the Civil Justice Reform Act of 1990.

1. *The court could schedule multiple civil cases for trial.*

   [If the judges set trial dates at the scheduling conference, they could schedule 10 to 15 cases for trial in one week. Many of these cases are likely to settle in advance of trial. If a case does not settle, the court has the opportunity to discuss and refine the trial date further with counsel at the final pretrial conference. Any further rescheduling should be kept to a minimum.]

2. *The court could keep trial dates firm for as long as possible before continuing them.*

   [With a strict continuance policy, the judges will have a better idea of exactly what their trial schedules will be like when they consider a motion for continuance.]

3. *The court could establish a trailing calendar system in which routine civil cases are typically set for trial during a certain term or period of time.*

[A trailing calendar system gives all parties an idea of how they stand on the docket. Some examples include Monday morning setting of all cases with attorneys on notice and a trial-ready calendar for the same or next day.]

4. *The court could employ an "accelerated calendar" system for routine civil cases in order to put its calendar on a more current basis and use the accelerated calendar system on a periodic basis as necessary to keep the calendar current.*

[The court has used a similar system in the past. The Western District of Missouri uses the "accelerated calendar" system twice a year to try all ready-for trial civil cases which take no more than four days to try. Under this system, cases are put on a master list and pooled for trial during a short period. The accelerated calendar system is successful in clearing a court's calendar because it (1) concentrates all of a court's judicial resources toward reducing the district's backlog of cases; and (2) generates a high rate of settlements because trial dates are definite and no continuances are allowed except under extraordinary circumstances.]

Reference: Contact Robert Connor, Clerk, Western District of Missouri (FTS-867-2811) for information about the court's "accelerated calendar" system.

5. *A policy of requiring counsel to premark exhibits could be stressed by the court, made part of the pretrial order, and formalized as a local rule.*

Reference: Contact Joseph Skupniewitz, Clerk, Western District of Wisconsin (FTS-364-5156) for sample exhibit list forms prepared by counsel in advance of trial.

6. *When possible, the court could bifurcate issues presented for trial.*

[For example, in some cases the issue of liability could be tried prior to the issue of damages. If no liability is found, then the issue of damages does not need to be addressed at trial. Alternatively, if liability is found, then the probability of settlement increases.]

7. *Stipulations of uncontested fact could be read into the record in lieu of live testimony.*

[The above three recommendations will assist the court to shorten the length of the trial.]

V. MAGISTRATE JUDGES

1. *The court could consider adopting a local rule that specifically delineates how a case and how a motion would be referred to a magistrate judge after assignment.*

   [The local rules for many courts specify the manner in which cases are assigned to district judges and magistrate judges upon filing. The court could randomly assign a magistrate judge to every civil and felony case at the same time the district judge is assigned. The draw could be weighted so that the new magistrate judge in Jackson would receive more of the cases filed in that division. Any motion referred in civil or felony cases would then go to the assigned magistrate judge. For dispositive motions, a copy of the docket sheet could be attached to the case file, with the matter ripe for review being highlighted.]

2. *The court could establish an order of reference or local rule for all discovery-related non-dispositive motions and for all social security cases to be referred to the magistrate judge assigned to the case at filing.*

   [Currently, one judge has a blanket standing order referring all of his civil discovery motions to magistrate judges, while other judges refer matters on a case-by-case basis. Many districts use some type of automatic reference of civil work to magistrate judges. For example, in the Eastern District of North Carolina, civil cases are randomly assigned to both a district judge and a magistrate judge at the time of filing. The assigned magistrate judge is then responsible for all discovery-related motions in most case categories and generally handles pretrial management.]

   References: Contact J. Rich Leonard, Clerk, Eastern District of North Carolina (FTS-672-4370) and Loretta Whyte, Clerk, Eastern District of Louisiana (FTS-682-2946) for information about automatic assignment and referral of matters to magistrate judges.

3. *The court could develop an order of reference form for use by the district judges in matters that are not automatically referred to magistrate judges.*

[Appropriate categories would be marked to describe the nature of the reference and the purpose for which the file is being assigned to the magistrate judge. Attached as Exhibit Three is a sample referral order form used in the Eastern District of North Carolina.]

4. *The court could encourage counsel to consent to proceed to trial before a magistrate judge. See 28 U.S.C. § 636(c)(2).*

[Recently, 28 U.S.C. § 636(c) was amended to allow district court judges or magistrate judges to remind parties of the availability of a magistrate judge to conduct all matters in a civil case, including the entry of judgment, upon consent of the parties. This subsection continues to require the clerk of court to notify the parties at the time of filing of the availability of a magistrate judge to exercise such jurisdiction. The local bar could be educated that the district judges support the use of civil consent jurisdiction for magistrate judges. Willingness of the parties to consent may flow from a more active role of the magistrate judges in civil pretrial management.]

5. *Magistrate judges could conduct discovery conferences, settlement conferences and status conferences.*

[This suggestion is consistent with the Report of the Senate Judiciary Committee accompanying the CJRA which contained the following observation: "[G]iven the increasingly heavy demands of the civil and criminal dockets and the increasingly high quality of the magistrates themselves, the committee believes that magistrates can and should play an important role, particularly in the pretrial and case management process." S. Rep. No. 416, 101st Cong., 2d Sess. 20 (1990).]

6. *The court could adopt a duty magistrate rotation system for criminal cases.*

[For example, for one month a magistrate judge could hold all felony preliminary proceedings arising during that time (i.e., warrants, initial appearances, detention hearings, preliminary examinations and arraignments). The new magistrate judge in Jackson could share in the proceedings at Memphis but handle all felony preliminary proceedings

arisi[illegible] at Jackson. Misdemeanor and petty offense cases could also be han[illegible]d by the duty magistrate judge.]

VI. PRO SE CASES

A. Role of Pro Se Law Clerk

Although the district has had a pro se law clerk position for several years, the current pro se law clerk had entered on duty shortly before the review and had begun to reorganize the procedures for handling pro se matters. The pro se law clerk was responsible for the initial screening of all pro se cases and handling requests for forms. Dispositive motions were referred by the district judges to the pro se law clerk on a limited basis.

1. *An administrative order could be issued by the pro se law clerk stating any deficiencies in the petitioner's case and instructing the petitioner to supplement the petition. The clerk's office could handle requests for forms.*

   Reference: Contact Robert Shemwell, Clerk, Western District of Louisiana (FTS-493-5273) for assistance and a sample order.

2. *All pro se cases could be screened by the pro se law clerk to determine if filing procedures have been followed and whether dismissal is appropriate based on frivolity. The pro se law clerk could prepare procedural orders and the order or recommendation for dismissal pursuant to 28 U.S.C. § 1915(d).*

   References: Contact Robert Shemwell, Clerk, Western District of Louisiana (FTS-493-5273) and J. Rich Leonard, Clerk, Eastern District of North Carolina (FTS-672-4370) for information about utilization of the pro se law clerk position.

B. Case Processing

3. *All Section 1983 and state habeas corpus cases could be referred to a magistrate judge for full case supervision.*

   [Magistrate judges supervise prisoner litigation in many courts. Dispositive motions could be referred to the magistrate judge who would then determine whether they should be referred to the pro se law clerk.]

4. *Dispositive motions could be referred automatically to the assigned magistrate judge. The pro se law clerk could prepare draft opinions as needed.*

[Dispositive motions for the most part are referred on a case-by-case basis. As the pro se law clerk becomes more experienced with pro se cases, particularly prisoner cases, more dispositive motions could be referred to him.]

Reference: Federal Judicial Center's Prisoner Civil Rights Committee, Recommended Procedures for Handling Civil Rights Cases in the Federal Courts, (Federal Judicial Center, 1980)

5. *If a witness cannot be available for trial, the testimony could be obtained by affidavit or deposition.*

[One of the magistrate judges has continued prisoner evidentiary hearings because witness fees were not available for witnesses to testify at the hearings. Unavailability of a witness should not be a good cause to continue the trial.]

VII. CRIMINAL CASE MANAGEMENT

1. *The magistrate judge could set the report date and trial date at the arraignment. The order of arraignment issued by the magistrate judge should be revised to reflect these dates.*

[Presently, the criminal docket clerks set both the report date, which is the final pretrial conference, and trial date at some point after the arraignment. A more realistic date can be set if the magistrate judges consult with the parties at arraignment. Prior to the arraignment, the magistrate judge's courtroom deputy could coordinate with the judge's courtroom deputy regarding the judge's trial calendar. At the report date, the judges can refine the actual trial date, if required.]

2. *The sentencing date could be scheduled at the time of a change of plea or when a guilty verdict is returned.*

[Proposed Local Rule 20(d) states that the sentencing will be scheduled when the court receives the presentence report and position papers. There have been some delays caused by this procedure.]

3. *The U.S. Attorney should discontinue approving criminal judgments prior to the judge's signature. If the court wants the judgments reviewed, then the Probation Office could perform this task.*

[This practice is causing undue delays in the processing of judgments. In most other courts, criminal judgments are not reviewed by anyone other than the courtroom deputy and the judge.]

VIII. CASE ASSIGNMENT

A. Pro Se Cases

1. *The court could consider assigning multiple filings by a prisoner to the same judge and/or magistrate judge.*

[Currently, all prisoner cases are assigned on a random basis.]

B. Divisional Representation

2. *The court could consider including Judge Todd in the draw for assignment of cases in the Western Division.*

[According to the district's case assignment procedures, Judge Todd is assigned cases arising only from the Eastern Division. Presently, his criminal caseload averages one-half that of the other judges and he has approximately 100 fewer pending civil cases than most of the other judges. One way to balance the caseload among all of the judges would be to give Judge Todd a percentage of the cases assigned in the Western Division. Alternatively, the court could change its assignment system to divert some cases from the Western Division to the Eastern Division. Attached as Exhibit Four is correspondence from the General Counsel to the Clerk of Court for the Western District of New York regarding transfer of cases.]

C. **Reassignment System**

3. *The court could adopt procedures and include in the case assignment plan or system which provide for calendar relief to judicial officers in instances of prolonged illness, protracted trials, unavoidable absence, disability, or other similar circumstances.*

IX. PERSONNEL MANAGEMENT

The case management functions are fragmented among the judges, magistrate judges, secretaries, courtroom deputies, docket clerks, and law clerks. All are involved to different degrees with scheduling and monitoring cases. The courtroom deputies perform primarily in-court functions for the judges in addition to having certain case scheduling responsibilities. The courtroom deputies to the district judges are classified at a grade JSP-11. For the courtroom deputies to be classified at this grade level, however, they should be performing the full range of case management and calendaring functions. See Exhibit Five for a list of the duties and responsibilities from the position descriptions of the Judiciary Salary Plan for courtroom deputies with full calendar management responsibilities to district judges and magistrate judges.

Effective case management can be achieved by focusing these functions on a single person, the courtroom deputy. Judges, secretaries, and law clerks have other responsibilities which require their attention.

In most courts, the courtroom deputy has complete calendar responsibility. The courtroom deputy is involved with the various aspects of case and motions management and represents the clerk of court in matters relating to the management of the various procedural stages cases must go through from filing to disposition. The courtroom deputy also advises counsel and the public about and assures compliance with court policies and local and Federal rules.

In order to implement this method of operation in the court, an overhaul of the present case flow system would be necessary. The following are recommendations and suggestions directed to this purpose.

A. Personnel Utilization

1. *The judges should relieve their secretaries and law clerks of the administrative calendar management responsibilities in order to concentrate on their other duties.*

2. *The judges, in conjunction with the clerk of court, should utilize the courtroom deputy positions to exercise the full range of calendar management and scheduling responsibilities.*

   [The full utilization of the courtroom deputies would not only relieve the judges, secretaries and law clerks from administrative responsibilities, but it would also enable the court to institute a highly effective level of calendar management through centralization of the functions in one individual, as well as to institute a court-wide case monitoring system in the clerk's office.]

   References: Contact Leonard Brosnan, Clerk, Central District of California (FTS-798-3535) and Loretta Whyte, Clerk, Eastern District of Louisiana (FTS-682-2946) for assistance in developing case monitoring systems for courtroom deputies.

3. *Whenever possible, the courtroom deputy could bring additional work into the courtroom while court is in session.*

4. *The judges could release the courtroom deputies from the courtroom during lengthy testimony, closing arguments and charging the jury.*

   [The judges have the discretion to decide in what types of cases or portions of trials and to what extent this practice would be permissible. The court could contact GSA to have buzzers installed at the bench to summon courtroom deputies to the courtrooms when necessary, or have speakers installed in the clerk's office so that the courtroom deputy can hear what is going on in the courtroom.]

5. *The clerk's office should review all active dockets periodically to make sure cases are kept current.*

6. *The courtroom deputy could prepare all judgments in civil and criminal cases.*

[Currently, the criminal docket clerks prepare the judgment and commitment orders. The civil docket clerks prepare the civil judgments in pro se cases.]

B. Training

7. *The clerk of court should develop a training program and procedures manual for courtroom deputies and docket clerks.*

   References: Contact Nancy Doherty, Clerk, Northern District of Texas (FTS-729-0787) for information about developing training programs. Contact Stuart O'Hare, Clerk, Southern District of Illinois (FTS 277-9371) for information on developing a manual for magistrate judge courtroom deputies.]

8. *The cross training of deputy clerks should be undertaken by the clerk's office to ensure adequate backup for courtroom deputies.*

9. *The clerk of court could direct the development and implementation of a structured training program for courtroom deputies to be facilitated by the training coordinator. In this connection, the court could utilize training materials including books and videotapes which are available through the Federal Judicial Center.*

   Reference: Contact Marilyn Vernon at the Federal Judicial Center (FTS-633-6316) for information on the role and responsibilities of the training coordinator position.

10. *The chief deputy clerk could travel to other districts to observe and be trained on case monitoring and processing systems.*

11. *The clerk of court could utilize personnel from other districts to train its employees.*

    [The clerk could consider bringing in senior personnel from another court that has set up a uniform case monitoring and tracking system in preparation for installation of ICMS.]

    Reference: Contact Stanley Sargol, Regional Administrator, Court Administration Division (FTS-633-6236) regarding funding for sending the

chief deputy clerk to other courts or bringing in personnel from other districts for training purposes.]

X. MISCELLANEOUS AREAS

A. Space and Facilities

1. *The court should continue efforts to address the courtroom and office space problem as a high priority matter.*

   [Lack of adequate courtroom and office space is a major problem in Memphis. One of the magistrate judges' offices is located in the tax court office. The courtroom is not designed to hold civil jury trials. When tax court is held, the magistrate judge uses the law library to conduct court business. The court recently received approval from GSA to build a new magistrate judge's courtroom, but funding has not been approved.]

2. *The judges could conduct pretrial and status conferences in chambers so that the courtrooms could be available for use by the magistrate judges and senior judge.*

3. *The clerk's office could coordinate the judges' and magistrate judges' calendars to determine courtroom availability.*

   [For example, if a judge schedules proceedings to begin in the afternoon, the courtroom could be used by other judicial officers during the morning. Utilization of magistrate judges for civil consent jurisdiction and other duties depends in part upon courtroom availability.]

B. Judges' Meetings

4. *The court could consider having the clerk of court attend and make presentations, when appropriate, at the judges' meetings on issues affecting clerk's office operations.*

C. Docketing

5. *Only essential information should be included in the minute entries on docket sheets.*

[From a review of the docket sheets, courtroom minutes in many instances are typed verbatim on the docket sheets. If the courtroom minutes are lengthy, a brief summary could be entered on the docket. The docket entry will serve as an index to the minutes in the file.]

6. *The docket sheet should remain in the docket tray at all times. If it is necessary for the docket to be removed, a copy could be made or an outcard could be provided in its place.*

[The media and attorneys are allowed to review dockets at the docket clerks' desks and at the intake counter. This practice should be prohibited. To reduce the risk of alteration, destruction, or loss of dockets, the clerk of court could adopt a policy to provide individuals with a copy of the docket. If a docket sheet is removed from the tray, an outcard could be used to indicate the date and by whom a docket sheet is taken, if for more than a very short period of time.]

7. *The index log could be eliminated.*

[The index log of party names duplicates information on the index cards.]

8. *The clerk of court could take steps to develop uniform docketing procedures.*

[Uniformity will facilitate the implementation and use of ICMS CIVIL.]

D. Case Files and Filing of Pleadings

9. *The filing of all pleadings in duplicate could be eliminated.*

[Currently, all pleadings and other papers are required to be filed in duplicate. The duplicate filing of all papers is counterproductive to effective case management. This procedure causes extra work for the clerk's office to process the papers and for the judge to review the papers and creates an unnecessary paper trail. If the judge or magistrate judge needs to review the pleadings in the case, the case folder containing the original pleadings can be forwarded to chambers. At a minimum, this practice could be discontinued at Jackson. After evaluating the experience with a single file system at Jackson, the court could consider adopting a single file system at Memphis. Alternatively, the court might consider requiring duplicate filing of only certain pleadings, such as motions and responses.]

E. Minutes

10. *Only essential information should be included in the courtroom minutes.*

[Minutes sheets should be used to record only the very basic information about what occurred in court (e.g., date of proceeding, what was ordered, and any action needed to be taken by the parties). Many courts have devised local minute sheet forms that make extensive use of short notations and abbreviations.]

Reference: Contact Joseph Skupniewitz, Clerk, Western District of Wisconsin (FTS-364-5156) for sample minute sheet forms.]

F. Reports

11. *The clerk of court could devise a system to generate status reports for the judges and magistrate judges regarding their respective caseloads.*

[For example, the clerk of court could utilize the Administrative Office monthly report of pending civil cases and include information on the status of all two-year-old cases. ICMS CIVIL can provide a similar report.]

G. Automation

12. *The clerk of court could provide courtroom deputies with personal computers to issue standard procedural orders, track and monitor case proceedings, and maintain case status reports.*

XI. ACTION PLAN

In order to implement the recommendations and suggestions for improvements outlined above, the court should develop a structured action plan including a timetable and priorities. This plan should be completed before implementing any realignment of duties and responsibilities of the staff or major changes in procedures.

Since many of the changes in procedures will affect several sections and/or individuals, no realignment of duties of staff should occur until the major changes in

procedures are implemented. An adequate period of training also should be provided.

For example, the recommendations and suggestions for changes in the case management practices of the court should be implemented before the recommendations and suggestions to realign the duties and responsibilities of the judges' staff, courtroom deputies and docket clerks. Any suggested changes in case management practices might be coordinated with the CJRA advisory group. The clerk of court and the chief deputy clerk also need to determine short and long range goals and establish due dates for the changes within the clerk's office to be accomplished. The clerk could memorialize all actions in writing and file written reports with the chief judge on a regular basis. In this way, progress can be monitored and follow-up assistance provided.

EXHIBIT ONE

SUMMARY OF TRIAL HOURS AND OTHER COURT ACTIVITY PER JUDGE

Month	Horton	Gibbons	Turner	McRae	Month	Todd
Apr 90	61	60	63	79.5	Oct 89	28
May 90	27.5	74.5	51	70.5	Nov 89	24.5
Jun 90	42	36.5	29.5	23.5	Dec 89	49
Jul 90	35.5	22.5	80	32.5	Jan 90	15
Aug 90	19.5	39.5	66.5	18.5	Feb 90	44.5
Sep 90	-	38	67	50.5	Mar 90	27.5
Oct 90	65.5	46	35	40	Apr 90	48.5
Nov 90	21.5	36	37	36	May 90	19.5
Dec 90	41	34	26.5	30.5	Jun 90	54.5
Jan 91	49	41	36	24	Jul 90	12.5
Feb 91	33	50	53.5	7	Aug 90	19.5
Mar 91	32.5	69	46.5	114	Sep 90	45
TOTAL	428	547	591.5	526.5		388

NOTE: This report was compiled by reviewing each judge's Monthly Report of Trials and Other Court Activity (JS-10) provided to the Court Administration Division by the Clerk's Office.

EXHIBIT TWO

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

JOHN DOE, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 91-1234
ABC CORPORATION, Defendant.	)	

SETTLEMENT ORDER OF DISMISSAL

_____ (Judge)

The Court having been advised that the above-entitled action has been settled; IT IS ORDERED that this action is hereby DISMISSED without costs and without prejudice to the right of any party upon good cause shown within 30 days,* to reopen the action if settlement is not consummated.

BY THE COURT,

_____
Deputy Clerk

DATE: June 1, 1991

*Thirty days is customary, but the time stated can vary and can be specified by counsel.

EXHIBIT THREE

REQUEST FOR INSTRUCTIONS OF HANDLING CIVIL MOTIONS

DATE: _____

TO: Judge _____

FROM: _____, Deputy Clerk

RE: Case Number: _____

_____ vs. _____

PLAINTIFF'S / DEFENDANT'S Motion _____

_____

in this action assigned to you was filed on _____. A copy of the motion is attached. Please return this form to the Clerk's Office indicating which of the procedures you desire to follow in its disposition:

_____ Calendar this before the Judge for oral argument _____

_____ Refer this motion to a Magistrate Judge for his recommendation.

_____ Motion will be decided by the Judge without oral argument.

_____

JUDGE OR LAW CLERK

Anticipated Trial Date: _____

EXHIBIT FOUR

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM R. BURCHILL, JR.
GENERAL COUNSEL

October 22, 1990

Mr. Michael J. Kaplan
Clerk, United States District Court
304 U. S. Courthouse
68 Court Street
Buffalo, New York 14202

Dear Mike:

Bill Burchill has asked me to respond to your recent letter asking if it would be lawful for your court to change its assignment system to divert some cases from Rochester to Buffalo, where a new judge will soon be sworn in. I apologize for the delay in responding, but the issues turned out to be more complicated than I expected. My conclusions, as discussed below, are that a change in your court's case assignment system would in no way violate the law regarding jury selection. As to venue, your court has broad latitude in fixing the place of trial of criminal cases, although it appears--somewhat surprisingly--that the court has less discretion to reassign civil cases without the consent of the parties.

Turning first to jury selection issues, I enclose my recent letter to Chief Judge Real in Los Angeles, analyzing the extent of a district court's discretion to utilize administratively-established divisions for jury selection purposes. As you can see, it is well established that there is no constitutional or other legal right to a jury drawn from an entire district, and that courts may permissibly select both grand and petit juries from only a portion of their districts. The Jury Selection and Service Act does require that all residents of a district have at least some opportunity for jury service, and one Federal case has held that division-based jury selection may not be concentrated so as to wholly exclude or significantly underrepresent cognizable groups from particular types of proceedings, such as grand jury sessions. Assuming your court conforms to these basic requirements, however, I foresee no jury selection problems in your new case-assignment system.

Turning next to considerations of venue, I enclose my 1983 correspondence with Chief Judge Weinstein of the Eastern District of New York, reviewing both the jury selection and venue implications of inter-division assignment of criminal cases within a

single district. The decisions cited therein establish that district courts have substantial flexibility in assigning criminal cases to either statutory or administrative divisions--and in selecting juries solely from those divisions--for the purpose of enhancing the court's administrative convenience. Cases since 1983 remain in accord. For example, United States v. Rosier, 623 F. Supp. 98 (W.D. Mo. 1985), determined that the place-of-trial factors listed in F. R. Cr. P. 18 are not exclusive, and that other considerations--including unpredictable weather in portions of a district--may properly influence the choice of division in which to hold a trial. To similar effect are United States v. Ezeodo, 748 F.2d 97 (2d Cir. 1984), cert. denied, 469 U.S. 1225 (1985); United States v. Truglio, 731 F.2d 1123 (4th Cir. 1983), cert. denied, 469 U.S. 862 (1984); In re Chesson, 897 F.2d 156 (5th Cir. 1990); United States v. Kaufman, 858 F.2d 994 (5th Cir. 1988); and United States v. Pepe, 747 F.2d 632 (11th Cir. 1984). It thus remains the law that parties in criminal cases have no entitlement to trials conducted in the part of the district where the case arose.

As noted in my letter, however, there are two caveats to this general principle: that the court's administrative convenience must yield, in cases of actual conflict, to the convenience of the defendant and his witnesses; and that the selection of the situs of trial must not be "abused" so as to appear to create a tribunal that is favorably inclined to the prosecution. Assuming these types of problems would not arise in your district (and you seem to be sensitive to them), I am confident that your court may adjust its assignment system to funnel more criminal cases toward the new judge in Buffalo, and select juries from the Buffalo division, even if the underlying cases arose elsewhere within the district.

Intuitively one would imagine that the same latitude exists as to civil cases, but such does not appear to be entirely the case. I could find no provision of the civil rules giving courts the same broad discretion to fix the place of civil trials as is set out in Criminal Rule 18. Rather, section 1404(a) of title 28, United States Code, authorizes the inter-district or inter-divisional transfer of civil cases as follows:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Note that there are several components to the statute. First, a transfer may only be made to a place "where [the action] might have been brought." While this provision must be adhered to, I suspect that the abolition of divisional venue requirements in

civil cases[1] will eliminate most problems arising from the simple transfer of cases between divisions of the same district. Second, the statute does not specifically authorize a court to initiate a transfer sua sponte. Nonetheless, a number of case decisions have suggested that such authority may fairly be read into the statute and that transfers may be ordered even over the objection of one of the parties. See generally Moore's Federal Practice, Vol 1-A, Part 2, ¶ 0.345[3.-2]. It has also been held, however, that the parties should be provided notice and opportunity to be heard before the court acts on its own. See Mobil Corp. v. S.E.C., 550 F. Supp. 67 (S.D. N.Y. 1982), and cases cited therein.[2] The statute's final--and most significant--requirement is that a transfer may be made only "for the convenience of parties and witnesses, in the interest of justice."

The Supreme Court has made clear that, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum [in a civil case] should rarely be disturbed." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). While section 1404(a) was intended to liberalize the earlier--and rather restrictive--doctrine of *forum non conveniens*, Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955), Mobil Corp. v. S.E.C., supra, at 70, some deference to a plaintiff's choice of forum remains due. In this regard, there is authority indicating that the administrative convenience of the court is insufficient, without more, to constitute "the interest of justice" supporting a transfer. In In re Scott, 709 F.2d 717 (D.C. Cir. 1983), the District Court for the District of Columbia sua sponte ordered the transfer of a Freedom of Information Act case to the Northern District of Georgia, where the desired records apparently were stored. The trial court justified its action on the basis that it had a large number of cases pending in forma pauperis that were burdening the court, and that there were other districts in which venue properly lay. Although not questioning the accuracy of those facts, the appeals court found the rationale legally unacceptable.

> The law is well established that a federal court may not order transfer under section 1404(a) merely to serve its personal convenience. We think it is clear in this light that a court may not utilize section 1404(a) as a handy device readily available to avoid

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[1]See Pub. L. No. 100-702, Title X, § 1001(a), 102 Stat. 4664 (1988), repealing 28 U.S.C. § 1393.

[2]I note in this regard that section 1404(b) of title 28 specifically authorizes inter-divisional transfers (in the discretion of the court) where all parties consent or stipulate. In light of limitations on the court's authority to order the transfer of cases solely for its own convenience, securing such consent may be the simplest way for your court to facilitate its desires to transfer civil cases between Rochester and Buffalo.

> the express congressional determination to place venue for FOIA suits in the District of Columbia. *A transferor court should act in response to considerations, apart from the court's own convenience, for rejecting a plaintiff's forum choice. Inconvenience to the court is a relevant factor but, standing alone, it should not carry the day.*

709 F.2d at 721 (emphasis added). Accord, In re Chatman-Bay, 718 F.2d 484 (D.C. Cir. 1983). For illustrative decisions in which the facts have been found to justify a transfer, see Pfizer, Inc. v. Lord, 447 F.2d 122 (2d Cir. 1971), and Washington Public Utilities Group v. United States District Court for the Western District of Washington, 843 F.2d 319, 326-327 (9th Cir. 1987).

Scott, like almost all of the other cases I found arising under section 1404(a), was concerned with an inter-district, rather than an inter-divisional transfer.[3] It thus may be distinguishable on the basis that a transfer within the boundaries of a district, especially the relatively short distance between Rochester and Buffalo, will entail less long-distance travel and other hardship than does a transfer between districts. Further, an inter-divisional transfer does not raise the specter of "dumping" an undesirable case to another court. Nonetheless, to my reading the literal language of section 1404(a) counsels hesitation in unilaterally ordering the transfer of civil actions. At a minimum, it would seem highly advisable that proposed transfers be preceded by giving the parties notice and an opportunity to comment, and that the court carefully weigh and make clear findings regarding the convenience of the parties and witnesses and the interest of justice. And, as with criminal cases, it would appear that a transfer should not be ordered when the parties or their witnesses demonstrate a specific inconvenience or hardship that would result therefrom.

In light of all the above, I do not believe it would be proper for your court to simply order in advance that a set number of civil cases filed in Rochester be transferred to Buffalo. Rather, I would recommend that the court consider each proposed transfer of a civil action on a case-by-case basis in accordance with the criteria of section 1404(a). Obviously this process will entail some extra effort, which suggests to me that perhaps the easiest way to achieve your overall management

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[3]The cases regarding inter-divisional transfers typically arose before 1988, and focused only on whether the case "might have been brought" in the proposed transferee division under the former divisional venue provisions of 28 U.S.C. § 1393. See, e.g., 15 Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3809. Although it is possible that I missed a relevant case among the hundreds discussing venue generally, I could not find much beyond the Scott case which discussed the extent to which convenience to the court may justify a transfer.

objectives (at least in civil cases) is by seeking consent. As indicated in footnote 2, section 1404(b) of title 28 explicitly authorizes consensual transfers of civil cases, so that there would seem to be no reason not to at least try to secure the consent of the parties to reassignments to Buffalo. Even if only a few parties so agree, perhaps that will be sufficient to balance the caseload among the two court locations.

I hope you find this response helpful; please feel free to contact me directly if you have any further questions or if you need any additional information.

Sincerely,

Robert K. Loesche
Deputy General Counsel

Enclosures

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

WILLIAM M. NICHOLS
GENERAL COUNSEL

September 23, 1983

Honorable Jack B. Weinstein
Chief Judge, United States District Court
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Weinstein:

Bill Eldridge of the Federal Judicial Center has referred to us your inquiry regarding the transfer of criminal jury trials from Brooklyn or Queens to Suffolk or Nassau counties. He explained that your court maintains two jury wheels; one covering the entire district and one covering only Suffolk and Nassau counties. Juries in Brooklyn and Queens are drawn from the former wheel, while juries in the eastern counties are drawn only from the latter wheel. As I understand the situation, the majority of criminal cases arise in Brooklyn, but to balance the caseload among the district's judges, you desire to assign some of these cases for trial in the outlying counties. The question, then, is whether the trial of offenses originating in Brooklyn or Queens may legally be conducted in Suffolk or Nassau counties before juries drawn exclusively from those localities. For the reasons set forth below, we feel that this practice is permissible, but only insofar as no significant inconvenience is caused to a defendant.

I

Since its amendment in 1966, F.R.Cr.P. 18 requires only that the place of holding trial be fixed within the district involved, giving "due regard to the convenience of the defendant and the witnesses and the prompt administration of justice." There is no longer a requirement that trial be held in the division where the offense occurred. Rule 18 thus mirrors the venue requirement set forth in the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ."

Cases have consistently concluded that a division, be it formal (i.e., statutory) or informal, does not constitute a unit of venue in criminal cases, nor does a division have any constitutional significance. United States v. Alvarado, 647 F.2d 537 (5th Cir. 1981); United States v. Lewis, 504 F.2d 92 (6th Cir. 1974), cert. denied, 421 U.S. 975 (1975); United States v. James, 528 F.2d 999 (5th Cir.), cert. denied, 429 U.S. 959 (1976). District courts enjoy wide discretion in determining where within the district a criminal trial will be held. United States v. Seest, 631 F.2d 107 (8th Cir. 1980); United States v. Lewis, supra. In the absence of objection by the defendant, courts may for their own administrative convenience schedule all criminal trials in one division or place of holding court. United States v. Burns, 662 F.2d 1378 (11th Cir. 1981).

Courts have equally broad latitude in defining the geographic area from which juries will be selected. There is no constitutional right to have a jury from an entire district. United States v. Herbert, 698 F.2d 981 (9th Cir. 1983); United States v. Young, 618 F.2d 1281 (8th Cir. 1980); United States v. Florence, 456 F.2d 46 (4th Cir. 1972); Ruthenberg v. United States, 245 U.S. 480 (1918). Juries may be selected exclusively from certain geographic areas, such as the division or counties located nearest the courthouse. Zicarelli v. Dietz, 633 F.2d 312 (3rd Cir. 1980), cert. denied 449 U.S. 1083 (1981); United States v. Young, supra; Zicarelli v. Gray, 543 F.2d 466 (3rd Cir. 1976); United States v. Edwards, 465 F.2d 943 (9th Cir. 1972).[1/]

Obviously, such selection may not be used to systemically exclude "distinctive groups" in the community. Taylor v. Louisiana, 419 U.S. 522, 538 (1975). But as long as the selection procedures are executed in a neutral and random manner, the fact that citizens from certain cities and towns are not represented on juries will not alone invalidate the procedure: "[I]t can hardly be asserted that the registered voters in a given city or town are sufficiently 'distinct' to constitute a cognizable group." United States v. Foxworth, 599 F.2d 1, 4 (1st Cir. 1979). Nor is the Jury Selection Act violated if certain counties are unrepresented:

[1/] Contrariwise, even though trials may be scheduled in only one division, juries may be drawn on a district-wide basis. United States v. Lewis, supra. Nor is a court required to concentrate its jury selection within the particular division, county or city where the trial will take place or where the defendant resides. Savage v. United States, 547 F.2d 212 (3rd Cir. 1976), cert. denied 430 U.S. 958 (1977).

> [W]e are not aware that residents of counties can be said to hold views and attitudes which are in any way 'distinct' from those of their neighbors in nearby counties. . . . While common experience tells us that people's attitudes differ to some degree along lines of age, sex and extent of education, we are not aware that they differ along county lines.

United States v. Butera, 420 F.2d 564, 572 (1st Cir. 1970).

Under these principles, "transfer of a particular case from one place within the district to another place within the district is a matter for the local district judges to decide, and the assent of the defendant to such a transfer is not required." United States v. Lewis, supra, at 98. This means, in my view, that your court is fully authorized to transfer a select number of criminal cases for trial in Suffolk or Nassau counties before juries drawn exclusively from those counties.

II

Cases have recognized, however, that one and possibly two limitations must be placed on this discretion.

A

First, a court's administrative convenience must yield, in cases of conflict, to the convenience of the defendant and his witnesses. That is, while the defendant need not be consulted as to the situs of the trial, the court must defer if he establishes that the transfer would work a hardship on his witnesses or interfere with the presentation of his defense. United States v. Burns, supra. This is an outgrowth of both the literal language of Rule 18 as well as "the public policy of this Country that one must not arbitrarily be sent, without his consent, into a strange locality to defend himself against the powerful prosecutorial resources of the Government." Id. at 1382, quoting Dupoint v. United States, 398 F.2d 39, 44 (5th Cir. 1967). Thus, in Burns, where the trial was automatically scheduled for Birmingham, Alabama--which was 100 miles from the place of the offense and from the residence of 22 of the defendant's 24 witnesses--the defendant's request for a change in venue should have been granted.

Burns did recognize that the interests of a court could prevail over those of a defendant if a violation of speedy trial requirements would otherwise result. This principle stems from Rule 18's mandate that, when selecting venue, a

court consider both the convenience of the defendant and the "prompt administration of justice." The decision also made clear, however, that more than a mere incantation of the words "speedy trial" is required to overcome a defendant's legitimate interest in a local trial. If speedy trial considerations are to outweigh the inconvenience to the defendant and his witnesses, such considerations must be articulated by the court in detailed findings of fact. 662 F.2d at 1383. See also United States v. Brown, 535 F.2d 424 (8th Cir. 1976).

Although Burns implied that speedy trial grounds were the only administrative interests which could be asserted over a defendant's objections, other concerns may be asserted as well. A court's administrative convenience has been honored, for example, where all other places of holding court were dismantled, United States v. Raineri, 670 F.2d 702 (7th Cir. 1982), or where a transfer was necessary to avoid extensive pretrial publicity in the area where the crime occurred, United States v. Alvarado, supra, United States v. Mase, 556 F.2d 671 (2d. Cir. 1977).

What Burns teaches, I conclude, is that your court may try Brooklyn-based cases in Suffolk or Nassau counties for reasons of its own administrative convenience. However, if a defendant establishes that such an assignment would interfere with his defense, and if there is no countervailing speedy trial or other consideration, your court will be obligated to return the case to Brooklyn.

B · 480 F.2d 726 (2d Cir. 1973)

The other limitation on your court's discretion was suggested by United States v. Fernandez, supra, a case originating in the Eastern District. In Fernandez, the defendant's conviction for armed robbery was overturned due to the partisan conduct of the trial judge, but the Second Circuit also expressed serious "disfavor" with the fact that the case was heard in Westbury (in Nassau county) rather than in Brooklyn, the court location nearest the scene of the offense. It appears that the case was randomly assigned to Judge Travia, who for his own convenience held the trial in his normal location in Westbury.

The Circuit did affirm that this exercise was constitutional:

> [S]ince the theft of which Fernandez was convicted occurred in Queens, in the Eastern District of New York, trial in Westbury, in Nassau County, a county adjacent to Queens and within the district, rather

> than in Brooklyn, the headquarters of the Eastern District, does not offend the terms of [the] venue requirements [of the Sixth Amendment and Rule 18] . . . . When a district is not separated into divisions, like the Eastern District of New York, trial at any place within the district is allowable under the Sixth Amendment and the first sentence of F.R.Cr.P. 18.

480 F.2d at 730.[2/]

The court nonetheless expressed concern that the grant of extensive leeway to the district court in selecting the situs of trial might "[lead] to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." United States v. Johnson, 323 U.S. 273, 275 (1944). There were two components of this problem.

First, pursuant to a now-repealed provision of the jury selection statute, jurors who lived more than 25 miles from the district headquarters in Brooklyn or 25 miles from the courthouse in Westbury were automatically excluded from service upon their request. Said the court:

> [A]n excuse procedure based on distance, reasonable though this may be from the standpoint of the prospective juror, will have the inevitable effect of tending to concentrate the representation on the venire of those living relatively close to the courthouse. Although this may be without legal consequences when veniremen are selected for a single courthouse within a division or district, [citation omitted], or when court is held in several places and cases are assigned because they rationally belong there, a more difficult problem is presented when the place of trial--and thus the area of likely concentration in the selection of a

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[2/] The court also referred to the problem subsequently addressed in Burns--inconvenience to the defendant. It noted that there was no "sound reason" to conduct the trial 26 miles from the headquarters of the court and the United States Attorney, and nearly that much farther away from the offices of the defendant's counsel. However, the defendant failed to establish any specific prejudice resulting from this arrangement, and so the issue was avoided.

> venire--is moved from its normal site, over objection, apparently for the sole convenience of the judge.

480 F.2d at 734.

Second, the court noted that juries from the outlying area would likely have a different racial composition. "Furthermore, our reading of the gross census figures for the counties involved indicates that the impact of the move to Westbury on the relative incidence of representation of non-white minorities might well have been significant." Id.

As indicated, it was the conduct of the trial judge, rather than venue problems, that led to reversal, but the Second Circuit's "disfavor" with the selection of the place of holding trial was evident. The Second Circuit "suggested" that the questions it raised "receive the immediate attention of the judges of the Eastern District." Id. at 735.

It is unclear to me how serious or substantial these questions really are. What the Second Circuit appeared to be saying was that the transfer of a trial to an outlying venue solely for the trial judge's convenience was somehow unseemly. Other cases are quite consistent, though, in holding that the administrative convenience of a court is a perfectly proper reason for selecting venue, as long as the defendant does not object. This is the only decision which has suggested that such a practice is per se inappropriate. Fernandez also found the transfer problematical because it exposed the defendant to a geographically and perhaps racially different jury. Where the jury for the outlying division is drawn in accordance with the Jury Selection Act, I fail to see the legitimacy of this concern. As the Fernandez decision itself noted, cases have held time and again that a defendant is not entitled to a panel represented by any particular racial, social, or economic group, United States v. Dennis, 183 F.2d 201 (2nd Cir. 1950), affirmed 341 U.S. 494 (1951), nor to exact "proportional representation" in the array, United States v. Flynn, 216 F.2d 354, 388 (2nd Cir. 1904 Harlan, J.) Certainly, as United States v. Johnson made clear, a transfer should not lead to the appearance of a tribunal more oriented toward the prosecution, but not a word in the Fernandez opinion explains why a jury drawn from Nassau and Suffolk counties would be presumed to be so biased. Even if juries from the outlying counties have lower minority representation and are more affluent than those from Brooklyn (although I note that Brooklyn juries do have representatives from Suffolk and Nassau counties), no case I know of has established or even suggested that such juries may be presumed to discriminate against defendants. Indeed, such a

March 27, 1989

Courtroom Deputy (Article III Judge)

Definition

The courtroom deputy to an Article III judge has complete responsibility for the calendar of the Article III active or senior district judge to whom assigned. The courtroom deputy to an Article III judge is highly involved with the various assigned aspects of case and motions management and may or may not be assigned in-courtroom related functions. The courtroom deputy to an Article III judge represents the clerk in matters relating to the management of the various procedural stages cases must go through before a judicial officer from the point a complaint is filed and assigned to the judicial officer until the case is either settled or disposed of through the judicial process.

Occupational Information

A courtroom deputy to an Article III judge performs duties and responsibilities such as the following:

1. Maintains control records of all cases or case related actions assigned to the judicial officer as they are filed. Examines all papers filed in an action assigned to a judicial officer to determine that these conform with the rules of practice and/or policies and procedures of the clerk's office and the individual judicial officer's chambers. Screens motions for readiness for judicial review.

2. Assists in the management and movement of case related matters on a judicial officer's docket from filing to disposition by calendaring and regulating the movement of these case-related matters; fixing (or resetting when necessary) dates and times for conferences, hearings, and trials; and notifying counsel accordingly.

3. Assists the judge in maximizing efficient usage of court time by gauging relative trial and/or hearing times; determining if estimates of trial and hearing time are accurate; and preventing over-scheduling by setting in consultation with the judge specific dates for hearings, pretrial conferences, settlement conferences, and trials; and by scheduling appropriate back-up matters to minimize any unplanned court sessions down time.

4. Establishes and revises recordkeeping methods and procedures, including various tickler systems, to accurately track case-related matters and motions before the assigned judicial officer. Provides up-to-date information on the status of matters before the judicial officer.

5. Assists the judicial officer in the reduction of procedural delays of case-related matters by monitoring the various recordkeeping and tickler systems (either manual or automated) which reflect the status of each pertinent case event (e.g., service, answers, and brief filing dates) for compliance by all parties on all critical deadlines as set by the judicial officer or by Federal or local rules. Assists the judicial officer in enforcing a continuance policy, by reviewing requests for continuances and extensions for time. Grants those requests which the

conclusion would undercut a core philosophy of our jury system: that any properly impaneled jury--regardless of its particular racial, social or economic makeup--may be expected to serve fairly and impartially according to law.

While this decision cannot simply be ignored, I consider it to have limited precedential value. In this regard, I find it significant that no other case has voiced the concerns expressed in Fernandez.

III

In conclusion, I feel that your transfer of cases to Nassau and Suffolk counties is permissible under the law, provided you accommodate any defendants who would demonstrably be inconvenienced thereby. The specter of Fernandez will linger over this procedure, however, and so you should be especially sensitive to any significant differences in the composition of the juries used. If a discernible racial or other disparity arises, you might, out of an abundance of caution, wish to curtail or modify the procedure to redress the imbalance.

I will be happy to discuss this further if you wish.

Sincerely,

Robert K. Loesche
Assistant General Counsel

cc: Mr. William B. Eldridge

16. Assists in the conduct of sessions, conferences, and hearings held in a courtroom setting before a judicial officer.

17. Records proceedings and rulings for minutes of the court and takes, marks, files or stores, and returns exhibits during open sessions before the court.

18. Prepares verdict forms, judgments, and copies, as well as composes minute orders, as required by the judicial officer.

19. Coordinates with other clerk's office staff such as courtroom deputies, docket clerks, etc., to ensure judgments and other actions of the court are entered in the dockets, order books, and other court records.

20. Assists in the preparation of statistical reports related to court sessions.

21. Coordinates with and advises the financial section of the clerk's office of matters affecting that section's records, such as the imposition of fines, orders of restitution, confirmation of sales, conditions of bond, etc.

22. Ensures that the equipment to be used for any scheduled court session is properly set up and operational. Ensures that the judicial officer, counsel and, as appropriate, parties and the jury are properly supplied with pens, pencils, paper, and any other appropriate supplies necessary for the conduct of court sessions. Sets up courtroom for sessions, ensuring proper temperature settings and lighting are maintained.

23. Performs other duties as assigned.

Organizational Relationships

A courtroom deputy to an Article III judge position is typically located in the operations section of a court and reports to the supervisor responsible for that unit.

Qualifications

To qualify for a position of courtroom deputy to an Article III judge, a person must be a high school graduate or equivalent and must have the following experience:

judicial officer has empowered them to review and/or forwards for the judicial officer's review those which the judge must oversee.

6. Confers with attorneys, acting as liaison between the bar, clerk's office, and the judicial officer to whom assigned. Serves as the main source of procedural information to attorneys for the scheduling and/or rescheduling of conferences, hearings, and trials, as well as the procedures of the clerk's office and special procedures of the judicial officer.

7. Assists with compliance to Federal and local rules, as well as special procedures peculiar to the court through reminding attorneys of their procedural responsibilities, resolving procedural problems, and ensuring that all parties have been notified of scheduled hearings, conferences, and trials.

8. Coordinates with various staff members of the clerk's office and judge's office such as jury administrator, speedy trial coordinator, docket clerks, law clerks, and secretaries, to ensure appropriate utilization of resources needed to support court sessions. Coordinates with other staff from the court family or offices and staff of other Governmental agencies (such as U.S. Marshal's Service, U.S. Attorney's Office, court security officers, federal public defenders, and the Federal Probation Service, etc.) concerned with court sessions. Acts as liaison with these various parties for the purposes of coordination and management of the trial and/or hearing calendar, monitoring case events, and to ensure proper courtroom administration.

9. Prepares special reports for the judicial officer on the status of case matters before the judge. Prepares statistical record of cases and special reports for the clerk, Administrative Office, and other interested parties, which provides up-to-date case-related information.

10. Evaluates case and motions management practices and recommends changes as needed. Implements and evaluates techniques for minimizing attorney schedule conflicts.

11. Arranges for the appointment of attorneys when such services are requested by defendants in criminal cases, thereby preventing late attachment of counsel.

12. Serves as relief courtroom deputy to an Article III judge to visiting judicial officers as requested.

13. Confers with the bar and other officials regarding particular cases and case-related matters.

14. Calls the court calendar. Notes appearance of counsel in matters before the court. Informs the judge that all parties are present, and opens court.

15. Swears witnesses and interpreters as well as other parties before the court; and, as appropriate, impanels the jury, administers caths to jurors, and keeps juror attendance records.

dural delays of case-related mattes by monitoring the various record keeping and tickler systems (either manual or automated) which reflect the status of each pertinent case event (e.g. service, answers, and brief filing dates) for compliance by all parties on all critical deadlines as set by the magistrate judge or by Federal and local rules. Assists the magistrate judge in enforcing a continuance policy, by reviewing requests for continuances and extensions for time. Grants those requests which the magistrate judge has empowered them to review and/or forwards for the magistrate judge's review those which the magistrate judge must oversee.

6. Confers with attorneys, acting as liaison between the bar, clerk's office and the magistrate judge to whom assigned. Serves as the main source of procedural information to attorneys for the scheduling and/or rescheduling of conferences, hearings, and trials, as well as the procedures of the magistrate judge.

7. Assists with compliance to Federal and local rules, as well as special procedures peculiar to the court through reminding attorneys of their procedural responsibilities, resolving procedural problems, and ensuring that all parties have been notified of scheduled hearings, conferences, and trials.

8. Coordinates with various staff members of the clerk's office and magistrate judge's office such as jury administrator, speedy trial coordinator, docket clerks, law clerks, and secretaries, to ensure appropriate utilization of resources needed to support court sessions. Coordinates with other staff from the court family of offices and staff of other Governmental agencies (such as U.S. Marshal's Service, U.S. Attorney's Office, Court Security officers, federal public defenders, and Federal Probation Service, etc.) concerned with court sessions. Acts as liaison with these various parties for the purposes of coordination and management of the trial and/or hearing calendar, monitoring case events, and to ensure proper courtroom administration.

9. Prepares special reports for the magistrate judge on the status of case matters before the magistrate judge. Prepares statistical record of cases and special reports for the clerk, Administrative Office, and other interested parties, which provide up-to-date case-related information.

10. Evaluates case and motions management practices and recommends changes as needed. Implements and evaluates techniques for minimizing attorney schedule conflicts.

Courtroom Deputy ("Full Case Management" Magistrate Judge)

Definition

The magistrate judge courtroom deputy clerk has complete responsibility for the calendar of a magistrate judge who requires full case and calendar management services. The magistrate judge courtroom deputy clerk is highly involved with the various assigned aspects of case and motions management and may or may not be assigned in-courtroom related functions. The courtroom clerk represents the clerk in matters relating to the management of various procedural stages cases must go through before the court.

Occupational Information

A magistrate judge courtroom deputy clerk performs duties and responsibilities such as the following:

1. Maintains control records of all cases or case-related actions assigned to the magistrate judge as they are filed. Examines all papers filed in an action assigned to a magistrate judge to determine that these conform with the rules of practice and/or policies and procedures of the clerk's office and the individual magistrate judge's chambers. Screens motions for readiness for judicial review.

2. Assists in the management and movement of case-related matters on a magistrate judge's docket from assignment or referral to disposition or conclusion by calendaring and regulating the movement of these case-related matters; fixing (or resetting when necessary) dates and times for conferences, hearings, and trials; and notifying counsel accordingly.

3. Assists the magistrate judge in maximizing efficient usage of court time by gauging relative trial and/or hearing times; determining if estimates of trial and hearing time are accurate; and preventing over-scheduling by setting in consultation with the magistrate judge specific dates of hearings, pretrial conferences, settlement conferences, and trials; and by scheduling appropriate back-up matters to minimize any unplanned court sessions down time.

4. Establishes and revises record keeping methods and procedures, including various tickler systems, to accurately track case-related matters and motions before the magistrate judge. Provides up-to-date information on the status of matters before the magistrate judge.

5. Assists the magistrate judge in the reduction of proce-

11. Arranges for the appointment of attorneys when such services are requested by defendants in criminal cases, thereby preventing late attachment of counsel.

12. Provides relief services as required.

13. Confers with the bar and other officials regarding particular cases and case-related matters.

14. Calls the court calendar. Notes appearance of counsel in matters before the court. Informs the magistrate judge that all parties are present, and opens court.

15. Swears witnesses and interpreters as well as other parties before the court; and, as appropriate, impanels the jury, administers oaths to jurors, and keeps juror attendance records.

16. Assists in the conduct of sessions, conferences, and hearings held in a courtroom setting before a magistrate judge.

17. Records proceedings and rulings for minutes of the court and takes, marks, files and stores, and returns exhibits during open sessions before the court.

18. Prepares verdict forms, judgments, and copies, as well as composes minute orders, as required by the magistrate judge.

19. Coordinates with other clerk's office staff such as courtroom deputies, docket clerks, etc., to ensure judgments and other actions of the court are entered in the dockets, order books, and other court records.

20. Assists in the preparation of statistical reports related to court sessions.

21. Coordinates with and advises the financial section of the clerk's office of matters affecting that section's records, such as the imposition of fines, orders of restitution, confirmation of sales, conditions of bond, etc.

22. Ensures that the equipment to be used for any scheduled court session is properly set up and operational. Ensures that the magistrate judge, counsel and, as appropriate, parties and the jury are properly supplied with pens, pencils, paper, and any other appropriate supplies necessary for the conduct of court sessions. Sets up courtroom for sessions, ensuring proper temperature settings and lighting are maintained.

23. Performs other duties as assigned.