CIVIL JUSTICE REFORM ACT ADVISORY GROUP
UNITED STATES DISTRICT COURT
219 South Dearborn Street, Room 2052
Chicago, Illinois 60604
(312) 435-5670

Frank J. McGarr, *Chairperson*

Anne Megan Davis, *Reporter*

February 17, 1993

Court Administration Division
Administrative Office of the
United States Courts
Washington, DC 20544

Re: *Preliminary Report* of the Civil Justice Reform Act Advisory Group of the U.S. District Court for the Northern District of Illinois

The Civil Justice Reform Act of 1990 requires every federal district court, in consultation with its appointed advisory group, to develop a plan to reduce delay and expense in civil litigation in its district. Each advisory group must submit a report to the district court, assessing the state of the court's civil and criminal dockets and recommending ways to reduce delay and expense in civil litigation for the particular district.

The Civil Justice Reform Act Advisory Group of the United States District Court for the Northern District of Illinois has completed its *Preliminary Report*, enclosed herewith. The Advisory Group is disseminating the *Preliminary Report* broadly so that all interested parties may have the opportunity to comment before a final Report is tendered to the court.

Any written comments should be sent to the CJRA Advisory Group, 219 South Dearborn Street, Room 2050, Chicago, Illinois 60604. Comments should be received by 4:30 p.m. Friday, April 23, 1993. A public hearing will be held Wednesday, April 21, 1993, from 10 a.m. to noon and from 2 to 4 p.m. in Courtroom 2525, the United States Courthouse, 219 S. Dearborn.

Sincerely,

Anne Megan Davis
Reporter

Enclosure

PRELIMINARY REPORT

Civil Justice Reform Act Advisory Group

of the

United States District Court

for the

Northern District of Illinois

Interested parties are invited to comment on the report, either in writing or at the public hearing.

Written comments should be addressed to CJRA Advisory Group, 219 South Dearborn Street, Room 2050, Chicago, IL 60604, and delivered to that address by 4:30 p.m., Friday, April 23, 1993.

The public hearing is set for 10:00 a.m. to noon & 2:00 to 4:00 p.m. on Wednesday, April 21, 1993. It will be held in Courtroom 2525, U.S. Courthouse, 219 South Dearborn, Chicago, IL 60604.

CIVIL JUSTICE REFORM ACT
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REPORTER

Anne Megan Davis

PRELIMINARY REPORT

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EXECUTIVE SUMMARY

The Civil Justice Reform Act of 1990 requires each federal district court to develop a delay and cost reduction plan in consultation with its appointed advisory group. The advisory group must submit a report assessing the state of the court's docket, identifying the principal causes of delay and cost in the court, and recommending ways to reduce delay and expense in the district through case management principles specified in the Act or other appropriate means.

The Civil Justice Reform Act Advisory Group for the United States District Court for the Northern District of Illinois disseminates this Preliminary Report for public comment in order to obtain a wide range of response from any and all interested parties. The comments received will better enable the Advisory Group to propose a plan that is responsive to the needs of this court.

DELAY.

Taken as a whole, this court is substantially faster than average among the ninety-four district courts in disposing of most of its civil cases. It is third fastest in the country in the median time within which its civil cases terminate. This is despite the fact that, when weighted for complexity, its civil caseload per judgeship is higher than any other large metropolitan court. The court is slower than average, however, in disposing of the two to three percent of its civil cases that actually go to trial.

COST.

Cost is not defined in the Act, but attorneys' fees are generally considered to be a primary component. Neither Congress nor the court should regulate attorneys' billing rates, either hourly or contingent. There are many attorneys practicing in the district, however, and their billing rates vary widely. This gives litigants some ability to control that factor in the cost equation. Judges and litigants must also weigh cost against benefit in making decisions over the course of a case.

THE EFFECT OF CRIMINAL PROCEEDINGS UPON CIVIL CASES.

The Speedy Trial Act requires judges to give criminal matters priority over civil cases no matter how long the civil cases have been pending. In addition, the war on drugs, expanding federal jurisdiction over "street crimes," huge conspiracy cases that take months to try, and application of the federal Sentencing Guidelines all shrink the time judges have available for their civil cases.

COURT RESOURCES.

Although the caseload in this court has increased fourfold over the last thirty years, the number of judgeships has only doubled. Taken together with the level of vacancies, and the magnitude and complexity of the cases, this places a heavy load on the active district judges.

To enable the judges to deal with these pressures and, in particular, to allow swifter resolution of those cases that must be tried, the three existing judicial vacancies should be filled and the number of judgeships should be increased from twenty-two to at least twenty-five. The number of magistrate judges should also be increased to bring this court even with the nationally recommended ratio of one magistrate judge to two district judges. Because magistrate judges are authorized to try civil cases with the consent of the parties, and to do many other things as well, they are an important and flexible resource for the court.

DELAY, COST, AND THE CIVIL JUSTICE REFORM ACT.

Delay and unreasonable cost in litigation in this district, where they occur, may be attributed to a number of factors, including the sheer size and complexity of the civil and criminal caseloads, overzealous advocacy and the varying workstyles of the judges. Some of these factors can be improved by changes in the rules or individual practice, as suggested in this Report. But the usefulness of case management principles is inherently limited by factors that only Congress or the Executive Branch control.

The extent to which court-wide rules governing case management can meaningfully reduce cost and delay is still open to debate. The Civil Justice Reform Act has established pilot programs to test the effectiveness of specific case management principles on cost and delay. Until the results in the pilot districts are evaluated, this court, which is already handling much of its civil docket more quickly than most, should exercise due care in changing its rules and practices. The following is a summary of this Report's recommendations.

DIFFERENTIATED CASE MANAGEMENT.

The judge's early participation can be valuable in streamlining the litigation, but all cases do not need the same amount of judicial involvement. This court has a local rule that automatically exempts eleven classes of cases from the pretrial conference requirements of F. R. Civ. P. 16. For those cases that do need the judge's supervision, a litigation plan can be fashioned for that specific case at pretrial conferences or status hearings with the judge. Telephone conferences should be used when possible.

DISCOVERY.

Litigants should try to agree on a discovery schedule to use themselves or for presentation to the judge. Discovery should be structured in stages to conserve expenditures of time and money. Litigants should cooperate in discovery to the extent possible but automatic pre-discovery "disclosure" of witnesses, documents and other matters should not be required. In determining the extent of discovery, judges should weigh the cost against the benefit, and shift the cost to the party seeking discovery when appropriate.

The amount of discovery necessary should be determined for each specific case, not preset by local rule. To reduce wasted time at depositions, the court should adopt specific guidelines governing how depositions should be conducted, with violations subject to sanctions. Judges should make themselves reasonably available to resolve disputes that arise during depositions.

MOTIONS.

Motions can result in efficient resolution of a case or cause it to stall. The judges should be commended for hearing motions on a frequent basis, but they should follow uniform procedures governing notices of motion and motion calls. Motions and briefs should be succinct. Judges must rule as promptly as reasonably possible. When a motion is taken under advisement, the judge should give a timeframe within which the parties can expect a ruling, for the judge's benefit as well as for that of the parties. The Clerk should develop a request form by which parties can obtain information on the status of a pending motion.

The Act requires publication of the names of judges with either motions pending or bench trials under advisement for more than six months. "Pending" has been interpreted to mean "filed plus thirty days." While this will increase the judges' consciousness of their pending motions, it also may decrease the amount of time judges are willing to allow for briefing. This can present problems if the respondent to a summary judgment motion needs additional discovery. In this situation, a premotion or status conference should be held, at which time the judge can tell the movant to hold the motion until discovery is complete. In general, however, mandatory premotion conferences are inadvisable because they tend to place unreasonable burdens on both judge and litigants.

Oral rulings on motions, or after bench trials, may hasten disposition because judges tend to spend time polishing written opinions. As with any ruling, however, there must be sufficient recitation of the facts and conclusions of law to allow for appellate review.

COMPLEX CASES.

Complex cases can gain special benefit from aggressive case management. Early identification of issues, a written case management plan, phased discovery, bifurcation of issues at trial, settlement and other matters should be discussed at pretrial conferences scheduled as necessary. The *Manual on Complex Litigation 2d* should be used as a guide.

TRIAL DATE AND TRIAL.

A firm upcoming trial date often motivates parties to resolve their dispute. Judges should try to set an early date, while recognizing that "hurry up and wait" is itself wasteful of time and money. Judges should routinely advise parties that they may consent to the reassignment of the case by the judge for trial before a magistrate judge. Lacking a felony trial calendar, the magistrate judge may be able to offer the parties a relatively early trial date. When possible, judges should take advantage of the court's new "short civil trial" rule to place prescribed trial-ready cases in a pool for visiting and other available judges to try.

The court's final pretrial order form should be revised to delete the requirement that counsel must submit an agreed statement of uncontested facts and contested issues of fact and law. The new form should be used by all the judges in cases for which a pretrial order is appropriate.

ALTERNATIVE DISPUTE RESOLUTION.

There are many forms of alternative dispute resolution (ADR) available with which judges and litigants should become familiar. The court should ask the bar associations to prepare a pamphlet describing the various methods available, both before and after a complaint is filed.

Settlement conferences with the judge have become an important ADR method. The judges should obtain training in settlement techniques to facilitate the process. Party representatives with authority to settle (except for the United States government) must attend the settlement conference by telephone or in person if the judge so requires. For those litigants who wish confidentiality, the court should establish a mechanism by which the parties can request mediation with a magistrate judge. Magistrate judges should obtain training in settlement, mediation and other ADR techniques.

We do not recommend a mandatory arbitration program in this district at present. Many of this court's more time-consuming cases could not be included because of statutory restrictions on such

programs. The results obtained from pilot courts that have adopted mandatory ADR programs should be studied when available, however, and a decision on this issue re-evaluated.

OTHER MATTERS TO BE CONSIDERED.

District judges should routinely advise parties that they may consent to have either their entire case or a dispositive motion ruled upon by a magistrate judge. But since referral of dispositive motions solely for report and recommendation often results in delays and extra expense, district judges should be sparing in such referrals.

The judges vary considerably in the standing orders that govern each of their courtrooms. Uniformity of practice would be ideal, but at the least, each judge should apprise litigants of the standing orders applicable in his or her courtroom early in the case, with updates to all litigants if a new order is issued. Each judge's standing orders must also be published to the bar at large.

The court has made significant improvements in the area of prisoner litigation. Some of these improvements -- a staff law clerk assigned to review complaints, a practical handbook for appointed counsel -- should also be used in *pro se* employment discrimination cases.

Certain kinds of cases should be diverted from the district judges and placed on a special calendar, where possible: bankruptcy appeals (which may be taken to a bankruptcy appeals panel upon consent of the parties), mortgage foreclosure actions, and actions seeking to recover employer contributions to employee benefit funds.

Fee petitions take time to prepare and time to review. The lodestar, which requires judicial scrutiny of the lawyers' record-keeping, must be used in "fee-shifting" cases, those for which the losing defendant is required by statute to pay the plaintiff's attorneys' fees. But less labor intensive arrangements may be used in other kinds of cases. In reviewing fee petitions, judges should consider the "audit" or sampling method, which reduces the time needed for judicial scrutiny while encouraging attorneys to be circumspect.

INTRODUCTION

In furtherance of the goal of the just, swift and inexpensive resolution of civil disputes, Congress enacted the Civil Justice Reform Act of 1990, codified at 28 U.S.C. §§ 471-482. The Act requires each United States district court to develop and implement a civil justice expense and delay reduction plan.

A guiding principle of the Act is that civil justice reform must coincide with the particular characteristics of each court and the perceived needs of its litigants. To accomplish this, the Act provides that each court must develop its plan in consultation with an advisory group, the membership of which would reflect those who use the court. The members of the Advisory Group for the United States District Court for the Northern District of Illinois were chosen for their wide range of experience in the many kinds of litigation with which this court is presented. They include former district court judges, lawyers from large firms and small, prosecutor and defense counsel, law school dean and practitioner, litigant and layperson. They have been assisted in their efforts by members of the court and the Court Administrator, serving ex-officio.

The Advisory Group must follow the explicit instructions of the Act; among them, to assess the state of the court's civil and criminal dockets; to identify trends in the demands on the court's resources; to identify the principal causes of cost and delay in civil litigation in the district; and to make recommendations to the court on a number of delay and expense reduction principles and techniques specified in the Act. 28 U.S.C. § 472.

Congress wisely chose not to impose these principles and techniques on all courts without first attempting to test their effectiveness in some courts. The Act establishes a series of pilot programs, requiring particular courts to test specific case management principles and alternative dispute resolution programs with the expectation that, if successful, these principles and programs will be adopted by other

courts. Some courts chose to become "early implementation courts" and instituted plans experimenting with a self-selected variety of techniques by the end of 1991.

The Northern District of Illinois is a comparison court against which the results of the pilot programs and the early implementation courts can be judged. Since this district is significantly faster than average in terminating most of its civil cases, a comparison with districts that have adopted the Act's principles and programs should provide valuable information on their effectiveness. This court may not stand still, however. It too must adopt a delay and expense reduction plan aimed at achieving the objectives of the Act. The court must also assess the state of its civil and criminal dockets annually, in consultation with its advisory group, in order to evaluate the effectiveness of its plan's provisions. 28 U.S.C. § 475.

As Advisory Group members, we have welcomed the opportunity to review the litigation practices in this court on the part of judges, lawyers and litigants. We have considered and made recommendations with respect to each of the Act's various components. We have no doubt that court-wide improvements in case management techniques and increased use of alternative dispute resolution methods can prove beneficial in reducing delay and possibly expense in this district. But since this court, taken as a whole, is currently resolving many of its cases with relative speed, it is important that we examine the proposed principles carefully. The best-intentioned concepts applied in one situation can have unexpected and unwanted effects in another.

Reducing the cost of litigation poses a distinctive problem because attorneys' fees, the primary component of "cost" in many instances, are for the most part based on billing rates or contingency contracts that are largely determined by the marketplace. This is not an area where even Congress wishes to tread.

Moreover, in the end, the usefulness of these principles and programs is inherently limited by the sheer number of cases, both civil and criminal, that are being filed in the federal courts. The number

of cases will not decline unless Congress decides to limit federal jurisdiction rather than expand it. But in an age when Americans expect such crucial issues as law enforcement and health care to be resolved on a national basis and commerce is expanding globally, it seems more likely that Congress will increase federal jurisdiction rather than restrict it. Clearly, Congress and the Executive Branch must give due regard to expanding judicial resources when they choose to increase federal jurisdiction or regulatory and law enforcement resources. They cannot continue to impose additional responsibilities on the federal court system without corresponding increases in judicial resources.

Mindful of these considerations, we have endeavored in this Report to set out both our reflections on the issues the Act raises for this court and our conclusions on how reductions in the length and expense of litigation in this district can best be achieved.

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This Preliminary Report is based on: the Advisory Group's review of local and national statistics, reports and plans of early implementation courts, and case law and literature on civil justice reform; interviews with the district and magistrate judges; an extensive survey of lawyers who have recently practiced in this district court; and the combined experience of the Advisory Group members.

This Report is being disseminated to the judges and the public for comment so that the Advisory Group may obtain a wide range of response from any and all interested parties. When the comment process is complete, the Advisory Group will issue its final Report.

PART ONE: THE COURT.

I. OVERALL VIEW OF THE COURT.

The United States District Court for the Northern District of Illinois is one of the largest federal district courts in the country, both in terms of population served (eight million) and of federal judgeships authorized (twenty-two). The Eastern Division sits in Chicago. The Western Division, located in Rockford, serves the burgeoning area to the west of Chicago and its suburbs. The district is home to a large, extremely active commercial and residential center, to developing exurban and rural areas, and to several state prisons south and west of Chicago. The court is thus presented with a diverse array of cases and issues.

The court generally manages its docket well, especially given the magnitude and complexity of its caseload. The court as a whole is substantially faster than average in disposing of its civil cases, save for that small percentage of cases that actually do go to trial. As in all large courts, some judges move their cases more slowly than others. The judges must work in collegial fashion to address the issues this raises. But speed cannot be viewed in isolation from fairness, which we believe is the court's paramount obligation to the parties. Swiftness is a vital element of justice, however, that all members of the court must strive to provide the litigants.

II. THE COURT AND ITS RESOURCES.

A. Personnel.

1. Active District Judges. The court has twenty-two authorized judgeships. Currently there are three vacancies. Twenty-one judgeships are assigned to the court's Eastern Division and one to its Western Division. In number of authorized judgeships, the court is somewhat smaller than the district courts for the Southern District of New York (twenty-eight), the Central District of California (twenty-

seven), and the Eastern District of Pennsylvania (twenty-three). In terms of population served, however, only one is larger -- the Central District of California, located in Los Angeles.

The full complement of active district judges is rarely sitting at any one time. During most of the 1980's, the court averaged the equivalent of more than two vacant judgeships per year. The current level of vacancies, however, is cause for concern.

*2. **Senior Judges.*** District judges are entitled to retire from regular active service and assume senior status upon attaining a combination of age and length of service totalling eighty years, provided they are at least sixty-five years old and have served at least ten years on the bench (e.g., age sixty-five plus fifteen years on the bench). 28 U.S.C. § 371(c). The burden borne by the senior judges varies with the individual, although few are assigned criminal matters. In recent years, the combined workload of the district's senior judges has roughly equalled the load carried by one regular active judge.

*3. **Visiting Judges.*** The court invites district judges from around the country to preside over specific matters. Judges from the United States Court of Appeals for the Seventh Circuit also preside occasionally over actions in the district court. In part because of the number of highly complex multi-defendant criminal matters awaiting trial in 1991, the court arranged for seventeen visiting judges to sit in this district in the fall of that year. They presided over some twenty trials, including a number of lengthy criminal matters that could have seriously delayed other cases pending before the judges in this district. But the presence of this number of visiting judges, while extremely helpful, can pose logistical problems in terms of courtrooms, chambers and support staff.

*4. **Magistrate Judges.*** There are currently nine magistrate judges in the district. Eight are assigned to sit in the Eastern Division and one in the Western Division. Pursuant to statute, they handle many types of matters, civil and criminal, both on consent of the parties and on referral from a district judge subject to the latter's review. 28 U.S.C. § 636. This district has fewer magistrate judges per

district judge than any other large metropolitan court, a situation which should be remedied. We discuss magistrate judges and our recommendations with respect to them in a later section of this Report.

5. The Clerk and the Clerk's Office. The Clerk of the Court is the court administrator. The Clerk's Office currently consists of 127 full-time employees, including six employees in the Western Division. A courtroom deputy is assigned to each active district and magistrate judge. The current level of authorized staffing for 144 positions, which is established by the Administrative Office of the United States Courts pursuant to 28 U.S.C. § 751, is adequate. But the federal judiciary is experiencing a fiscal crisis that will prevent the Clerk's Office from reaching this level or indeed from hiring any new personnel until the present number drops through attrition to 104.

6. Law Clerks, Secretaries, and Externs. Generally, each active judge has a secretary and two law clerks. Each senior judge may have a secretary and, depending on level of activity, up to two law clerks. Each magistrate judge has one law clerk and a secretary. In addition, three law clerks work almost exclusively on prisoner petitions. There are also law student externs who assist the judges from time to time without compensation. Judges faced with an especially time-consuming or other very unusual case can obtain the assistance of another law clerk hired on a temporary basis especially for that purpose, subject to the approval of and funding by the Judicial Council for the Seventh Circuit.

7. Court Reporters. There is an official court reporter regularly assigned to each active district judge and, when circumstances require, to cover proceedings before a magistrate judge. The number of official reporters is established by the Judicial Conference of the United States, and the district currently employs the maximum number. The court also has a contract with a private reporting agency to provide additional reporters as the need arises.

8. Interpreters. The court is authorized by F. R. Civ. P. 43(f) to appoint interpreters and to provide for their compensation. The court employs one full-time Spanish language interpreter; all others are free lance. Requests for interpreters are handled on a case-by-case basis through the Clerk's Office.

9. Special Masters and Receivers. District judges occasionally appoint special masters to hear complex or extended matters and to report back to the judge pursuant to F. R. Civ. P. 53 and Local Civil Rule 12. Ordinarily magistrate judges can and do fulfill this function pursuant to 28 U.S.C. § 636(b)(2) and Local General Rule 2.41E. Receivers are appointed in foreclosure and similar proceedings. 28 U.S.C. § 754 and Local Civil Rule 9.

10. United States Marshal's Service, Court Security Officers, and the Federal Protective Service. The United States Marshal's Service is responsible for judicial security. Deputy marshals are also available for service of summonses and writs under certain circumstances. The Marshal's staff is augmented by court security officers supervised by the Marshal's Service. The deputies are armed, but court security officers carry firearms only in prescribed situations. The Marshal's Service is responsible for security in the courthouses in both Chicago and Rockford. The Federal Protective Service, a branch of the General Services Administration, provides security of the buildings' perimeters and grounds. The court lacks sufficient security personnel to cover all active courtrooms. Although criminal trials are normally covered, a large criminal trial requiring more than the usual number of security personnel may force other judges to relinquish security officers in their courtrooms even in criminal cases.

B. Administration. The court's administration is the responsibility of the Chief Judge, who is selected according to statutory criteria and serves for seven years, and the Executive Committee, which consists of the Chief Judge, four active district judges chosen according to prescribed rules of seniority, the Acting Chief Judge and the Clerk. In this district, the Executive Committee reports to all the district judges, a majority of whom may approve or disapprove Executive Committee recommendations and decisions. 28 U.S.C. § 136; Local General Rule 1.02.

C. Case Assignment System. The court employs the individual calendar system, according to which a case is assigned at the time of filing to one judge for its duration, unless reassigned for reasons external to the case. There are many benefits to this system, which was pioneered by this court in the

1940's. Among these are a sense both of judicial accountability and of economy arising from the fact that one judge is responsible for and familiar with the case from beginning to end.

Random assignment of cases is integral to this system. Its dual purposes are: (1) to prevent predetermination of the judge assigned to a case; and (2) to distribute workload among the active judges in such a way that both the number of cases and the amount of judicial effort needed to dispose of them is roughly equal, except for the Chief Judge, who has considerable administrative responsibilities and handles all grand jury matters. At the time of filing, the Clerk's Office obtains information from the plaintiff to categorize each case according to how much judicial time the case is expected to take. There are five criminal and five civil categories. A judge's name is selected randomly by computer within each category.

The Executive Committee reviews the random assignment system from time to time to adjust for the court's experience with the amount of effort a particular kind of case requires. For instance, it has become clear that a long criminal trial has extremely adverse effects on the presiding judge's ability to attend to other pending cases. A judge presiding over such a trial now receives relief from assignment of new cases according to a formula based on the number of trial days consumed. General Order of December 26, 1990. Two or more district judges may also request reassignment of specific cases among themselves if this will allow for more efficient administration or result in a savings of judicial time. Local General Rule 2.3(E).

Randomness in assignment does not result in a perfectly even distribution of workload among the judges and inequities inevitably occur. For this reason, and because judges tend to dispose of cases at varying rates of speed, there can be substantial disparities in the number of cases being handled by the active district judges at any point in time. For example, as of October 31, 1992, one judge had 186 pending cases, another had 454 cases, and the mean number for all active judges in the district was 315. Disparities cannot be avoided, however, in large courts if the goal of case assignment is the even

distribution of *new* cases among the judges. If the goal is to maintain a relatively even number of *pending* cases among the judges, the court would have to reassign cases to faster judges to prevent slower judges from building up a backlog. This would initially level out the caseloads, but would soon have adverse consequences of its own as those judges who routinely dispose of cases more quickly find that their reward is the assignment of more cases. In fact, informal estimates suggest that the disparity between the judges with the highest and the lowest caseload is smaller in this district than in many other large district courts. As we discuss in a later section, however, the court must seek out ways to assist judges who have large numbers of cases pending.

About ten percent of the court's pending cases are reassigned each year. Reassignment of cases to new judges deserves special mention because it is often thought that the sitting judges use reassignment as an opportunity to saddle a new judge with the oldest, most intransigent cases on the docket. In fact, over the last decade, the court has made substantial efforts to ease a new judge's entry into the judicial system. The new judge receives no criminal cases from the sitting judges and indeed no criminal cases at all for three months. To ensure that a new judge starts with a fair civil caseload, cases are taken from each sitting judge according to a random process that yields an age distribution similar to that of the other judges. The sitting judges have very little control over which cases are taken for reassignment and which they may retain. Moreover, to guard against the ravages that random selection can wreak on any one particular case, the court has provided that a case cannot be reassigned to the calendar of a new judge more than twice.

Despite the disparities that occur from time to time, both bench and bar generally perceive the present assignment system to be fair. We commend the court and the Clerk for their diligent efforts to achieve this goal.

D. Facilities. All of the facilities of the court's Eastern Division are located in the Everett M. Dirksen Building at 219 S. Dearborn Street in Chicago. There has been a chronic shortage of courtroom

space in this facility. This is largely due to the long lead time (two to five years) necessary to build courtrooms for new judges. This problem is being addressed through the construction of additional courtrooms on the twelfth and fourteenth floors and long range plans for courtrooms on other floors as well.

The court's facilities in the Federal Building in Rockford are woefully inadequate to house the judicial officers and staff currently assigned to the Western Division. A new facility is needed and we understand that the administrative process necessary to accomplish this has begun.

E. Equipment. The court is in the process of installing various kinds of automated equipment. All chambers have personal computers and on-line access to computer research services. In late 1990, the Clerk's Office began using an electronic system to maintain the civil dockets. This allows several persons to view a case docket simultaneously and at the same time provides greater security for and control over the court's records. The court expects to have the technology in place shortly that will allow public access to civil dockets via computer and modem. This should save time and money for lawyers who will be able to check the docket without coming to the courthouse.

Electronic technology is rapidly changing, and the court must continue to explore the advances available. One such advance, which would allow documents to be filed with the court by facsimile machine (fax), has been considered by the court but rejected because of current budgetary and technological constraints. Filing by fax presents a considerable challenge to a large court that receives tens of thousands of motions each year. The Clerk's Office presently does not have the adaptive equipment or the telephone lines necessary to receive documents from a large number of attorneys attempting to fax from all manner of machines all at the same time -- an event that could easily happen on any given day shortly before close of business. But many perceive filing by fax to be a question of "when," not "if." The court should also explore the use of simultaneous transcription machines for court reporters permitting instant retrieval of testimony during trial.

III. THE STATE OF THE CIVIL DOCKET.

The Civil Justice Reform Act requires each advisory group to assess the court's dockets, both civil and criminal, and to identify trends in case filings and demands being placed on court resources. 28 U.S.C. § 472(c). The statistics cited herein are taken from internal records kept by the Clerk of the Court and from information published by the Administrative Office of the United States Courts and the Federal Judicial Center.

In brief, the Northern District of Illinois has one of the most complicated caseloads of any district court in the country. Yet on most measures of speed used to compare the ninety-four district courts in their handling of civil cases, it is significantly faster than average. In median time to case disposition, this court is third fastest in the nation and has been among the fastest courts in this regard for the last six years. It is slower than average, however, in disposing of those cases that actually go to trial. The slower disposition time of these cases may be a function of their difficulty. Only a tiny percentage of civil cases in this district actually do go to trial (slightly more than two percent in the statistical year ending June 30, 1992), but clearly they take a significant amount of the judges' time.

We commend the court on its record overall, but continuing efforts to improve docket management are essential, particularly with respect to those cases that appear bound for trial.

A. A Snapshot View. Descriptive numbers and statistics about the court's performance should be viewed in context to avoid inevitable distortions when a single year is isolated for attention, but citation of data for the most recent year available does give a baseline.

1. Number of Cases Filed. For 1992, 8811 civil cases were filed in the District Court for the Northern District of Illinois.[1] More than 9000 were closed, and 6281 were pending at year end.

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[1]All references are to statistical years ending June 30, unless otherwise noted. The data cited are taken from Table C-1, *Statistical Tables for the Twelve Month Period Ended June 30, 1992* (hereinafter *Statistical Tables*), published by the Administrative Office.

2. Median Time To Termination.[2] This district was third fastest in the country in median time from filing to disposition in civil cases: four months.[3] [4] It is the fastest of the ten largest metropolitan courts on this measure.[5] *See* **Chart 1**, attached.

The vast majority of cases in this and other districts terminate before trial. But there is a small percentage of cases that continue on and do take up a considerable amount of time. In an effort to measure the courts' handling of these cases, the Administrative Office reports not only the median time to termination, but also two numbers that give information about the ten percent of the cases at either end of the time line (i.e., the fastest and the slowest). For all civil cases in this district in 1992, the fastest ten percent closed in less than one month; the median termination took four months; and the slowest ten percent took at least twenty-seven months to close. *See* **Chart 2**, attached.

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[2]The Administrative Office uses the median, which measures the point at which half of the court's cases are terminated, in its time statistics because the median provides a more stable picture of a court's caseload than the mean (commonly considered the average by non-mathematicians). To illustrate, there is only a small percentage of cases that take a very long time to terminate. But some courts have a relatively high number of these cases. Their long disposition times would push the mean way up for those courts, distorting their performance. Median is less affected by this class of cases, so it is a more appropriate measure.

[3]Table C-3, *Statistical Tables, supra* note 1. The Administrative Office does not include suits for the recovery of overpayments by the Veteran's Administration, enforcement of judgments on unpaid student loans and certain other categories of cases which, although often large in volume, usually take very little court time. Nor does it include prisoner petitions, which can be time-consuming.

[4]The Northern District is unique among district courts in having a very large number of mortgage foreclosure cases filed each year. These cases typically are disposed of with very little judicial supervision in relatively short order (median disposition time: ninety-one days). The Advisory Group examined whether the court's overall speed is primarily the result of its swift disposition of these cases, but determined that it is not. If mortgage foreclosures are excluded from the calculation, the median time to disposition for all other civil cases increases by only sixteen days (from 126 to 142) for calendar year 1992. This results in a median disposition time of 4.7 months, which is still far better than average, even without taking into account similar kinds of cases that may be pending in other districts.

[5]The ten largest metropolitan courts, as measured by number of authorized judgeships (in parentheses), are: Southern District of New York (28), Central District of California (27), Eastern District of Pennsylvania (23), Northern District of Illinois (22), Southern District of Texas (18), New Jersey (17), Southern District of Florida (16), Eastern District of Michigan (15), Eastern District of New York (15), and the District of Columbia (15).

As may be seen, this court is faster on this measure than the average for all district courts, despite the fact that the weighted caseload borne by the judges of this district (discussed below) is among the highest in the country.

*3. **Weighted Caseload.*** The concept of weighted caseload is important because raw numbers do not fairly convey the varying complexity of cases which the judges in a district confront. Courts in large, densely populated commercial centers receive a different array of cases than courts in less urban areas. A weighting system, keyed to the amount of time judges tend to spend on various categories of cases, has been developed to deal with this problem. The Federal Judicial Center conducted a Time Study in 1979, wherein volunteer judges were asked to record how much time they spent each day on each case. The results were assembled by case category and analyzed for amount of judge time consumed. A case in a category that constituted one percent of the cases terminated but took two percent of the judges' time in the Time Study was given a weight of two.[6]

The Northern District of Illinois had 401 *un*weighted civil filings per authorized judgeship in 1992.[7] When the weighting factor is applied, this number jumps to 462 weighted civil cases per judgeship. This again is higher than any of the other ten largest courts and among the highest in the country. *See* **Chart 3**, attached.

*4. **Time to Termination by Type of Disposition.*** The Administrative Office also reports statistics on the number of cases that close at four defined stages in the life of a case: (a) no court action (indicating that a default judgment has been entered by the Clerk or the case was voluntarily dismissed); (b) before a final pretrial conference has taken place; (c) during or after a final pretrial conference; and

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[6]The weights were calculated more than a decade ago and do not take into account some more recent categories such as civil RICO, which can be very time-consuming. A more sophisticated methodology is being developed, but the current method does provide a measure of comparison among districts.

[7]Table X-1, *Statistical Tables*. Weightings are calculated per authorized judgeship, not per sitting judge.

(d) during or after trial. Almost one-fourth of the civil cases in this district (more than 2000 cases) terminated with no court action at all in 1992.[8]

An additional 5000 cases closed after some court action had taken place, but before a final pretrial conference. As may be seen in **Chart 4**, attached, this court is considerably faster than the national average in disposing of the cases in these categories. The court is also substantially faster than average for cases that close during or after final pretrial conference. Even its slowest ten percent (which took at least thirty-three months to close) were much faster than the national figure (fifty-four months). When we look at the relatively small number of cases that do go to trial, however, this district is considerably slower than the national average: the Northern District's median disposition time was twenty-seven months for 1992, the national average was twenty months. *See* **Chart 4**, attached.

5. Percent of Cases More Than Three Years Old. Until recently, the Northern District had a large number of old asbestos cases that could not be pursued because of the bankruptcy of the primary litigant. In the second half of 1991, those cases were transferred to another district, dramatically reducing the number of civil cases that have been pending for more than three years. As of June 30, 1992, this older segment was down to less than seven percent of the court's pending civil caseload.[9]

B. Filing Trends. It is important to review the court's statistics over time because this allows trends to be discerned and avoids the distortions that statistical blips may create.[10]

1. Number of Cases Filed. Over the last thirty years, the number of civil cases filed each year in the district has risen substantially. In 1961, just over 2000 cases were filed. Civil case filings peaked between 1985 and 1989 at 10-11,000 per year, then fell to just under 8000 in 1990, rising again to 8800

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[8]Table C-5, *Statistical Tables*.

[9]Administrative Office, *U. S. District Courts -- Judicial Workload Profile*, at 101.

[10]We also note, however, that measuring data over a long period of time in a changing environment means that practices have to some extent changed by the time the data is collected and we may be examining factors that once had an effect but do not now exist.

in 1992. The drop occurred after Congress increased the jurisdictional amount in diversity cases from $10,000 to $50,000 in 1989. In the first statistical year thereafter, the number of diversity cases declined almost by half.

It appears, however, that the decline in diversity cases is a transitory phenomenon. Administrative Office records show that historically a sharp drop in filings has occurred in the year after a jurisdictional increase. But this has been followed by a nearly constant increase in filings as the bar and litigants become accustomed to the new threshold and inflation exerts its inexorable effect. The number of diversity cases in this district has indeed started to climb back up.

*2. **Cases per Judgeship.*** In 1961, there were ten authorized judgeships in the Northern District for 2000 new civil cases filed. The number of authorized judgeships doubled to twenty-two over the next thirty years. In the same time period, the number of cases quadrupled. This slower growth in the number of judgeships has resulted in significantly larger caseloads for each judge. Throughout the 1960's, caseloads averaged in the low 200's per judge. By the 1980's, that figure had more than doubled and, in one year, tripled. Following the decline in diversity filings, the civil caseload has been down from that extremely high number. But it is still almost twice what it was only thirty years ago.

*3. **Historical Life Expectancy.*** The Administrative Office has developed two concepts to predict from the court's performance over the last ten years how long it will take to dispose of a case: Life Expectancy and the related notion of Indexed Average Life Span, which compares the characteristic life span of cases in one court to that of all district courts over the past ten years. On both measures, cases in the Northern District have a life span shorter than the national average.[11] This court's relative

[11]These concepts are discussed in *Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990, February 1991, SY91 Statistics Supplement,* prepared by the Administrative Office and the Federal Judicial Center, October 1991, at 14-15 and Appendix B (hereinafter *Guidance*).

speed in disposing of cases is not a fluke. It has been faster than average in all "type of disposition" categories, except for cases that go to trial, for the last thirty years.[12]

4. Caseload Mix. In 1962, much of the legislation and litigation in the areas of civil rights, Title VII employment discrimination, pensions, and prisoner litigation did not exist. Thirty years later, these are among the most frequently filed cases in this district.[13] They are often among the most time-consuming cases as well, as is reflected in the high weights assigned them by the Federal Judicial Center. They are less likely to settle than other cases and, indeed, they account for more than half the jury trials conducted in this district in the last five years. Private contract and personal injury cases also account for a substantial number of trials. In addition, the court has a steady number of securities and patent cases, which tend to be complicated and can result in lengthy trials.

IV. THE STATE OF THE CRIMINAL DOCKET.

The court's civil caseload cannot be viewed in isolation from its criminal docket. All the judges in this district believe that their ability to attend to their civil cases properly has been adversely affected by the ever-increasing demands of their criminal calendars. The number of federal criminal trials has exploded in this country since the mid-1980's. This district has always been primarily a civil court, but in 1992, there were nearly as many criminal trials as civil (both in gross number of trials and in number of trial hours). Pressures from constantly expanding federal criminal jurisdiction, lengthy (or even not-so-lengthy) criminal trials which receive precedence under the Speedy Trial Act, and the time requirements of the Federal Sentencing Guidelines and the Bail Reform Act are dramatically reducing the time judges have available to address their civil cases.

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[12]Table C-5, *Annual Report of the Director of the Administrative Office of the United States Courts*, 1963-1991.

[13]Table C-3, *Statistical Tables.*

A. Statistics.

*1. **Number of Cases Filed.*** In statistical year 1992, 740 criminal cases were commenced in the Northern District, the great majority of which charged felonies. Five hundred eighty-two were terminated. At year end, 1104 were pending, an increase of almost 300 from 1990.[14]

*2. **Number of Criminal Defendants.*** It is widely believed that the number of criminal defendants is at least as important as the number of criminal cases in assessing a court's workload.[15] Each defendant in a criminal case has his own lawyer, his own motions, his own theory at trial, his own sentencing if convicted. In 1992, proceedings were commenced against more than 1100 defendants in this district, averaging out to 1.6 felony defendants per case.

*3. **Median Time to Disposition.*** The median time from filing to disposition in criminal felonies in 1992 was 7.4 months.[16] This is higher than it has been over the last seven years, in all probability because of the number of lengthy multiple-defendant, multiple-count criminal "megatrials" that terminated in 1992.

B. Filing Trends and Problems.

*1. **Megatrials.*** The effect of a multiple-defendant, multiple-count case can be devastating on the calendar of the judge to whom the case has been assigned and detrimental to the entire court as its side-effects ripple out from the assigned judge. A judge presiding over a megatrial has little time or energy for anything else. Lawyers representing clients in a megatrial are not available to participate in other cases. This causes delays for other judges. The priorities established by the Speedy Trial Act require that criminal cases take precedence over civil cases, no matter how long a civil case may have

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[14]Table D-1, *Statistical Tables*, and *1990 and 1991 Annual Reports* at 54-55.

[15]Data collected for the most recent Federal Judicial Center Time Study indicate that the burden of a criminal case is proportional to the number of defendants. *Guidance, supra* note 11, at 18.

[16]*Judicial Workload Profile, supra* note 9.

been pending. One judge in this district was faced with a 175 count indictment that named thirty-eight defendants and alleged more than 250 criminal acts, including murders and RICO and narcotics conspiracies. The judge ultimately divided the case into five smaller cases, which were tried before him and several other judges from inside and outside the district. One of these smaller cases itself took four months to try.

The United States Attorney has brought fewer such indictments recently. From the standpoint of case management, this is certainly beneficial. For those multiple-count, multiple-defendant cases that are brought, it is essential that the judge employ aggressive case management techniques, both to maintain control over the case and to assist the jurors in comprehending it. We discuss some of these techniques in the section on complex civil cases later in this Report.

2. Drug Cases. The "war on drugs" has resulted in a great increase in narcotics and controlled substance prosecutions. The number of felony drug cases filed in this district has tripled from 1985 to 1992. Drug cases now constitute almost one-third of the indictments in this district.

3. Gun Cases. Operation Triggerlock is a Justice Department initiative, begun in March 1991, to bring firearms cases into federal court. It directs the United States Attorney in each district to identify and prosecute repeat offenders for "street crimes" that would otherwise be prosecuted under state law, by invoking federal laws that prohibit the use of guns in violent crimes. Its purpose is to allow the imposition of harsh federal mandatory minimum sentences. The program is new, but already many of the judges we interviewed report that these cases are consuming a significant amount of their time. It has been estimated that the number of federal criminal defendants could triple if prosecutions continue at the pace set by Triggerlock's first nine months.[17] Again, because of the priorities of the Speedy Trial Act, these cases will inevitably affect the court's civil caseload.

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[17]Judicial Impact Office of the Administrative Office, *Judicial Impact Statement: Operation Triggerlock*, at 1 (March 10, 1992).

*4. **The Speedy Trial Act.*** It is not clear whether the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.*, which began its three-year phase-in period in 1976, has been effective in hastening the administration of criminal justice. The majority of judges we interviewed in this district believe that the Act has been effective in resolving criminal cases more quickly than before. But in this district, and indeed nationally, disposition times for felonies have *not* decreased significantly since the Act's implementation. *See* **Chart 5**, attached.

It is not clear why the Speedy Trial Act has not had a more positive effect on speed of disposition. Possibly criminal cases are more complex now than in prior years and would take even longer to travel through the system if they did not receive priority under the Act. It is certainly true that the Speedy Trial Act keeps criminal defendants at the front of the line as the total caseload expands. In the end, this is an issue of social policy that we do not suggest be changed, but it should be understood that priority for criminal cases comes at the expense of civil litigants who must wait to have their disputes resolved.

*5. **The Sentencing Guidelines.*** The Sentencing Reform Act of 1984 mandated the creation of Federal Sentencing Guidelines, a primary purpose of which was to reduce disparate sentencing practices that disadvantaged certain defendants because of their race. 28 U.S.C. §§ 991, 994. The Supreme Court upheld the Guidelines in 1989. *Mistretta v. United States*, 488 U.S. 361 (1989). Meaningful data about their effects is thus just starting to become available.

Bench and bar are divided on the benefits of the Guidelines. They are controversial for a number of reasons, including the increased discretionary power they vest in the United States Attorney. Under the Guidelines, the facts of the specific offense proven and the "offender's characteristics" give rise to a strictly defined sentencing range from which the judge has little discretion to vary. The offense with which the prosecutor chooses to charge the defendant thus significantly affects the sentence that must be imposed if the defendant is convicted.

From a purely calendar management standpoint, sentencing now requires more of the judge's time than was formerly the case. This is because factual questions not previously of great moment must be heard and resolved in order to determine what category the offense belongs to and, consequently, what sentence is appropriate. The judge must also state reasons for the sentence so that there is a basis for appellate review which, prior to the Sentencing Reform Act, was available only in limited circumstances. Informal internal estimates suggest that application of the Guidelines in this district requires each judge to spend as much as an extra forty hours annually. This reduces the time that each judge has available to address civil cases by a solid week each year.

Some feared that the Guidelines would reduce the number of guilty pleas, and thereby increase the number of trials, on the theory that defendants would take their chances at trial rather than submit to the Guidelines' provisions. In this district, however, the number of pleas has *in*creased in the three years since the Guidelines' effective date. But overall it is too early to draw firm conclusions from the data.

6. The Bail Reform Act and the Effects of Mandatory Minimum Sentences. The Bail Reform Act, 18 U.S.C. §§ 3141 *et seq.*, has significantly increased the ability of the government to request pretrial detention of defendants. Hearings, which vary in length, are typically held before the magistrate judges, subject to *de novo* review by the district judge. In addition to the increased judicial workload created by the statute, the pretrial detention of a defendant gives rise to increased pressure under the Speedy Trial Act and further limits the time available for civil cases.

Apart from the logistical impact of the hearings necessitated by the Bail Reform Act and the Guidelines, the proliferation of mandatory minimum sentences in drug and other cases may result in an increased number of prisoner petitions being filed with the court. As we discuss later, prisoner petitions form a significant and time-consuming percentage of this court's caseload. This burden will only increase as the number of prisoners increases.

V. DELAY AND COST IN CIVIL LITIGATION IN THIS DISTRICT.

Section 472(c) of the Civil Justice Reform Act requires each advisory group to identify the principal causes of delay and cost in civil litigation in its district. In reaching our conclusions on these issues, we reviewed objective measures of speed comparing this district court with others (we know of no objective measures of cost); we interviewed the district and magistrate judges and conducted an extensive survey of attorneys who have recently practiced in this district; and we looked to the combined experience of Advisory Group members.

A. Definitions. Neither "delay" nor "cost" is defined in the Act. As a justice of the United States Supreme Court once said about pornography, people know it when they see it. Thus the same set of facts can yield different conclusions from different people.[18] We briefly highlight some of the problems in dealing with these terms.

1. "Delay." Delay has been defined as "any elapsed time other than reasonably required for pleadings, discovery and court events."[19] But this does not help us determine what is "reasonably required" in a particular case. Nor does it tell us from whose perspective the assessment of what is reasonable should be made — the parties, the lawyers and the judge all have their own points of view.

The CJRA seems to contemplate eighteen months as the maximum reasonable time within which a case should be brought to trial. The Act suggests that after that point, the judge must certify that he or she has not been able to try the case because it is too complicated, or it demands more time, or criminal cases intervene. 28 U.S.C. § 472(a)(2)(B). These exceptions themselves indicate how difficult it is to determine the gross amount of time a case will require. On the other hand, reasonable time intervals for specific events within a particular case may be easier to evaluate; e.g., how long should the

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[18]As we shall see, this observation was strongly supported by our survey results.

[19]The National Conference of State Court Judges, *Standards Relating to Court Delay Reduction*, Defeating Delay: Developing and Implementing a Court Delay Reduction Program, Appendix E, § 2.50 (1986).

parties in a particular case be given to produce documents; how long should the judge take to rule on a particular motion.

At some point in every case, all will agree that the elapsed time has become unreasonable. But except in the more extreme cases, that point eludes prediction or agreement. For the most part, we are each left with our gut reaction to an individual case.

2. "Cost." The major component of out-of-pocket cost to the client in litigation is commonly thought to be attorneys' fees. But the cost of litigation also includes expenses directly arising from the litigation (such as court reporter fees and photocopying), as well as lost opportunities and other potentially expensive social costs to the client such as increased transaction costs and the risk of follow-on suits.[20] These latter costs are generally very difficult to measure, although they may dwarf direct expenditures. In addition, the ever-higher ultimate dollar value of litigation, whether in judgment or settlement, surely influences the discussion of this topic.

The CJRA reflects society's frustration with the cost of litigation. The ability to vindicate one's rights in federal court should not be held hostage to one's ability to pay for it, but to some extent the different kinds of costs pull in opposite directions. For instance, the greater the social costs (and of course the value of the potential judgment), the more willing the parties are to pay their lawyers to make the best case, whether in seeking the judgment or in defending against it. The rates at which attorneys bill are largely governed by the marketplace. There is a wide range in rates among lawyers who practice in this district, as well as a variety of fee arrangements lawyers are willing to make. This is not an area that Congress or the courts should regulate.

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[20]Engelmann and Cornell, *Measuring the Cost of Corporate Litigation: Five Case Studies*, 17 Journal of Legal Studies 377, 396 (1988).

Even if the conflicting elements of "cost" were separately analyzed, there is still the question of determining the point at which these costs become excessive rather than reasonable. In making this determination, we are again each left with our varying responses to the individual case.

3. The Relationship Between Delay and Cost. The CJRA assumes that reduction in delay, achieved by more effective case management and by routing cases to alternative dispute resolution, will automatically yield a reduction in costs. The premise is that reducing the opportunity for attorneys to bill time in a case will inevitably reduce costs, at least for clients whose attorneys bill by the hour. (The Act does not address contingency fee agreements.) But the relationship between cost and the time a case is pending is a complex question about which useful information is limited. Even for lawyers who bill by the hour, the research that has been done does not show a one-to-one relationship. Reducing the time a case is pending does not automatically reduce costs arising from the litigation.

Certainly attorneys' fees are sometimes reduced when the time periods in a case are compressed. The longer a case goes on, the more time the lawyers have to take additional discovery. New lawyers coming into an older case must spend time learning the file and even those who have been with the lawsuit from the beginning have to refamiliarize themselves with the case. But while reducing the time to trial in a case may be valuable to the extent it avoids the cost of marginally useful discovery or time wasted in reviewing the file, time limits do not necessarily have that effect.

First, if cases are pushed along quickly, proper representation of the clients may force the lawyers to intensify their activities into a compressed schedule. The case would move faster, but the attorneys' fees would not be reduced. Fees might be increased if a short deadline requires the assistance of extra lawyers, who must spend time to learn at least some portion of the case. It has been observed that time limits may result not in the litigants self-selecting only the most important discovery, but in a tactical

battle waged by parties with greater resources against those with less.[21] Rigid application of time limits can backfire.

Second, judicial control over time spent on a case comes at its own price. Preparation for and attendance at pretrial conferences require lawyers to spend time for which they will bill the client.[22] Research on alternative dispute resolution is illustrative: according to one study, cases sent to arbitration were decided more quickly, but they did not cost less.[23]

Third, cases sometimes need to season. The parties may need time to gain a sense of realism and perspective about their positions that may not be possible earlier in the case. There are also occasions when an upcoming event may have a significant effect on a case, changing or even obviating the basis for the pleadings. Pushing cases along quickly in these kinds of situations may result in expense that could have been avoided.

Fourth, although the apparent focus of the term "cost" in the Act is attorneys' fees, other economic factors such as the ultimate dollar value of the case may have a greater influence on the parties' litigation decisions. For instance, the parties' expectation of how long it will take to go to trial affects their assessment of the settlement value of the case. It has been suggested that if the expected length of the case is reduced, clients may be less willing to settle, which may lead to more trials, with attendant

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[21]*See The Manual on Complex Litigation 2d*, (5th ed. 1985), 1 - Pt. 2, Moore's Federal Practice, § 21.421.

[22]Research comparing attorneys' fees in state and federal courts supports this observation. Kritzer *et al., Courts and Litigation Investment: Why Do Lawyers Spend More Time on Federal Cases?*, 9 The Justice System Journal 7, 8 (1984). In federal court, it was more likely that motions would be briefed and pretrial conferences would take place, both of which require lawyer time and consequent cost to the client.

[23]Kritzer *et. al., The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts,* 8 The Justice System Journal 6, (Spring, 1983).

increased expense to both sides and a developing backlog of cases awaiting trial.[24] We do not raise this issue to assert that delay is good because it leads to settlements, but rather to acknowledge that there are competing considerations that must ultimately be balanced if we are to approach problems of delay and excessive cost realistically.

These are complex issues which Congress itself does not fully understand. It seems clear, however, that given the differing circumstances of the ninety-four district courts, one set of rules cannot appropriately address delay and excessive cost for all. The variety of district court plans with time-compressing mechanisms intended to reduce both delay and cost offer an excellent opportunity for research into the relationship between time compression and cost to litigants. This correlation should be carefully analyzed so that the bench, bar and litigants can become aware of the varying ramifications. In the course of this analysis, the quality of the ultimate result in cases where time is strictly controlled must be carefully monitored to ensure that the rush to judgment does not leave a just result to the parties bobbing in its wake.

Bearing these problems in mind, we turn to the information we have gathered on delay and cost in this district.

B. Objective Measures of Speed. Statistics from the Administrative Office described previously indicate that this court is generally handling its civil cases faster than average. But the court has a number of slow-moving cases and it is slower than average in disposing of cases that go to trial.

C. The District and Magistrate Judge Interviews. Advisory Group members interviewed the district and magistrate judges to get their observations, which were many and valuable. For the most part, the judges addressed issues of court management and delay rather than cost. On one cost issue, however, they all agreed: judges should take cost into account in ruling on discovery and scheduling.

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[24]*See* Priest, *Private Litigants and the Court Congestion Problem*, 69 B. U. L. Rev. 527, 533 (1989).

The district judges were also unanimous in reporting that their criminal cases have had a negative impact on their civil calendars. Most judges reported that multiple-defendant criminal cases, the increasing federalization of crimes, the Speedy Trial Act, and the requirements of the Sentencing Guidelines have all adversely affected their ability to attend to their civil cases.

The kinds of civil cases the judges most frequently identified as causing serious delay were in the category of "copyright, patent and trademark." Patent cases in particular are virtually always complex and demanding. Civil rights, RICO, securities and commodity cases, and prisoner and *pro se* litigation were also frequently mentioned. The judges had a wide variety of views on what was the most time-consuming aspect of their dockets, but summary judgment motions were a particular bane. Trying cases, preparing findings of fact and conclusions of law, writing opinions, and conducting pretrial conferences were among the other time-consuming obligations mentioned.

Many judges perceived a variety of discovery abuses. Some thought there should be a limit on the number of depositions allowed and that early exchange of documents should be required, but the majority felt that the court should not adopt general orders that would establish tracks governing discovery and trial. Most felt that Rule 16 of the Federal Rules of Civil Procedure was performing its function in providing judges and litigants with a framework for case management.

While there was a divergence of views on how best to make use of the magistrate judges, many district and magistrate judges agreed that referral of dispositive motions to the magistrate judges was inefficient and could increase both delay and cost. This is because the magistrate judge's report and recommendation is subject to *de novo* review by the district judge, complete with new briefing by the parties. Many judges felt there were better ways to make use of the magistrate judges' position. We address these issues in a later section of this Report.

The judges were divided in their opinion of whether there was judicial delay in deciding fully briefed motions. Most judges thought that the prompt disposition of motions is the responsibility of the

entire court, but there was little agreement on how that responsibility should be translated into policies on such issues as how to deal with particular judges' accumulated backlog of undecided motions and bench trials or untried cases.

D. The Attorney Survey. The CJRA requires each advisory group to consider the ways in which litigants and their attorneys approach and conduct litigation and how this might contribute to unreasonable delay and excessive cost. 28 U.S.C. § 472(c)(C). To get as wide and as systematic a response as possible, we conducted a survey of attorneys who have recently practiced in this court.[25]

1. The Methodology. We took a stratified random sample of roughly 6800 of the civil cases that closed in calendar year 1991.[26] The cases were divided into sixteen categories by case type and by time within which the case closed.[27] Roughly twenty cases were selected at random from each of the sixteen groups and a questionnaire was sent to every lawyer who had filed an appearance in those cases, about 1200 lawyers in all. Almost 400 returned completed questionnaires, which we believe is a very good response rate.

The sample was skewed to include three times as many older cases as would appear in a purely random selection.[28] The survey was designed this way in part because we thought we would obtain

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[25]We did not try to survey litigants in the same way. It is not possible to contact litigants directly because court records do not reflect the addresses of the parties. Therefore, we would have had to ask the lawyers who appeared in each case to send a questionnaire on to their clients. Some other advisory groups that tried this approach experienced an extremely poor response rate -- too low to yield any meaningful information. We therefore concluded that it was not cost-effective to conduct an extensive survey of litigants.

[26]Mortgage foreclosures, student loan cases, and prisoner *pro se* petitions were excluded from this figure because these cases involve very few lawyers.

[27]The cases were divided into four categories by type of case: private contract, private civil rights, labor, and "all other." Each of these four case types was further divided into four categories describing a range of time in which the cases terminated: 0 to 6 months; 6 to 18 months; 18 to 36 months; and over 36 months.

[28]Only eight percent of the cases terminating in calendar year 1991 were over thirty-six months at the time they closed, but they constituted twenty-five percent of the sample cases.

more complaints on excessive costs and/or delays from more protracted cases (and we did). There also had to be enough cases in each group to assure that meaningful inferences could be drawn from the responses. This intentional skewing toward older cases enables us to make a conservative analysis of the conditions in this district, a fact to be borne in mind when drawing overall conclusions from the survey.

The questionnaire was divided into separate sections on delay and cost because we wanted to see to what extent attorneys would report one without the other. (The respondents did in fact draw a distinction.) Respondents were asked to limit their answers to their experience in an identified case. We thereby hoped to reduce the anecdotal effect of general impressions unrelated to a specific case. The attorneys were also asked to rate the effectiveness of various reforms that have been proposed or adopted by other courts and certain technological improvements.[29]

2. The Findings.

a. General Observations. Sixty percent of the respondents reported they experienced neither unreasonable delay nor excessive cost in their particular case. The forty percent who did report a problem may be categorized as follows:

- seventeen percent experienced both excessive costs and unreasonable delays in their cases;
- fourteen percent complained of delay, but did not find the cost excessive;
- eight percent reported excessive cost, but had no problems with delay.

See **Chart 6**, attached. Since defendants' lawyers are often accused of dragging out the proceedings, one might expect that a higher percentage of plaintiffs' lawyers than defendants' lawyers would complain about delays and probably costs. This did not occur: the results showed that sixty percent of both groups reported no complaints about either delay or cost.

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[29]Analysis of the responses to a second questionnaire to practitioners that includes a section on the impact of the criminal calendar on civil cases will be included in the Final Report.

We also found that the percentage of respondents with complaints was relatively low in cases that closed in less than two years (about twenty percent). That complaint rate nearly tripled for cases that took more than two years to terminate. It is not surprising that there are many complaints after two years. But it is interesting that complaints stay at a relatively even level until the two year mark. This may indicate that lawyers have an expectation that cases in this court will be resolved within two years. After two years, however, this expectation is defeated and the lawyers become much more likely to perceive problems with delay and/or costs. It may also be that in some absolute sense, lawyers believe that two years is as long as almost any case should take.

The subjective nature of delay and excessive cost was well-illustrated in those situations in which more than one attorney completed a questionnaire arising from the same case: their opinions on the existence of delay or excessive cost often differed. It is worth noting again that the perception of delay and excessive cost did *not* depend on whether the attorney represented the plaintiff or the defendant. Clearly, we are dealing with terms that do not have a well-defined meaning.

b. Causes of Unreasonable Delay. The questionnaire asked respondents who complained of unreasonable delay to choose from a list of contributing factors, including "conduct of opposing counsel," "conduct of clients," "conduct of insurers," "excessive discovery," "judicial inefficiencies," and "other" (which they could specify themselves). Respondents could choose as many causes as they wished. The most often-cited causes of delay were "conduct of the opposing counsel" and "judicial inefficiencies."

Far fewer identified "excessive discovery." *See* **Chart 7**, attached. When asked to further describe the offending "conduct of the opposing counsel," respondents most often ascribed blame for delay to two factors: (a) lack of professional courtesy; and (b) failure to attempt to resolve disputes in good faith without judicial intervention. It is noteworthy that the respondents blamed these attitudinal factors more often than excessive discovery. Of those who ascribed unreasonable delay to the judge, failure to rule promptly on dispositive motions was mentioned most often.

c. Causes of Excessive Cost. Those who said the cost in their case was excessive were given the same list of contributing factors as those who reported delay. Again they could pick more than one factor. Two-thirds of those reporting excessive cost ascribed the problem to the conduct of opposing counsel. Half blamed judicial inefficiencies. Half blamed excessive discovery. More than forty percent attributed excessive cost to conduct of the client. *See* **Chart 8**, attached. Of those who identified conduct of the opposing counsel, the behaviors most often mentioned were: (a) failure of the opposing lawyer to attempt to resolve issues without court intervention; (b) lack of professional courtesy; and (c) overbroad document requests. Again, the judge's failure to rule on dispositive and other motions promptly were the reasons most often mentioned by those who ascribed excessive costs to the judge.

d. Reforms That Might Be Effective in Reducing Delay and/or Cost. Respondents were asked to describe the potential impact of thirty-two proposed reforms on delay and cost. The list included: proposed amendments to the Federal Rules of Civil Procedure calling for limitations on the kinds and amount of discovery and for automatic prediscovery "disclosure" of relevant persons and documents; cost-shifting and other limits on the use of discovery; increased use of telephone conferences with the court; a requirement of premotion conferences; a requirement that parties and/or their insurers attend settlement conferences with the court; and various kinds of alternative
dispute resolution methods, such as mandatory arbitration, voluntary arbitration, and early neutral evaluation.

The reform most often chosen by responding attorneys as a means of reducing both delay and cost was the proposal that broader discovery be conditioned upon shifting the cost of that discovery in instances where the burden of responding appears to be out of proportion to the amounts or issues in dispute. Other proposals most often identified as effective in reducing delay and, to a lesser extent, cost were:

- increasing the availability of telephone conferences with the court;

- requiring early, automatic disclosure both of witnesses likely to have information bearing significantly on the pleadings and of documents relied on in preparing the pleadings;
- assessing the cost of discovery motions on the losing party; and
- defining the scope of allowable discovery by balancing the burden of discovery against its likely benefit.

e. Technological Advances That Might Affect Delay and/or Cost. Respondents were given a list of items, some sophisticated (e.g., instant access to computer-assisted transcription of courtroom testimony); some familiar (e.g., telephone conferences). Nearly all respondents thought that increased use of the telephone for both conferences and hearings would reduce cost; seventy-five percent thought they would reduce delay. Other technologies that respondents most often identified as having the potential to reduce cost and, less often, delay include:

- authorizing attorneys to file materials by fax;
- allowing computer access to the Clerk's automated docket to retrieve copies of the docket and obtain the current status of a case; and
- installing video-conferencing equipment in the courtroom which would (a) reduce the need for attorneys to appear on routine matters or (b) facilitate the testimony of witnesses not readily available for trial.

E. The Causes of Delay and Cost in This District. Our review leads us to the following conclusions. There is a percentage of cases that are moving more slowly through the system than they should be. These cases tend to be those which cannot be resolved short of trial. We believe that the delay in these cases may be attributed to a number of factors. First, the difficult and time-consuming nature of the civil cases filed in this district taken together with the sheer total number of cases per judgeship is responsible for a large part of the problem. The expanding demands of the criminal caseload have also caused significant delay in civil litigation. We believe that lawyers can behave in ways that contribute to delay. Excessive discovery is a manifestation of this, but it is so often highlighted that it warrants separate mention. Finally, delay occurs when judges do not issue rulings or try cases within a reasonable period of time.

We also conclude that these same factors can be responsible for excessive cost, defined primarily as attorneys' fees, at least some of the time, and that in fact excessive discovery may be more likely to raise costs than to create delay. We discuss each of these causes in turn.

1. The Difficult and Time-Consuming Nature of Civil Cases Filed in This District. The difficult and time-consuming cases facing this court include: complicated business litigation arising from the court's location in a major commercial center; the substantial number of civil rights cases which are twice as likely to go to trial as many other kinds of cases; a significant volume of prisoner litigation including both injunction cases seeking supervision of chronically inadequate facilities and many individual damage suits: These latter cases rarely settle and additionally exhibit a poor history of cooperation by counsel for defendants (often the consistently understaffed and overworked state Attorney General's Office) that results in unnecessary delays and wasted judicial resources.

There is little, if anything, the court can do to alter its mix of difficult cases. We do strongly recommend, however, that Congress carefully examine proposed legislation so that the ramifications of new laws on the courts are considered and provided for in planning judicial resources needed to cope with the legislation. It has been suggested that an Office of Judicial Impact Assessment be created to predict the impact of proposed legislation upon the federal courts,[30] a proposal we endorse.

2. Court Resources and the Number of Cases Per Judgeship. As we have discussed above, the number of civil cases per judgeship jumped from 240 in 1962 to 401 in 1992. The difficulty of the cases has increased even more dramatically. The number of weighted filings per judge in 1992 was 462 cases; it was half that in 1970.

The judges themselves are divided on how to deal with this problem. Some believe that proper case management techniques provide them with sufficient means to dispose of cases and prevent a backlog

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[30]*Report of the Federal Courts Study Committee* at 21-23 (April 2, 1990). The Administrative Office currently has a very small judicial impact staff, which primarily responds to *ad hoc* requests from Congress.

from building. They think it inadvisable to add more judges to the court for several reasons. First, they think the addition of a small number of judges would not materially affect the caseloads of the current judges, but it would make Congress less willing to heed protests about expanding federal jurisdiction. Second, they believe the federal judges should remain limited in number, in part to preserve the specialness of the court and collegiality among the members, but also because an expansion at the district court level would lead to a proliferation of case law that the courts of appeal do not have the resources to rationalize without themselves expanding in an endless cycle. These judges believe that additional law clerks would be a better way to increase productivity of the chambers, particularly for those judges who have a backlog.

Other judges believe that the current caseload level is too high to allow for the proper administration of justice. They are concerned that if judges are pressured to push through a large number of cases to meet demands about reducing delay, a lesser brand of justice might be dispensed: quicker, perhaps, but less reasoned. They are concerned that law clerks may bear the brunt of the decision-making on motions without proper supervision from a judge who does not have enough time in the day.

Judicial Conference guidelines refer to a goal of 400 weighted filings per judgeship, which is itself a very high number. This would allow our court to increase the number of judgeships to as many as twenty-seven. We think that the caseload per judge in this district is too high when viewed against the national standard. Some increase in the number of judges is desirable, although the appointment of new judges presents a challenge to the court in terms of orientation and collegiality, both of which we believe to be of considerable importance. Balancing these factors, we think that the number of active district judges in this court should be increased from twenty-two to at least twenty-five.

An increase in the number of magistrate judges in this district to the Judicial Conference's recommended ratio of one magistrate judge for every two district judges would also help ease the burden on the district judges and increase the availability of these flexible judicial officers.

3. The Criminal Caseload. As we have discussed above, criminal matters from indictment to sentencing are absorbing more and more judicial time. If the number of prosecutions increases, as is expected under Operation Triggerlock, and Congress continues to expand federal jurisdiction over "street crimes," the Speedy Trial Act priorities will foil attempts to move civil cases quickly. In addition, criminal megatrials present mammoth administrative challenges to the individual judges and the court as a whole. The time requirements of the Sentencing Guidelines also take a significant toll on the judge's time. Congress and the Executive Branch must be aware of the increased pressure criminal matters are imposing on the judges' ability to address their civil cases. An assessment of this impact prior to passage of new criminal legislation is especially important if Congress expects courts to expedite their civil cases.

4. Conduct of Attorneys. The attorney survey produced several striking results. First, even in a selection heavily skewed to older and presumably more problematic cases, a great many lawyers representing both plaintiffs and defendants reported neither unreasonable delay nor excessive costs in their cases. Second, those that did have problems with either delay or cost more often laid the blame on their opponents' conduct -- lack of professional courtesy and failure to attempt to resolve issues in good faith without the court's intervention -- and judicial inefficiencies rather than on excessive discovery.

Our adversary system requires attorneys to walk a fine line between their dual roles as officers of the court and advocates for their clients. We recognize that the business of law has shifted as clients, particularly commercial clients, assert more control over their litigation. To get and keep business, lawyers must prove themselves to the client. Whether through ignorance or design, some lawyers think that proving themselves means abandoning ordinary principles of civil behavior, wasting time and money on disputes that have little, if any, relevance to the matters at issue.

It is essential that the bench and bar emphasize the importance of professional and ethical behavior. It is partly a question of education and partly a question of attitude. It is something that professors must pass on to law students, older lawyers to younger lawyers, and judges to counsel.

Civility by both judges and lawyers in the courtroom sets the tone for behavior in the lawsuit. Not only does this make the proceedings more professional and in keeping with the dignity of the court, it will also make the process more efficient. If our respondents are correct, this will inure to clients' economic advantage in the end. Under the leadership of Judge Marvin Aspen, the Committee on Civility of the Seventh Federal Judicial Circuit has drafted Standards of Professional Conduct for litigation in this circuit, the goal of which is to heighten awareness of the need for professional integrity and behavior appropriate to the administration of justice on the part of both judges and lawyers in the federal courts.[31] Every judge and lawyer should become familiar with and live by these standards. In addition, the court should adopt specific standards for conduct at depositions, which the judges should enforce with sanctions. We further address these issues in the section on principles of case management.

*5. **Excessive Use of Discovery.*** Discovery abuse is mentioned so often in anecdotes that there is no doubt it exists and that it causes delays and unnecessary cost. But stringent judicial control of discovery must be viewed with caution. Federal procedure is predicated on notice pleading, which allows a relatively abbreviated recitation of the facts, with discovery designed to flesh out the rest. Lawyers who do not make adequate use of discovery may be liable for malpractice by unhappy clients. We do not think that the judge is in the best position to determine what discovery will best serve each party. In our adversary system, that is the lawyer's function. What the judge can provide, however, is the voice of experience and perspective. Moreover, in the increasingly competitive world of law, larger clients can assert more control over the lawyers' decisions on discovery than was previously the case. Lawyers who want repeat business would be foolish to run up the bill -- such clients can take their business elsewhere the next time.[32]

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[31]*Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit* (1992).

[32]This observation is undoubtedly more true for larger clients than for those who do not have in-house counsel supervising the litigation. On the other hand, bigger corporate clients may be more likely to be parties to big lawsuits with substantial discovery that may benefit from client supervision.

We conclude that what discovery is appropriate in a particular case is a question that must be resolved by the responsible input of the lawyer, an informed client, and the judge. We address this in more detail in the section on the CJRA principles of case management.

*6. **Undecided Motions and Untried Cases.*** The court's statistics indicate that generally the judges in this court are moving their cases along with reasonable dispatch -- a relatively small number of judges are responsible for more than half the motions still pending after six months.

Judges who allow a significant amount of time to elapse before a ruling is issued or a case is tried cause delay and often extra expense for the parties. The first line of defense against such delay lies with the individual judges themselves. It is clear from our interviews and courtroom experiences that the judges feel pressure from all sides for speedy resolution of disputes. The CJRA has stepped up that pressure by providing for publication of the names of judges who have either motions pending or bench trials under advisement for more than six months, along with the names of the cases. Judges with cases that are more than three years old are also identified. 28 U.S.C. § 476. As we discuss later, we think this mechanism will on the whole be beneficial, although it is not without drawbacks.

It is also the responsibility of the district court as an institution to ensure that litigants are not unduly penalized by undecided motions and untried cases. The Advisory Group discussed whether the Chief Judge and the Executive Committee should take a more active role in redistributing cases that have been long-ready for trial or have long-pending fully-briefed motions. This concept is controversial. Federal judges have a great deal of control over their courtrooms and the cases assigned to them. Their independence is fostered by the tenure provision of Article III so that external attempts to impose control would raise difficult constitutional issues. A majority of the judges could probably adopt rules that modify assignment of *new* cases to judges for whom a serious backlog has developed, but we conclude that such rules are unwise for several reasons.

First, adoption of mandatory assignment rules, the purpose of which is to reduce judge-caused delay or backlog, presupposes that there are meaningful time limits that can be defined and enforced. Second, such rules would interfere with the individual calendar system, departure from which would have serious adverse consequences of its own. Since many of our district judges are moving most of their cases along with reasonable speed (at least compared to most other federal courts), such assignment rules could function as a disincentive to them. This also raises the specter of cases being funnelled away from or to certain judges by a canny or corrupt litigant.

On the other hand, general efforts to expedite trials such as the recently adopted "short civil trial rule" may prove effective. Local General Rule 2.30(J) allows judges to place in a pool those cases that are ready for trial (defined to require a final pretrial order) and will last no more than five days. Visiting judges or judges from this district with time available can pull a case from that pool according to prescribed procedures. The rule has limitations: the requirement of a pretrial order may force litigants to go to the expense of preparing a pretrial order even though they might not otherwise need one; the parties lose the judge who shepherded their case through its pretrial phases; and it may be that few district judges can take time from their own cases for even a short trial. But it is a codification of what some judges have been doing on an informal basis for years. We endorse the institutionalization of this collegial practice.

We also recommend that the court adopt a mechanism whereby one or more parties can learn the status of an undecided motion or bench trial. As we discuss in a later section, the Clerk's Office can develop a form request or otherwise act as intermediary, routinely obtaining such information after a defined length of time has passed. This can serve to alert the judge to the amount of time elapsed without personalizing the request.

Most judges we interviewed did not think that the current, somewhat vague, supervisory powers of the Chief Judge and the Executive Committee should be increased to grant them more specific

authority with respect to undecided motions and bench trials or trial-ready cases that have languished for long periods of time. We agree for the reasons set forth above. As a practical matter, however, the Chief Judge and the Executive Committee may exercise significant control over the workings of the court through leadership, persuasion and collegiality. We recommend that they address problems with judge-caused delay through private and informal conferences with district or magistrate judges. The court should also continue to sponsor, and urge its judges to participate in, conferences, seminars and social events that create and maintain a learning environment and a feeling of collegiality and cooperation among all the judges on the court.

PART TWO: CJRA PRINCIPLES THE ADVISORY GROUP MUST CONSIDER.

Section 473(a) of the Civil Justice Reform Act requires each district court, in consultation with its advisory group to consider six "principles and guidelines of litigation management and cost and delay reduction." All pilot courts are required to include these principles in their expense and delay reduction plan and to evaluate the resulting effect on delay and cost. Other district courts, such as this one, must consider the principles but may choose appropriate measures for themselves. In this section of the Report, we set out each of these six principles and guidelines and our recommendations.

VI. SYSTEMATIC, DIFFERENTIAL TREATMENT OF CIVIL CASES.

The statute requires the Advisory Group to consider:

> the systematic, differential treatment of civil cases that tailors the level of individualized and case specific management of 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. 28 U.S.C. § 473(a)(1).

According to the concept of "differentiated case management" used by the Brookings Task Force on Civil Justice Reform in its report (which was instrumental in giving rise to the CJRA), cases should be channelled according to their needs and characteristics into tracks that limit the time for discovery and trial.[33] The concept of tracking has mushroomed beyond simple time limits, however, and now refers to a variety of case management techniques applicable to variously defined classes of cases.[34] The overarching theory is that when appropriate case management techniques are applied systematically to

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[33]Brookings Institution Task Force, *Justice For All: Reducing Costs and Delay in Civil Litigation*, at 14 (1989).

[34]*Cf.* S. Rep. No. 416, 101st Cong., 2d Sess., at 23 (1990).

specific groups of cases, the cases will be processed more efficiently by both judges and lawyers with less expense to the parties.

As originally introduced, the Civil Justice Reform Act would have required all federal courts to adopt a tracking system. But the Judicial Conference expressed concern that the concept had not been tested adequately to support mandatory imposition on all courts. The legislation was revised to require only that courts consider the concept, with the exception of the pilot courts and two "demonstration" courts that were required to devise and implement their own tracking systems. Pub. L. No. 101-650, § 104.

The Advisory Group discussed the array of differentiated case management systems adopted by various early implementation and pilot courts. Some have as few as two tracks, others as many as six. One particularly fast court declined to adopt any tracking system. There are also numerous methods for determining how, when, and by whom a case is assigned to a track. For some courts, the concept of tracking greatly exceeds the notion of time limitations for discovery and trial. In the plan adopted in the Northern District of Ohio, for example, the track presumptively determines most procedural aspects of the case: not only the duration, but also the kinds and extent of allowable discovery, the length of the briefs, the number of witnesses at trial, and the length of the trial. Other courts use the tracks less sweepingly.

The Advisory Group also examined the provisions of F. R. Civ. P. 16, which addresses case management. Rule 16[35] was extensively revised in 1983 to stress the role of the judge in managing the pretrial aspects of a case, emphasizing conferences and scheduling orders as a means of shaping the issues and setting priorities in an efficient manner. The notes to the 1983 amendment state that the revised Rule shifts the emphasis away from a conference focused solely on trial (now called the final pretrial

[35]References to a "Rule" in the text are to the Federal Rules of Civil Procedure, unless otherwise noted.

conference) and toward management that embraces the entire pretrial phase. The judges in this district generally accomplish this by means of status hearings, a format in which the litigants appear in court and report to the judge on what they have done and what they intend to do. The judge and the litigants also use the status hearing to raise any other issues that may need attention.

It was recognized at the time of the amendment to Rule 16, however, that pretrial conferences and scheduling orders were not necessary or desirable in all cases, and the Rule allows courts to make their own exceptions by local rule.

In this district, Local General Rule 5.00(A) provides that, with specified exceptions, all cases will be subject to pretrial procedures set forth in a Standing Order adopted by the court. The Standing Order sets forth in detail the items to be discussed at a pretrial conference or status hearing, including: issues raised by the pleadings, jurisdictional questions, contemplated motions, discovery needed, as well as time limits for discovery. The Order stresses the need to explore settlement thoroughly and authorizes the parties to invite the judge's participation in negotiations, if they so desire.

Local General Rule 5.00(B) specifies eleven classes of cases to which the district's prescribed pretrial procedures do not apply. Some of these classes are exempted because the cases require no discovery (e.g., reviews of administrative rulings on Social Security matters); or because this court's experience indicates that pretrial intervention is rarely justified and would thus be wasteful of the court's resources (e.g., mortgage foreclosures.)

Some classes of cases receive special administrative treatment beginning with the time the complaint is filed. Actions to collect defaulted student loans are kept on a special calendar, assigned to a magistrate judge and usually handled on papers alone. In any given year, a large volume of these cases can move through the court without absorbing significant judicial time. Prisoner *in forma pauperis* petitions are assigned to a judge and immediately directed to the staff law clerks responsible for prisoner matters. The law clerks' expertise helps expedite the judges' rulings on these petitions.

We doubt that imposition of a more formal tracking system would speed the slowest cases in this court -- the two or three percent that go all the way to trial. It is almost redundant to say that these cases tend to be complex. Tracking would add a layer of regulation that has a cost of its own and could well result in additional disputes over what is appropriate in a particular case. Moreover, many judges we interviewed rejected the notion of tracks. Some stressed that an efficient case management style uses a flexible approach geared to the specific case.

We conclude that this district's systematic selective treatment of cases for pretrial purposes and specialized administrative procedures, while not a tracking system *per se*, fulfills the CJRA's prescription for differentiated case management. A significant number of cases are exempted from the time and expense of pretrial procedures. For those cases that do need more active supervision, the judge can fashion a case management plan tailor-made for each case at pretrial conferences or status hearings.

We await with interest the results of the various districts that have adopted formal tracking systems. However, until those systems are shown to be effective in reducing delays and possibly cost to the litigants, we believe that the current provisions of the Federal and Local Rules give this court the tools it needs to resolve its civil cases expeditiously.

VII. EARLY, ON-GOING INVOLVEMENT OF THE JUDICIAL OFFICER.

The CJRA requires us to consider the early and continued involvement of the judicial officer in a number of areas.

A. Assessing and Planning the Progress of the Case.

We must consider:

> early and ongoing control of the pretrial process through involvement of a judicial officer in (A) assessing and planning the progress of a case. 28 U.S.C. § 473(a)(2)(A).

The Advisory Group agrees that the judge's early and continued participation in the case can be very effective in giving shape to the litigation. The experience of our members has been that, in many instances, the earlier the parties confer with the court, the more quickly the case will progress. Rule 16 embodies this principle. It requires the court to confer with the parties no later than 120 days after the complaint is filed and to issue a scheduling order limiting the time to amend, file motions and complete discovery (except for those cases exempted by local rule). Some of our judges intervene very early. They have their clerks contact the plaintiff's lawyer at the time of filing and set a status date within thirty days, whether or not the complaint has been served. It is the plaintiff's responsibility to contact the defendant. The parties come back for status hearings on a regular basis, and the judges keep notes of what has transpired and what is expected at the next conference. Judges have found that this very early intervention prevents cases from stagnating. We do not suggest that this should be *required* of all judges, but it is noteworthy that those who have used very early intervention procedures report earlier resolution of many of their cases.

Most of the judges we interviewed felt that Rule 16 was performing its function in giving judges a framework for case management. But there is expense attached to these appearances before the court.[36] The judge and the lawyers must work to ensure that the time and money spent attending and preparing for pretrial conferences are time and money well spent. All participants, including the judge, should be prepared. Many of the respondents in our survey thought that telephone conferences would reduce the cost of litigation. It may oftentimes be beneficial for the judge and the litigants to meet face to face, but the court should consider telephone conferences when appropriate.[37]

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[36]Research indicates that federal judges require more pretrial conferences than state court judges and are more actively involved in the case, with resultant higher legal fees for the client. Kritzer *et al.*, *Courts and Litigation Investment: Why Do Lawyers Spend More Time on Federal Cases?*, 9 The Justice System Journal 1 (1984).

[37]It should be noted, however, that while telephone conferences may reduce lawyers' fees and expenses, they will also increase the telephone bill for the court by a potentially large amount.

Although we believe the judge's informed participation is important, we have some reservations about the extent to which a judge can dictate the appropriate course of action in a case. In view of the heavy caseloads and diverse bodies of applicable law, a judge's understanding of the legal and factual issues in any one case is necessarily limited. Our underlying concern is the lack of reviewability of decisions made in pretrial conferences. Some commentators have expressed grave doubts about stressing judges' management skills at pretrial conferences, especially if decisions are made in chambers on the basis of untested statements by the lawyers without a court reporter present.[38] Even if a court reporter is present, the judges have a great deal of discretion in pretrial proceedings and they must be vigilant in ensuring that the parties' rights are not sacrificed in the name of efficient management.

B. An Early, Firm Trial Date.

The CJRA also asks us to consider:

> early and ongoing control of the pretrial process through involvement of a judicial officer in . . . (B) setting early, firm trial dates such that the trial is scheduled to occur within eighteen months after 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. 28 U.S.C. § 473(a)(2)(B).

It is the confirmed experience of many, both on our Advisory Group and elsewhere, that a firm trial date is a key factor in resolving litigation. We endorse this concept heartily. But the ramifications of the dramatically expanded number of criminal cases Congress and the Executive Branch have imposed upon the court, compounded by the priorities of the Speedy Trial Act, make it extremely difficult for the

[38]*See* Resnick, *Managerial Judges*, 96 Harv. L. Rev. 374, n. 137 (1982).

court to set firm, much less early, trial dates in civil cases. Moreover, the time-consuming nature of the court's cases to some extent limits the speed with which they can be resolved.

The Act sets a goal of eighteen months for a civil trial date, but the practicalities of our court dictate that it remain a goal, not a requirement. We recognize that this court takes longer to dispose of civil cases that actually go to trial than the national median and that the judges must attend to these slow-moving cases in order to resolve them more quickly. But we do not think a judge should be required to schedule trial for a date within eighteen months of the complaint being filed. It may be helpful for the judge to set eighteen months or earlier as a goal, but short deadlines for discovery and motions should be premised on a short trial date only if it is a realistic possibility. The "hurry up and wait" phenomenon can be expensive and wasteful if the trial date cannot be honored. Nor do we think that the judge must certify the reasons why a trial date within eighteen months is not possible. There are more constructive uses of a judge's time.

A more positive approach to attaining earlier trial dates is the "short civil trial rule"[39] that we discussed in an earlier section. This rule will benefit the parties by affording them the possibility of trial more quickly than would otherwise be possible. It gives the parties and their lawyers the motivation to focus on the case and, as often happens, settle the dispute short of trial.

We also note that since magistrate judges cannot preside over felony trials, their time is not constricted by Speedy Trial Act priorities. They are therefore in a better position to set a firm trial date in civil cases they try on consent of the parties. Parties who want an early trial date should be reminded of this possibility.

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[39]Local General Rule 2.30(J).

C. Controlling the Extent and Timing of Discovery.

We must consider:

> early and ongoing control of the pretrial process through involvement of a judicial officer in . . . (C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion. 28 U.S.C. § 473(a)(2)(C).

Discovery is the little-loved child of the Federal Rules of Civil Procedure. Before the adoption of the Rules in 1938, the only information most litigants could glean about their opponent's case prior to trial was set forth in the pleadings.[40] Parties had no right to learn anything else about their opponent's case until trial and only by filing a bill in equity could they obtain information about their own case that was in their opponent's possession.[41] Trial by surprise was the rule.

The drafters of the Rules believed they were creating a new era of openness -- notice pleading followed by broad discovery that would allow litigants to get information they needed to evaluate their case properly and either settle it or try it fairly on the merits. Half a century later, discovery is widely reviled. Judges, clients and lawyers agree and anecdotes abound: discovery abuses are perceived to be rampant.[42] Clearly, something must be done. But few would advocate a return to the battle of

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[40]*See* Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective,* 135 U. Pa. L. Rev. 909, 914-17 (1987).

[41]Connolly *et al.*, *Judicial Controls and the Civil Litigative Process: Discovery*, at 5-10 (1978).

[42]In a survey conducted by the Seventh Circuit Bar Association, lawyers and judges were asked to identify the one thing they could change about the American judicial system. A third of the respondents answered: discovery. In our own survey, there were many complaints about discovery. But a higher percentage of lawyers attributed their problems to "conduct of the opposing counsel" and "judicial inefficiencies" than to excessive discovery.

common law pleadings. As long as our judicial system has notice pleading, discovery will be necessary.[43] The challenge is to see that it is used properly.

The Advisory Group believes that early participation by the court can help rationalize discovery. We also recommend that discovery should be conducted in phases in most cases. We believe that this is a commonsense way to proceed. The first phase should involve information necessary to evaluate the case, lay the foundation for a motion to dismiss or transfer, if appropriate, and explore settlement possibilities. The remaining phase or phases would focus on other motions, if warranted, and preparation for trial. In determining what is appropriate for each phase, litigants should plan ahead, to the extent possible. Initial limits on the scope or form of discovery should be such that, if the issues are later broadened, additional document productions or depositions will be supplemental, not duplicative of what was initially done.[44]

As soon as possible after service of the complaint, counsel should attempt to agree on a discovery schedule that they will carry out among themselves or present to the judge at an early pretrial conference. The lawyers should address the anticipated scope of the first phase (subject matter and time period, necessary documents and witnesses, and tentative cut-off dates); and more generally discuss what would be needed in remaining phases. If they cannot agree, each side should prepare its own proposed schedule. The parties will then be prepared for a conference with the judge. The court should modify its Standing Order governing pretrial procedures to provide that discovery proceed in phases in all appropriate cases.

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[43]*See, e.g.*, Easterbrook, *Comment: Discovery As Abuse*, 69 B. U. L. Rev. 635, 640-642 (1989). It has been suggested, however, that the Federal Rules embody the historical flexibility and discretionary aspects of equity, with equity's resultant unpredictabilities. Subrin, *supra* note 40, at 925-26. Subrin suggests that this unpredictability may be a major cause of the lamentable state of modern civil litigation. He advocates a revival of certain more rigid, and therefore more predictable, aspects of common law thinking and procedure.

[44]*See, e.g., The Manual On Complex Litigation 2d, supra* note 21, at § 21.41.

We do not think that discovery should be controlled by fixed limitations on the kinds or amount of discovery, with the exception of interrogatories which are already limited to twenty by Local General Rule 9(G). Most judges believe this rule is accomplishing its purpose. We are aware of the proposed amendment to F. R. Civ. P. 26, which would specifically authorize courts to limit the number of requests to produce documents and the number of depositions per side, as well as how long the depositions may last. We are also aware of various discovery limits that have been imposed by courts in other districts, primarily those that have also adopted formal tracking systems, but at least one that has not.[45] It is our opinion, however, that this decision should be left to the judge and litigants in the individual case.

Incivility is becoming an insistent theme in litigation and, as has been noted, nowhere is it more prevalent than in depositions.[46] Moreover, the way in which depositions are conducted is far from uniform. This gives rise to a substantial amount of wasted time and needless bickering. The court should adopt specific guidelines for conduct at depositions, including: procedures for establishing where depositions are to be taken, who may attend, how to handle documents, what objections are allowed, and when a lawyer may instruct the witness not to answer. These guidelines should be incorporated into every pretrial order governing discovery issues, with the explicit statement that violations will be subject to sanctions. The court should ask the bar associations to draft these guidelines.

If serious disputes do arise during depositions, we encourage the judges to make themselves reasonably available to resolve those disputes. Bench and bar are divided on whether increased judicial involvement will be effective in discouraging disruptive behavior at depositions. Some judges fear a serious encroachment on their time. At the very least, each judge should inform the parties of his or her policy on availability at the first pretrial conference or status hearing.

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[45]E.g., the Eastern District of Wisconsin has adopted a local rule limiting depositions to six hours and requiring that they be videotaped.

[46]*Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit* at 19 (1991).

Sanctions are available to help control discovery gone awry. F. R. Civ. P. 26(g) and 37. But sanctions are controversial. Some commentators have observed that the system should be using carrots, not sticks, although it is unclear what carrots the system can offer.[47] Moreover, sanctions require enforcement proceedings and absorb time, energy and money from all sides.[48] The sanctions levied now are very often monetary. This adds to expense and may or may not have a truly prophylactic effect. Sometimes they only heighten hostility, which leads to greater intransigence and results in needless delays and extra cost. Proposed Amended Rule 37 seeks to expand the current conception of sanctions by specifically authorizing non-monetary penalties, such as a declaration that specific facts are established or a statement to the jury regarding the offending non-disclosure. This approach may prove effective.

Another serious problem with discovery is that of its proportion to the issues and amounts in controversy. One form of discovery abuse often mentioned occurs when one side inundates the other with requests to produce and notices of deposition. This is especially troublesome if there is an economic disparity between the parties. (It can also be very expensive for economic equals, but the ethical and moral implications are less compelling.) It is significant that the judges we interviewed agreed unanimously that they should take cost into account in ruling on discovery and scheduling matters. It is important that they do so.

Almost three-fourths of our survey respondents stated that the court should grant broad discovery requests only upon the condition that the cost be shifted to the party seeking discovery, if the burden of responding to these requests appears to be out of proportion to the amounts or issues in dispute. Our respondents identified this as a means of reducing both unreasonable delays and excessive cost more frequently than any other item we suggested in the survey. Another significant percentage took the more generalized position that defining the scope of allowable discovery by balancing the cost against the likely

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[47]*See, e.g.*, Weinstein, *What Discovery Abuse?*, 69 B. U. L. Rev. 649, 655 (1989).

[48]Rosenberg, *The Federal Civil Rules After Half a Century*, 36 U. Me. L. Rev. 243, 244 (1984).

benefit would reduce both costs and delay. A large number thought that assessing the costs of a discovery motion on the losing party would have a positive impact.

Rule 26(b)(1) currently allows the court to limit discovery if it is unduly burdensome or expensive in the context of the case. But the rule does not contemplate cost-shifting, except as a sanction. We recommend that cost-shifting on broad discovery requests be used where appropriate. It allows lawyers to obtain discovery they believe they need by agreeing to pay for it, presumably in consultation with their clients. As clients are becoming more aggressive in negotiating with their own counsel on fees, this should operate as a check on discovery requests. This proposal would also obviate the problem of a judge or a track systematically forcing litigants to take less discovery than the lawyers believe is merited in a particular case.

D. Motions.

We must consider:

> early and ongoing control of the pretrial process through involvement of a judicial officer in . . . (D) setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition. 28 U.S.C. § 473(A)(2)(D).

More than 30,000 motions are filed in this district court each year. The judges in this district do the litigants a great service by entertaining motions at frequent and regular "motion calls." This accessibility may be one reason why the court, as a whole, is able to move many of its cases along with relative speed. But there is a variety of motion call requirements among the judges. Local General Rule 12, which governs motions, provides that a litigant must give two days notice of the motion, if it is served personally. It may be inferred that motions can be heard any working day with proper notice. But motions are heard anywhere from daily to once a week. Some judges require three days notice; another requires a week's notice. The lack of uniformity and conformity to local rule can be confusing to litigants and creates problems for personnel in the Clerk's Office, who are not in a position to decide which motions may be accepted for filing and which may not. F. R. Civ. P. 5(e).

We realize that there are competing considerations. On the one hand, in a large court, simultaneous motions calls could cause a serious hardship for one attorney obliged to be in several places at once; and defined rules of seniority to govern priority of appearance are unworkable in any realistic sense. On the other hand, motions build up: a lawyer who wishes to present a motion to a judge who hears motions only once or twice a week can waste a great deal of time waiting for his or her case to be called. We also realize that extra time for notice may give the judge the preparation time necessary to allow ruling from the bench. But some degree of uniformity in number of motion days, time of motion call, and notice period required would be most helpful. We urge the court to take steps in this direction. If uniformity is deemed impossible, Rule 12 should be amended to state that there are varying practices in the court and that the litigants must ascertain what rules are applied by the particular judge to whom their case has been assigned. The present rule lays as a trap for the unwary or the inexperienced.

Many of the motions filed in this court do not need extensive consideration. The judges can and do rule on many of these motions with dispatch, often without requiring the litigants to appear. This saves time for everyone. Dispositive motions present a more difficult issue. They can result in an early and less expensive resolution of a case or they can cause it to stall. Many litigants say that they have not received prompt rulings on a dispositive motion. On the other hand, a number of judges we interviewed felt they are being bombarded with frivolous motions, particularly for summary judgment, that waste a considerable amount of their time.

Rule 11 allows the judges to impose sanctions for frivolous motions.[49] But we also think it is the bar's responsibility to take a strong stand against the filing of frivolous motions for purposes of

[49]Rule 11 is not a panacea. The 1983 revision of Rule 11, authorizing attorneys' fees for abuses in pleadings and motions, vividly illustrates the dark side of sanctions. Disputes over alleged Rule 11 violations assumed a life of their own as voluminous satellite litigation ensued. The Judicial Conference is now seeking to amend the rule in such a way as to deter abuses without creating additional litigation. The July 1992 proposed amendment specifies that if a penalty is assessed, it will be paid into the court unless the court determines that payment of the opponent's attorneys' fees is needed for effective deterrence.

harassment and delay and to inculcate this ethos in young lawyers. Over the long term, this is an issue of education and emphasis on professional responsibility.

Some courts have adopted a rule requiring premotion conferences so that the judge can weed out frivolous motions before they are filed.[50] We do not agree. We address below one situation in which we believe premotion conferences may be helpful, but for the most part, we conclude they would only add to cost and delay. First, with all the wisdom of the ages, a judge today cannot be familiar with the numerous bodies of law arising in cases being filed in the federal courts. In the American legal system, we look to our judges, particularly our federal judges, for reasoned application of the law.[51] But with the proliferation of federal and state laws and the even greater expansion of case law interpretations, it is becoming increasingly more difficult for judges to reach a reasoned conclusion unassisted by briefs or, at the least, an opportunity to review the authorities. Rulings on dispositive motions should not be based on gut reaction to statements made at a motion conference.

Second, lawyers told in a premotion conference that they should not file a motion they believe is meritorious find themselves in a quandary. Do they risk the judge's wrath and proceed with the motion, possibly damaging their clients' case, or do they acquiesce and lose the opportunity to obtain a favorable ruling? What must a litigant do to protect its record in such a situation?

With respect to summary judgment motions, however, there may be a benefit to a premotion conference for the following reasons. As a means of prodding judges along, the CJRA requires the Administrative Office to publish a report identifying each judge who has motions pending for more than six months along with the case names. 28 U.S.C. § 476. The theory is that judges will make every effort to see that they are not named on that list. The Judicial Conference has interpreted "pending" to

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[50]*E.g.*, the Eastern District of New York.

[51]Most of our survey respondents who had a choice of forum chose federal court.

mean thirty days from date of filing, not from the date the motion is fully briefed.[52] This will undoubtedly increase judges' consciousness of their pending motions. It will also likely decrease the amount of time judges are willing to allow for briefing. This can work a particular hardship on the respondent to a summary judgment motion. In some cases, the movant will have had ample time to prepare its motion, but the respondent needs additional discovery to defeat the motion it has just received.

To alleviate this problem, the party intending to file the motion should ask for a status hearing. If additional discovery is needed, the judge should tell the moving party to hold the motion until the requisite discovery is completed. Once this has been accomplished, the judge should set another status hearing, at which time a tight briefing schedule should be set. In this manner, neither of the parties is prejudiced by the six-month reporting rule.

The six-month rule may present another unintended potential for problems. When granting a dispositive motion, the Seventh Circuit requires that the judge give the reasons underlying the ruling, so that there is a basis for review.[53] It is possible that, as the six month reporting deadline approaches, a judge may find it more expedient simply to deny the motion. We hope and expect that this event will not come to pass.

The CJRA suggests that the judge establish with the parties a time frame within which a motion will be resolved. This could prove helpful as an organizational tool for both the judge and the litigants. It sets a goal for the judge and gives the parties a sense of what to expect, but it is flexible enough to let the judge take his or her particular circumstances into account. We suggest the judges routinely use this technique.

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[52]Administrative Office, *CJRA Report of Motions Pending Over Six Months; Bench Trials Submitted Over Six Months, and Civil Cases Pending Over Three Years On September 30, 1991*, at 1.

[53]Circuit Rule 50. Proposed Amended F. R. Civ. P. 56 would also require the judge to recite the law and facts on which the summary adjudication is based in an order or by separate opinion.

For those motions that do remain undecided for long periods of time, there are various mechanisms by which litigants, wary of seeming to pester the judge for a ruling, can learn the status of their motion. The Clerk could develop a request form that would allow a party's inquiry on status to pass anonymously from the litigant through the Clerk's Office to the judge. The court could also establish a system by which the Clerk's Office notifies every judge on a routine basis of all motions pending for more than a certain period (e.g., three months), thus allowing the requesting party to remain anonymous. This essentially tracks the Administrative Office report, but on a tighter time schedule. The court should explore these proposals.

It has been suggested that oral rulings on motions (or bench trials) will reduce delays because the judge does not need to spend time polishing a written opinion. Not surprisingly, research indicates that preparation of a written opinion does indeed delay the date of the ruling.[54] The Seventh Circuit, addressing this issue in the context of a bench trial, has acknowledged that oral rulings are indeed authorized by the Federal Rules of Civil Procedure. The court cautioned, however, that in a complex case a judge who rules orally may miss a factual dispute that must be resolved for the benefit of the parties and the reviewing court. *Okaw Drainage District v. National Distilleries and Chemical Corp.*, 882 F.2d 1241 (7th Cir. 1991). But such an omission can occur in a written opinion as well. A judge issuing any ruling must be prepared. Given that caveat, we endorse the use of oral rulings when possible.

VIII. COMPLEX AND OTHER CASES.

We must consider:

> for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate

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[54]Connolly and Lombard, *Judicial Controls and the Civil Litigative Process: Motions* at 15 (1980).

> monitoring through a discovery-case management conference or a series of such conferences at which the presiding officer —
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> > (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)];
> > (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;
> > > (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. 28 U.S.C. § 473(a)(3).

The drafters of the CJRA gave special attention to complex litigation because almost by definition it is expensive and time-consuming. Cases may be complex because of the number of parties or of claims, or the difficulty of the legal issues or the subject matter. For such cases, the *Manual for Complex Litigation 2d* is an outstanding resource that presents detailed recommendations on how the judge and litigants should proceed. Its suggested procedures include early resolution of issues wherever possible, document organization, discovery "waves," and many other matters. The *Manual's* utilization should be insisted upon by the judge in cases involving numerous litigants and/or documents.

The subjects identified by the CJRA in the above-quoted section, all of which are addressed in the *Manual on Complex Litigation 2d* in some detail, should be explored by the court and the litigants at status hearings or pretrial conferences as the court deems appropriate throughout the case. We have the following additional comments with respect to specific items.

A. Settlement. Rule 16(c)(7) specifies settlement as a topic for discussion at a pretrial conference. The possibility of settlement is an important consideration for several reasons. First, it usually allows the parties to reach an earlier resolution than if they went through trial. This confers a

benefit not only on one (and possibly more) parties to the immediate lawsuit, but on others as well: the court clears a case from its docket, thereby affording other litigants the judge's attention. Second, settlement can give the parties more options in structuring the resolution than is possible at trial. It should be noted, however, that the pressure to settle can work to the detriment of a party that perceives itself forced into a settlement because of potentially astronomical damages, a long wait to trial, or some other reason.

Judge-hosted settlement conferences are considered an alternative method of dispute resolution and we discuss them as such in a later section of this Report. We state here only that the judge should raise the possibility of presiding over settlement talks with the parties whenever it seems appropriate prior to trial. If a case has gone to trial and an appeal is expected, however, the judge should offer his or her services only if all the parties request it.

B. The Principal Issues in Contention. All cases need to have the principal issues identified as swiftly as possible so that discovery can proceed efficiently. Since discovery sometimes yields information that changes the basis for the pleadings, regular re-evaluation may be necessary. Priorities for resolving the issues may need to be established. For instance, class certification should ordinarily be decided before the merits of the case, but it may be appropriate to decide a motion to dismiss first, if that can dispose of the case. A rigid order of procedure is thus not advisable.

C. Bifurcation of Issues for Trial. This district has long been aware of the possible benefits of bifurcation. One of our now-senior judges has been its strong advocate for some time. But the experience of the Advisory Group members with bifurcation is sufficiently mixed that we only suggest it be employed where appropriate pursuant to F. R. Civ. P. 42(b).

D. Discovery Schedule. As we have discussed above, phased discovery is an excellent idea for all cases in which discovery is necessary. In complex cases, the concept of discovery waves described in the *Manual* works on the principle of setting strategic priorities and then determining what discovery

is necessary to achieve those goals. This gives the judge and the parties a method for organizing potentially vast amounts of material in a coherent fashion.

The court's Standing Order Establishing Pretrial Procedure currently provides that the court may require the parties to provide a joint written discovery plan with a proposed cut-off date if it appears that discovery will be complex or protracted. We endorse this, with the reservation that if the parties cannot agree, they should each submit their own proposed discovery schedule prior to a conference with the judge.

Time limits on discovery must be carefully set: as we have discussed above, limits that are too short may result in increased costs as the parties rush to complete the necessary tasks. Considerations we discussed in an earlier section pertaining to the cost of requested discovery relative to its projected benefit apply here as well.

E. Case Management Plan. A rule that requires preparation of a formal case management plan in all cases is not advisable. Many cases will not need it and an attempt to codify standards for its use would in all probability lead to over-regulation that might increase costs to the parties, who must pay their lawyers to comply. In a complex case, however, a written plan is necessary to foster efficiency and to ensure that all litigants understand the ground rules of the case. The plan might include provision for lead counsel for plaintiffs or liaison counsel for co-defendants, a coordinating technique that has been used successfully in this district. The agreed-upon discovery schedule should be incorporated, as should any rules regarding who may take or attend depositions, and any division of labor among attorney committees (e.g., brief-writing, document production, administration). This should work to reduce duplicative efforts, paperwork and cost to clients or class members. The CJRA suggests that the presiding judge prepare the case management plan after consultation with the litigants at a conference. This suggestion is sensible, in part because some of the above-mentioned delegation of authority may require a court order.

F. Pretrial Conferences. Pretrial conferences or status hearings should be held as the parties and the court deem appropriate. Complex cases will obviously need more frequent attention. Although this comes at a price to the parties, presumably it results in more effective overall management of the case. Judges should consider telephone conferences, particularly with counsel from outside the state, in order to avoid the expense of out-of-town travel, although when there are a large number of participants, it may be difficult for the court reporter or the participants themselves to keep track of who is speaking. The judge should also inquire into the status of settlement negotiations as deemed appropriate. Furthermore, the court should set a firm date for trial at the earliest possible time.

G. Final Pretrial Order. Many members of the bar view the sections of the court's standard Final Pretrial Order requiring agreed statements from the parties as an expensive exercise in futility. An onerous pretrial order should not be used as a threat to force a settlement. Many judges agree that the current standard form is too burdensome, but think that some form of pretrial order should be required in most civil cases. Some judges have developed their own forms.

We recommend that the standard form be revised to eliminate sections that require submission of statements that must be negotiated by counsel. Other requirements in the standard Final Pretrial Order should be retained. In most cases, each side's submission of a list of witnesses, exhibits marked for identification, experts' qualifications, jury instructions and verdict forms are helpful to all involved. But the sections requiring counsel to meet and agree on uncontested and contested facts are wasteful of the lawyers' time and the clients' money. The judges should use the revised final pretrial order in those cases for which a pretrial order is deemed appropriate.

H. Special Masters. Rule 53(b) provides that referral to a special master should be the exception, not the rule, necessitated by complicated issues in a jury case or "exceptional conditions" in a non-jury case. While the use of masters is thus generally disfavored, these considerations can be satisfied in certain situations. For instance, masters may be useful in complicated cases involving

technical or arcane areas with which the district and magistrate judges are not familiar. In such situations, referral to a master prevents the judge from having to spend significant time learning the area, thus conserving the court's resources. Since the master's compensation is borne by the parties, the cost is presumably increased for the individual litigants to some degree, but time and money may be saved in the long run because the master's expertise will facilitate an earlier resolution of the case. Other litigants should also benefit because the judge has more time to attend to their cases.

Special masters may also prove useful in cases in which the litigants have embroiled themselves in continuing, debilitating discovery disputes requiring, for instance, the examination of voluminous documents *in camera*. Here the use of a master does not depend on the person's technical expertise, but serves to shift part of the burden of a case that could absorb significant judicial time to a third party paid for by the litigants.

I. Experts. We recommend that the court require automatic disclosure, before the final pretrial conference, of the qualifications of any experts to be called as trial witnesses. A large number of our survey respondents identified this as a way to reduce delays. We also urge the judges to limit the number of experts to one per side per issue, unless otherwise warranted. This is currently the standard included in the court's standard Final Pretrial Order, footnote 8, and it should be enforced.

J. Trial. Aggressive case management is warranted in complex jury trials to move the trial along and to make it comprehensible to the jurors. Trial should commence on time. Jurors can be given notebooks containing the key exhibits, and pictures and names of each witness, together with blank pages for notes on the testimony. "Pre-instructions" can be read to the jurors before the trial begins so that the jury has a framework within which to place the arguments and evidence. Final instructions can be read prior to closing arguments (as permitted under F. R. Civ. P. 51) to prevent objections during the summations over what each side says the instructions will be.

For bench trials, some judges prepare, or have the attorneys prepare, a checklist of matters in dispute so that they can make all the necessary findings. This can facilitate a prompt ruling, from the bench, if possible.

IX. VOLUNTARY PRE-DISCOVERY DISCLOSURE.

We must consider:

> encouragement of cost-effective discovery through voluntary exchange of information among litigants and through the use of cooperative discovery devices. 28 U.S.C. § 473(a)(4).

We believe that there is already a fair amount of cooperation among attorneys in this district. Many times, documents are requested and produced and depositions noticed and taken with no need for judicial intervention. But most courts and advisory groups have interpreted this section of the Act as calling for automatic pre-discovery "disclosure" of persons, documents and certain other information contemplated in proposed amendments to F. R. Civ. P. 26. Under this system, parties must disclose this information *sua sponte* before they can seek any other discovery.

We do not recommend that the court adopt such a rule at this time. First, the concept of voluntary disclosure is in flux. Several draft versions of Proposed Amended Rule 26 have been attempted. The first version, published for comment in August 1991, would have required automatic disclosure of persons and documents likely to have information "that bears significantly on any claim or defense. . . . " Some courts adopted plans requiring disclosure based on this language, although in doing so, one court stated that it expected the definition of "bears significantly on" to provide "new grist for the common law mill."[55]

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[55]The District Court for the Eastern District of Texas, *Civil Justice Reform Act Expense and Delay Reduction Plan*, preface, adopted December 21, 1991.

But reaction to the proposal was generally negative and the proposed rule was rewritten. Revised Proposed Amended Rule 26 has replaced "bears significantly on" with the requirement that the parties disclose information about persons and documents "relevant to the disputed facts alleged with particularity. . . ." Many of our Advisory Group members felt that the word "relevant" was too vague. Some did not think it reasonable, given our adversarial system, that one litigant be required to identify for its opponent what the opponent should be seeking.

We agree that there are benefits to getting the discovery process under way, as well as to reducing paperwork. Our recommendation set forth above that the court should consider phased discovery in all appropriate cases is an effort to accomplish the same goal, while remaining within a traditional adversary context. We encourage attorneys to cooperate in discovery by agreeing to an appropriate phased schedule of discovery and by conducting themselves professionally in the discovery process. In the meantime, it is evident that pre-discovery disclosure is an evolving concept and we await with interest further developments in the amendment of Rule 26 and the results obtained by those courts that have adopted its varying versions.

X. REASONABLE GOOD FAITH EFFORTS TO AGREE ON DISCOVERY MATTERS.

We must consider:

> conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion. 28 U.S.C. § 473(a)(5).

This principle has been in effect in this district for some time. Local General Rule 12(K) states that the court shall refuse to hear motions relating to discovery disputes unless the motion includes a statement that counsel have personally consulted and sincerely attempted to resolve their differences or that the movant's lawyer was unable to meet with the opponent's lawyer through no fault of his or her

own. It is the experience of many that this rule works very well in resolving disputes when it is conscientiously observed. Compliance with the rule should be insisted upon by the judges.

XI. ALTERNATIVE DISPUTE RESOLUTION.

We must consider:

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, minitrial, and summary jury trial. 28 U.S.C. § 473(a)(6).

The term "alternative dispute resolution" ("ADR"), as used in the extensive literature on the topic, covers a wide range of activities, both mandatory and voluntary, adjudicative and conciliatory, binding and non-binding. Both the varieties and the uses of ADR have expanded dramatically in recent years as potential litigants try to find ways of resolving their disputes that are cheaper and faster than the courts provide. Claims of success with ADR, however, are often anecdotal. Wisely, we think, the CJRA has required certain "test" courts to experiment with particular ADR methods and to analyze the results. P.L. 101-650, §§ 104, 105. The experience of those courts will be valuable in determining whether specific programs should ultimately be adopted in this district. Lacking that data, however, we do not recommend that court-wide mandatory programs be established in this district at this time. We do recommend that judges and litigants here be encouraged to explore the variety of voluntary alternative dispute resolution options available and to employ them where appropriate. We discuss a number of ADR techniques in this section, some of which are specified in the statute and others of which are not.[56]

[56]We do not discuss early neutral evaluation, another ADR technique, in this section because the Act requires us to consider it as specific technique under § 473(b), which we address in a later section of the Report.

A. Settlement Conferences With the Judge. A settlement conference presided over by a judicial officer is the most commonly used ADR technique in the federal courts.[57] Judicial participation in settlement was traditionally left up to the individual judges, some of whom became involved through personal inclination and others of whom thought it an inappropriate role for the judge. The 1983 revision to Rule 16 allayed that concern by specifically authorizing judges to discuss settlement at pretrial conferences in furtherance of active case management.

Judicial participation in settlement discussions serves an important purpose. As advocates, litigators are often reluctant to broach settlement until they have established a track record of toughness with the opposing side. The presence of a judicial officer at the settlement conference may afford litigants the chance to communicate meaningfully for the first time. But the judge's personal participation, however potentially valuable, must be handled with some delicacy. On the one hand, the judge can be very helpful in instigating talks when neither side wishes to make the first move. On the other, the trial judge may not appear to force settlement on an unwilling litigant. Even the strongest proponents of managerial judging agree that the judge must scrupulously avoid coercing settlement.[58] The result could be very unfair to one party and it would be unreviewable.

If settlement discussions would involve confidential or other matters the parties feel are inappropriate for the trial judge to hear, the judge could suggest referral to a magistrate judge, who can keep the negotiations confidential and work individually with each side. Litigants may worry, however, that suggesting this may offend the trial judge. In part to address this problem, some courts have adopted local rules establishing formal settlement conference programs that allow the parties to request or the court to order counsel to attend a settlement conference presided over by a magistrate judge not otherwise

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[57]*ADR in the Courts*, 9 Alternatives to the High Cost of Litigation 102 (July 1991).

[58]Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 Rutgers L. Rev. 253, 264 (1985).

involved with the case.[59] As with many ADR techniques, it is not known whether the program results in more settlements than would otherwise have occurred.[60] But we think it likely that the very act of putting litigants in communication may precipitate an *earlier* settlement than might otherwise have occurred, at a lower cost to the client.

The district judge should inform the parties at the first pretrial conference or status hearing that they should feel free to request a settlement conference with the judge or a magistrate judge on a confidential basis. We realize that judges vary in their ability and inclination to participate in settlement conferences, but we encourage them to engage in the process. We further recommend that the Chief Judge and the Executive Committee urge both district and magistrate judges to take advantage of training programs in settlement techniques so that they can be better prepared to participate in and facilitate the process.

B. Court-Annexed Arbitration. Court-annexed arbitration refers to a program administered by the court in which cases meeting defined criteria are mandatorily placed on an arbitration track. The arbitration itself is an extra-judicial adjudicative proceeding presided over by one or a panel of neutral persons. The arbitrators conduct a hearing according to relaxed rules of evidence, after which they render a decision and determine an award which, in federal court programs, is not binding on the parties. This diversion of certain presumptively simple classes of cases (usually of lower dollar value) away from the courts to an arbitration forum was designed to ease court congestion; the theory was that this would

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[59]*E.g.*, the Northern District of California.

[60]Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values*, 1990 University of Chicago Legal Forum 303, 313.

allow judges to concentrate on the "harder" cases, thereby resulting in more efficient resolution of all matters.[61]

In the federal courts, court-annexed arbitration is essentially a settlement device because the litigants cannot be forced to accept the arbitrator's award. The Seventh Amendment limits the financial disincentives federal courts may impose on a losing party that wishes to appeal the arbitrators' decision. The loser may be required to pay the arbitrators' fee (which are usually modest), for instance, but attorneys' fees cannot be awarded to the victor. *Tiedel v. Northwestern Michigan College,* 865 F.2d 88 (6th Cir. 1988).

We considered but do not recommend a court-annexed arbitration program in this district. There are significant disadvantages to imposing an extra layer of required, but not binding, adjudication upon the litigants here. First, cases can be directed into mandatory arbitration only if the relief sought is solely for money damages of less than $100,000. 28 U.S.C. § 652(a)(B).[62] Suits brought for violation of constitutional or civil rights must also be excluded, unless the parties agree. 28 U.S.C. § 652(b). Thus the more time-consuming cases with substantial discovery or difficult constitutional issues could not be placed on an arbitration track in any event, absent consent of the parties. Since delay is not a serious problem in many other kinds of civil cases in this district, forcing them into arbitration would not serve the intended purpose.

Second, shunting cases off the calendar of a judge with a well-managed docket into an arbitration track could increase the time the litigants in those cases spend in the system. Arbitration might be especially helpful to litigants with cases assigned to judges with substantial backlogs, but it is not feasible

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[61]Rolph, *Introducing Court-Annexed Arbitration: A Policymaker's Guide,* The Institution for Civil Justice 6 (1984).

[62]Those courts that had an upper limit in their arbitration programs of $150,000 as of November 15, 1988 have been allowed to retain that limit. Pub. L. 100-702, § 901(c).

to establish a mandatory program limited to judges with backlogs. The disincentives to other judges are too great.

Third, both delay and expense will often increase if the arbitrator's award is appealed. The loser's right to trial *de novo* puts the case back on the trial court's docket for adjudication, often at a later time than if arbitration had not intervened. Moreover, litigants must bear the expense of two trials. Although an arbitration hearing is less formal, it still requires lawyers to prepare and present the case and witnesses to testify.

Courts that have implemented mandatory arbitration programs are often enthusiastic about them. Within the geographical confines of this district, the Circuit Court of Cook County has established a mandatory arbitration program for all personal injury cases seeking money damages between $2500 and $15,000. Cir. Ct. of Cook County Rule 18.3. Perhaps because of the perceived success of the circuit court's program, a substantial number of respondents to our attorney survey thought that mandatory arbitration of cases under $100,000 would reduce both cost and delay in civil litigation. But we do not think this court has a sufficient accumulation of the smaller, money-damages-only cases to warrant establishment and funding of a mandatory program.

The research on the effectiveness of mandatory arbitration programs in reducing delay and expense is inconclusive. A Federal Judicial Center five-year study of ten district court pilot arbitration programs reported that arbitration programs can, but do not always, reduce disposition times.[63] With respect to costs, another study concluded that arbitration, while often faster, was no less expensive to the client than proceeding through federal court.[64]

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[63]Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* at 109, Federal Judicial Center (1990).

[64]Kritzer *et al., The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts,* 8 The Justice System Journal 6 (1983).

Moreover, establishment of an arbitration program requires a substantial commitment of the court's resources. Arbitrators must be chosen, trained, paid, and evaluated. (The State of Illinois pays the arbitrators in the circuit court program.) The program must be administered and monitored by the court to assure that the parties are afforded appropriate treatment and that the time and money expended on arbitration is not wasted. This comes at a cost to the judicial system, which itself is a subject worthy of discussion.

If parties choose arbitration with the hope of achieving faster, cheaper resolution, they are certainly free to do so, although court-administered voluntary arbitration programs have not been a success.[65] But we do not see the wisdom of forcing the parties into a track that may cause them delays or extra expense, at least in this district. When the courts now experimenting with mandatory programs analyze and publish the results obtained, it may be determined that this court too should adopt a court-annexed program. For the present, however, we conclude that a mandatory arbitration program should not be established in this court at this time.[66]

C. Mediation. Mediation is a relatively informal, confidential procedure in which an impartial third person (other than the trial judge) listens to the positions of the parties and attempts to facilitate a settlement. Mediation emphasizes reconciliation of the parties rather than adjudication of legal positions. Although voluntary participation is a hallmark of private mediation, some courts are currently

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[65]Meierhoefer, *supra* note 63, at 120.

[66]There is an argument that the CJRA may not permit the court to establish a court-annexed program. Although arbitration had been mentioned in earlier drafts of the legislation, the final version does not identify arbitration as a possible ADR method to be considered (except for the oblique reference to programs that have been "designated for use in a district court"). The General Counsel of the Administrative Office has opined that "designated" refers only to those district court programs authorized by statute prior to passage of the CJRA. Memorandum from W. Burchill, Jr. to A. J. Mattos, July 5, 1991. However, at least one non-designated court has applied for permission from the Judicial Conference to establish a court-annexed program.

experimenting with mandatory mediation programs.[67] We are interested in their results, particularly the disposition times of cases on the mandatory mediation track compared to all others. But without such data, we are reluctant to recommend that the court commit the resources that establishment of a mandatory program would require.

Some judges have referred cases to mediation with magistrate judges, former district judges, and others from time to time with some success. We recommend the judges employ this technique as they deem appropriate. The court should encourage the magistrate judges to participate in mediation training programs in order to learn the skills necessary to engage in this process.

D. Summary Jury Trial. Summary jury trial is a proceeding in which the lawyers present the case in the courtroom to a jury, using summaries of witness testimony.[68] The jury, which usually believes the proceeding is a real trial, is given an abbreviated charge and then returns a verdict, which is advisory only. Clients are expected to be present so that they can evaluate their respective cases for settlement purposes. The proceeding usually lasts a day or two, although some have lasted several weeks. The CJRA specifically authorizes summary jury trials. Prior to the Act's passage, however, the Seventh Circuit ruled that trial courts have no authority to compel an unwilling litigant to participate in the proceeding, a position it confirmed in 1992 without reference to the intervening CJRA. *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1987); *Russell v. PPG Industries*, 953 F.2d 326, 333 (7th Cir. 1992).

We think that summary jury trial is an interesting but limited technique. Its chief conceptual drawback is that the lack of live testimony prevents the jury from determining witness credibility, one

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[67]*E.g.*, the Eastern District of Pennsylvania; the Southern District of California.

[68]Lambros, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution*, 103 F.R.D. 461 (1984).

of the jury's primary functions.[69] A summary jury trial takes more court time and resources than most other ADR techniques, including the time of citizens who are led to believe they are rendering a binding verdict. It thus requires the judicial system to subsidize a settlement technique that could perhaps be replaced by a method that is less expensive to the system, if not to the parties. But if other methods have failed and the trial in a case is expected to be extremely long and therefore itself a substantial drain on court resources, the judge and litigants may conclude that the potential benefits of this technique warrant the commitment of time, expense and effort required.

E. Minitrial. This is a proceeding conducted by a neutral moderator in front of the litigants' senior management who must have authority to settle. The lawyers and experts for the litigants make informal summary presentations of their positions, usually followed by negotiations between the executives. Ordinarily used with corporate litigants, a minitrial is intended to give the businesspeople a realistic appraisal of their respective positions and the opportunity to communicate and settle with their counterparts.[70] Some judges preside themselves over a minitrial; others refer the litigants to a private moderator. This procedure should be considered where appropriate to the litigants, issues and amounts in controversy.

F. Special Master. As we have discussed above in the context of complex litigation, referral of a case or specific issues to a special master can speed resolution of cases involving arcane factual disputes for which the services of a third party who is expert in the field are especially valuable. It can also be useful in situations in which the parties have locked themselves in a massive discovery battle that should not be maintained at public expense.

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[69]*See, e.g.,* Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations,* U. Chi. L. Rev. 366, 374 (1986).

[70]Lambros, *supra* note 68, at 467.

G. Conclusion. The court should ask the bar associations to prepare a pamphlet listing the various ADR methods available. Lawyers can thereby acquaint themselves with the many ADR options a litigant might choose both before filing a lawsuit in federal court and after the suit has been filed. The pamphlet should also include a general description of private dispute resolution options and sources of information. Once a case is in federal court, the judge and the parties should determine which, if any, ADR techniques may facilitate a fair, prompt and inexpensive resolution of the dispute. This will afford litigants a choice and a measure of control over their dispute, in turn leading to an overall greater sense of satisfaction with the resolution.

PART THREE: CJRA TECHNIQUES THE ADVISORY GROUP MUST CONSIDER AND OTHER APPROPRIATE MATTERS.

Section 473(b) of the Act requires each district court, in consultation with its advisory group, to consider certain techniques for litigation management and cost and delay reduction. These techniques and our recommendations follow.

XII. JOINT DISCOVERY-CASE MANAGEMENT PLAN.

The statute requires us to consider:

> 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. 28 U.S.C. § 473(b)(1).

In our view, any rule that necessarily involves negotiations between the litigants will add to cost and delay in a significant number of cases in this court. Especially at the beginning of a case, time and money can easily be wasted as lawyers stake out their positions and take their opponent's measure. As we discuss above in the context of complex cases, we think a plan can more easily be arranged at the pretrial conference in the presence of a moderator -- the judge; and indeed this is contemplated by § 473(a)(3)(C). Counsel should attend the first pretrial conference or status hearing fully prepared to address the topics itemized in Rule 16. The court should also take the position that lawyers are expected to cooperate on scheduling and other matters whenever possible. But we do not think lawyers should be required to agree on a written plan prior to the pretrial conference unless the judge considers it necessary in a given case and notifies the litigants in advance. The Standing Order Establishing Pretrial Procedures should be clarified to so state.

XIII. ATTORNEY WITH AUTHORITY TO BIND.

We must consider:

> a requirement that counsel for 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. 28 U.S.C. § 473(b)(2).

We agree that the attorney representing each party must have authority to bind the party with respect to all matters previously identified by the court for discussion at the pretrial conference. This does not mean that the lawyer must agree to the topics under discussion, but lack of authority may not be used as an excuse to delay taking a position. This requirement is both eminently fair, because the litigants have been put on notice of the matters the court will consider, and efficient. Our court has a similar provision, paragraph 6 in the Standing Order Establishing Pretrial Procedure. To the extent that the CJRA provision is broader, the Standing Order should be amended and enforced.

XIV. REQUESTS FOR EXTENSION OF TIME TO BE SIGNED BY ATTORNEY AND PARTY.

The statute requires us to consider:

> 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. 28 U.S.C. § 473(b)(3).

Although this proposed technique presupposes otherwise, we do not think that the prevailing practice among lawyers in federal court is to seek repeated or substantial extensions that they then hide from their clients. For hourly rate attorneys, lawyers' activities are routinely itemized in the bill. As many clients are becoming more actively involved in the litigation of their cases, they are continually apprised of their lawyers' activities in the case and know if and why an extension is needed. It is also true that obtaining the client's signature would require an expenditure, albeit usually a minor one, of

attorney (and client) time and effort. There will also be situations in which the client cannot be reached at the point when a motion for an extension of time must be filed.

As the business of law becomes more competitive, lawyers cannot afford to alienate clients by dragging out a case the client wants to see resolved. For those clients who do want to delay resolution, this proposal would present no bar. We do not recommend it be adopted.

XV. EARLY NEUTRAL EVALUATION.

We must consider:

> 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. 28 U.S.C. § 473(b)(4).

Early neutral evaluation (ENE) is a type of alternative dispute resolution in which the lawyers make a summary presentation early in the case to a neutral evaluator who is experienced in the primary substantive area of the litigation. The evaluator attempts to give the parties a realistic appraisal of their respective positions and either helps develop a rational case management plan or assists the parties in settlement. The conference is confidential and non-binding and must be attended by both counsel and clients. ENE is different from mediation both because the evaluator's expertise in the substantive area is designed to add credibility to the evaluation and because there is less focus on reconciliation and more focus on the merits and case management.

Existing ENE programs rely on a pool of evaluators who are qualified as experienced in various substantive areas. Often they are volunteers, but some programs require the parties to pay a fee to the evaluator. A study of ENE effectiveness in the Northern District of California, where the technique was developed in the mid-1980's, yielded mixed results. Many attorneys thought that the intervention of ENE

did not reduce costs, for example.[71] But a number of cases did settle at the conference or shortly thereafter and many attorneys felt that the neutral evaluators often devoted significantly more time to the cases than the district or magistrate judges were usually able to spend at a Rule 16 conference.

The Northern District of California and several other courts are continuing to study ENE's effectiveness. The court should evaluate their results when they become available, but we do not recommend allocation of this court's resources to establishment of an ENE program at this time.

XVI. REPRESENTATIVE OF PARTY WITH AUTHORITY TO BIND TO BE PRESENT DURING SETTLEMENT CONFERENCES.

We must consider:

> 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. 28 U.S.C. § 473(b)(5).

We agree that, upon notice from the court, representatives of the parties with authority to bind should be available at least by telephone and in person, if warranted, during settlement conferences. Client availability can be valuable for a number of reasons. Most importantly, it can serve to focus clients on the realities of their case. In addition, time and momentum are not lost while the attorney checks back with the client.

This is already the law in the Seventh Circuit. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989). The court, ruling *en banc,* held that the parties, or their employees with authority to settle, can be compelled to attend a pretrial settlement conference, even though they cannot be required to settle or even to negotiate in good faith.

A dissenting opinion in *Heileman* expressed concern that a party who refuses to settle after being called in to a settlement conference by the judge must surely worry about the fairness of the upcoming

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[71]Brazil, *supra* note 60, at 340-44.

trial. That is a concern, but we think this is another situation in which we must expect that the judge will honor the obligation to be impartial. Moreover, we think the potential benefits of party availability generally outweigh the possible detriments, and the judge's order is subject to review under an abuse of discretion standard.

We recommend that the Standing Order Establishing Pretrial Procedures be amended to conform to the above provision. An exception must be made for the United States government, which invests settling authority in very few persons who cannot constantly be called into courts across the country for settlement conferences. The government's decision to restrict settlement authority does cause considerable and otherwise needless delay if the appropriate person does not become available, but this rule is not the appropriate method for addressing that problem.

XVII. OTHER APPROPRIATE MATTERS FOR CONSIDERATION.

A. Magistrate Judges. The magistrate judges provide an important resource for the court. In the Judicial Improvements Act of 1990 (of which the CJRA is a part), Congress increased their responsibilities and their stature as a means of emphasizing their value in dealing with expanding litigation. Specially designated magistrate judges are now authorized to hear and determine any civil matters reassigned to them by district judges on the consent of the parties, with appeal directly to the Court of Appeals. 28 U.S.C. § 636. All magistrate judges in this district are "specially designated." They are also authorized to perform many kinds of pretrial responsibilities in both civil and criminal cases upon referral from the district judge.[72]

The role of the magistrate judges varies from court to court and within each court as well. In the Western Division of this court, which has one active district judge, the single magistrate judge is

[72]The magistrate judges in this district may also try and enter judgment on misdemeanor offenses defined in 18 U.S.C. § 3401. 28 U.S.C. § 636(a)(3).

responsible for the bulk of civil pretrial matters, save for dispositive motions. This arrangement is working well for the small number of judicial officers in the Western Division and we make no recommendations for change.

In the much larger Eastern Division, however, the magistrate judges can be better utilized than they are now. Some district judges refer matters to the magistrate judges frequently, others rarely. Just three district judges accounted for more than fifty percent of all non-consensual referrals to magistrate judges in the last year. We considered whether the district and magistrate judges in the Eastern Division should be "paired" to encourage collegiality and more effective communications between them, but concluded this was inadvisable given the uneven usage the district judges make of the magistrate judges. We do have the following recommendations.

1. The Court Should Foster an Environment in Which Parties Will Consent to Proceeding Before a Magistrate Judge. Because magistrate judges are not authorized to try felony cases, their time is not constrained by the requirements of the Speedy Trial Act. They should therefore be able to give civil litigants earlier and firmer trial dates than the district judges can. The quality of the magistrate judges is such in this district that they are well able to try a case on consent of the parties, but litigants and lawyers are only slowly becoming aware of this. The court has highlighted the availability of the magistrate judges by providing that the magistrate judge on each case be designated at the time the case is filed. Local General Rule 2.41(A). Litigants' uncertainty as to which magistrate judge they would receive if they do consent is thus eliminated and they can make an informed decision.[73]

The Chief Judge and the Executive Committee should also encourage the district judges to discuss the possibility of proceeding before the magistrate judge as a routine matter at the first pretrial conference

[73]The "short civil trial rule" may also have the effect of sending more trials on consent to the magistrate judges. Litigants do not know which district judge could pull their case from the short trial pool, but they do know who their designated magistrate judge is. They can avoid uncertainty by consenting to proceed before the magistrate judge.

or at any appropriate time. Both the statute and F. R. Civ. P. 73(b) make clear, however, that consent cannot be pressured. District judges must advise the parties that consent may be withheld without "adverse substantive consequences."[74] 28 U.S.C. § 636(c)(2). Judge and litigants must also take care that consent is expressly given by all parties either orally or in writing, including those joined after the initial consents are given. *Jaliwala v. United States*, 945 F.2d 221 (7th Cir. 1991).

In addition to consensual referrals of civil trials, there is no reason in the statutory language why dispositive motions may not also be referred to the magistrate judge upon express consent of all the parties. While this practice does not appear to be widespread as yet, we understand that it has worked well in some other districts. Local General Rule 1.72 should be amended to specify this possibility and district judges should be encouraged to discuss this with the parties if a dispositive motion is filed.

Referral of either the entire proceeding or of dispositive motions on consent may be especially beneficial to litigants if the district judge faces a lengthy trial or has a backlog of undecided motions and trials. Moreover, increased referrals to the magistrate judges will inevitably lead to greater acceptance of this practice among the bar and increase the esteem in which the magistrate judges are held, all to the enhancement of the court as a whole.

*2. **Referrals to Magistrate Judges Should Emphasize Case Management, Contested Matters, and ADR Proceedings.*** We believe it is cost-effective for district judges making non-consensual civil referrals to capitalize on magistrate judges' ability to hear evidence and interact with litigants. Case management, including supervision of discovery, is particularly important. Without a felony trial calendar, the magistrate judges can help focus the parties on the issues, rationalize and resolve discovery disputes, and address other matters that can benefit from a commitment of judicial time and effort. If

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[74]Until recently, only the Clerk's Office could notify the litigants of the magistrate judges' availability in order to avoid any hint of pressure from the district judges. But in 1990, the magistrate statute was amended to authorize district and magistrate judges to advise the parties of the magistrate's availability at any time during the litigation. As with many other things, we must expect the judges will act in an appropriate fashion in this regard.

the district judge has referred a case to a magistrate judge for pretrial supervision, we think it is efficient to include dispositive motions in that case within the scope of the referral. In such a situation, the magistrate judge becomes familiar with the case and thus has the background necessary to issue a prompt and complete report for the district judge's review.

Although there are not many hearings of contested matters short of trial in this district, district judges should also consider referring such matters to the magistrate judge in appropriate cases, subject to the district judge's review. Motions for temporary restraining orders, however, should not be referred because by their nature they would expire before the ten day objection period and would thus be unreviewable if entered by a magistrate judge.

Finally, magistrate judges provide a readily available alternative dispute resolution option that is cost-free to the litigants. They can serve as mediators, evaluators or special masters in confidential proceedings the trial judge may lack the time for, or should not ideally hear. As we have recommended in discussing ADR options, the magistrate judges should receive training in these methods, particularly mediation, so that they can develop the necessary skills.

*3. **District Judges Should Consider Cost and Delay in Deciding Whether to Refer Dispositive Motions to Magistrate Judges for Report and Recommendation.*** As we have mentioned, there are situations in which it may be cost-effective for the district judge to refer dispositive motions to the magistrate judge for report and recommendation: when the district judge has referred all pretrial matters in a case to the magistrate judge for supervision; and if a motion is so complex it is advisable to call upon the expertise of a magistrate judge (as opposed to the district judge's law clerk). But often such referrals have the undesirable effect of increasing both cost and delay for the litigants. The magistrate judge must prepare a report; the parties may then object (and they almost always object), which entails new briefs. The district judge must not only make a *de novo* determination of these matters, the statute also allows the judge to receive additional evidence not presented to the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Some district judges will not receive evidence outside the record presented to the magistrate judge except for good cause shown and we think this should be standard practice. The end result is that the magistrate judge has been used as a highly paid law clerk and much attorney time and client money has been spent.

This is especially problematic if a party has filed a summary judgment motion that is not meritorious for a particular reason. A district judge can deny the motion in a minute order, but the magistrate judge must produce proposed findings and recommendations on the entire motion, which the district judge must review. It also seems inefficient, as a general rule, for the district judges to refer matters such as fee petitions that require evaluation of credibility or performance if the magistrate judge did not observe the activity to be evaluated.

*4. **The Number of Magistrate Judges Should Be Increased.*** The Judicial Conference has a recommended ratio of one magistrate judge to two district judges. On that basis, this district (which has a lower ratio than any other large metropolitan court) should have at least two additional magistrate judges. We recommend that the court request that the number of magistrate judges be increased to meet this standard so that the court and litigants can take advantage of these versatile judicial officers in reducing delay and expense.

B. Standing Orders. The standing orders adopted by each district judge to govern his or her courtroom with respect to motions and other matters often differ from the local rules and vary among the judges as well. Uniform procedures would reduce the possibility for confusion and mishap, particularly for litigants who do not have broad experience with the judges of this court. If the judges consider it necessary to retain individual procedures, however, the local rules should be amended to state that variations among the judges are possible. Dissemination of standing orders to the bar is critically important. The judges should advise litigants with cases pending of all applicable standing orders at the first status hearing or pretrial conference, if not before. The litigants should be advised of any revisions

in the standing orders as well. In addition, the court should publish their standing orders to the bar at large.

C. Prisoner Litigation. Between six and nine hundred cases are filed each year in this district by inmates of state, county and federal prisons, most of them petitioning for leave to file *in forma pauperis*. The vast majority come from state prisons, alleging a variety of wrongs pursuant to 42 U.S.C. § 1983 (inadequate conditions of confinement), or seeking a writ of *habeas corpus* under 28 U.S.C. § 2254. The court attempts to handle this volume of litigation expeditiously but with due respect for the petitioners' rights under the law. Prisoner cases are randomly assigned among the judges, except that one judge will get all condition of confinement cases filed by the same prisoner. All *habeas* petitions filed by one prisoner are also assigned to one judge, although it cannot be the same judge who is assigned that prisoner's condition of confinement cases. Local General Rule 2.21(D).

In 1977, the court became part of a pilot project that provided a staff attorney to review prisoners' petitions. That one dedicated attorney has been joined by two others, who advise the judges whether a petition should be dismissed as frivolous or malicious pursuant to 28 U.S.C. § 1915(d) or, if it is a *habeas* petition, whether it is facially deficient. The staff attorneys serve an important function as gatekeepers. First, they help the judges maintain uniform minimum pleading standards. Second, they are able to identify and channel those prisoners who shower the courts with numerous petitions, often arising from a single incident and without regard to whether their prior petitions have been resolved. In both situations, the staff attorneys help keep track of the allegations and see that consistency is maintained.

About half the cases are dismissed at the petition stage. For those cases in which the petition is granted, the staff attorneys generally serve as law clerks for the judges on defendants' subsequent motions to dismiss. State prison defendants are represented by the woefully understaffed office of the Illinois Attorney General, which often fails to file timely responses on behalf of defendants. Many times default

judgments are entered against these defendants, only to be vacated when a motion or answer is finally made. The staff attorneys are now working with lawyers from the Attorney General's office and the Cook County Department of Corrections, which oversees the Cook County jail, to develop a better system for keeping track of their cases, enabling them to file timely responses. We encourage the efforts the staff attorneys are making to increase cooperation and efficiency and to elevate the level of representation in these cases.

Most judges appoint counsel for the prisoner if the judge has determined the case has merit and a motion for summary judgment has been filed. The district court has developed a support system for appointed attorneys, commissioning the Federal Court Litigation Project *Handbook*,[75] a practical manual updated annually, that addresses matters ranging from such basic items as how to locate one's client in prison to a review of the substantive law in the area. Project personnel are also available at an hourly rate, paid for by the district court, to assist the lawyer in representing the prisoner, if necessary. We commend the court for its work in this area.

Prisoner cases are much less likely to settle than other cases but settlement may be possible in certain instances. We think the staff attorneys, with their experience and knowledge in the subject area, can hold telephone conferences with the parties, if the judge has determined the case potentially has merit, to encourage settlement.

There is a significant number of prisoners who file petitions repeatedly. They pose a particular problem for the court because the prisoner has often acquired the expertise necessary to allege facts sufficient to survive dismissal, even though these allegations probably could not be proven at trial. If the petition does survive dismissal, the defendants must respond, with consequent delays and expenditures

[75]The Legal Assistance Foundation of Chicago, *The Federal Court Prison Litigation Project Revised Handbook* (6th ed., July 1992).

of court time and resources. There is no simple solution to this state of affairs. All cases must be treated with respect due under law.

D. Other *Pro Se* Litigation. The techniques that have worked with some success for prisoner litigation can also be applied to other kinds of cases that are often brought *pro se,* particularly employment discrimination cases under Title VII of the Civil Rights Act of 1964. We understand that the court has explored preparation of a handbook for attorneys appointed in Title VII cases, similar to the Federal Court Prison Litigation Project's *Handbook*. Since many Title VII plaintiffs do not meet the indigency standards of the Legal Assistance Foundation, which prepared the prisoners' *Handbook*, we urge the court to solicit the bar associations and other appropriate groups to undertake this project.

New complaint forms are necessary for Title VII *pro se* plaintiffs; the current forms have been in use for several decades without change. The court is seeking assistance in devising new forms from attorneys experienced in Title VII litigation, which should prove helpful.

It has been suggested that appointed counsel in Title VII cases be specialists in the area, but most judges we interviewed did not think this was wise and we agree. That would burden a small sector of the bar with a *pro bono* obligation that should be borne by all. We do think that uniformity of approach to *pro se* Title VII complaints would be helpful, as it is with prisoner litigation. A staff law clerk should be assigned to review these cases as they are filed to ascertain preliminarily whether they meet all jurisdictional requirements and can survive a motion to dismiss.

E. Special Types of Civil Litigation. Appeals from decisions by bankruptcy judges are reviewable by the district courts under 28 U.S.C. § 158(a). But § 158(b) allows the judicial council of a circuit to establish a bankruptcy appellate panel comprised of bankruptcy judges from districts within the circuit, which would hear bankruptcy appeals on the consent of the parties. We recommend that the court ask the Judicial Council of the Seventh Circuit to establish such a panel. The expertise of the panel

members should enable them to rule on these appeals with greater efficiency than may currently be the case.

There are also certain kinds of recurring civil litigation that do not require sophisticated handling or involve difficult questions of law but that do take some time and effort to resolve. Mortgage foreclosures, which are filed in the federal court on the basis of diversity of citizenship, could be filed in the state courts, but attorneys for mortgagees have found that the fees and expenses in the district court are lower than payment to the sheriff in the circuit courts. We recommend that the court remove the current economic advantage that bringing these suits in federal court confers. In the alternative, the court could put these cases on a general calendar and assign them to a single district judge on a rotating basis who would hear them once a week.

Actions to collect employer contributions to health and welfare plans may be filed in federal court with no minimum jurisdictional amount and plaintiffs are accorded nationwide service of process. 29 U.S.C. § 1132. Because many plan trustees are located in this district, many such actions are filed in this court, often against small employers in distant states for relatively small amounts of money. These cases often result in default judgments because the defendants do not find it financially feasible to appear. These cases should be put on a special calendar and assigned to a magistrate judge to be handled on papers alone, absent unusual circumstances.

F. Contingency Fees, Court Awarded Fees, and Fee Petitions. The CJRA's attack on cost in litigation is largely based on reducing the number of hours lawyers will spend on a case. The Act assumes this will reduce attorneys' fees, at least for lawyers who bill by the hour. The Act does not address contingent fee arrangements, but all advisory groups have been asked to address this issue and to consider setting a ceiling on contingent fees in personal injury actions.[76]

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[76]Memorandum from Judge Robert Parker, Chairman of the Judicial Conference Committee on Court Administration and Case Management, to Advisory Group Chairmen *et al.*, October 22, 1992.

We have considered the issue but decline to impose limits. There are many different types of contingent fee arrangements available, including straight percentage, graduated percentage, and hybrids that include an hourly rate with a percentage dependent on recovery. We do not think the court should regulate contingency contracts. The market is a more appropriate forum and a plaintiff has plentiful opportunities to comparison shop if the arrangement that one lawyer suggests seems high.

The court awards attorneys' fees in "fee-shifting" cases (in which the losing defendant is required by statute to pay the plaintiff's attorneys' fees) and in common fund or class action cases (in which the plaintiffs' lawyers are paid from the settlement or judgment amount). Fee petitions take the lawyers time to prepare and the judges time to review. Where possible, the court should seek ways to streamline this process.

In common fund cases, for example, it may be appropriate for the judge to award a percentage of the recovery to the lawyers if the case settles early on. This gives the plaintiffs' lawyers an incentive to move the case quickly, while reducing the time lawyers and judges must spend preparing or reviewing a detailed fee petition. At least one advisory group has recommended this approach.[77] The Seventh Circuit has suggested in passing that attorneys' fees can be based on what the market would pay for "the ensemble of services rendered" in a particular kind of case; for instance, a graduated percentage fee may be used in certain commercial litigation: one-third for the first million dollars recovered, one-fourth for the second million, etc. *In re Continental Securities Litigation*, 962 F.2d 566, 572 (7th Cir. 1992).

Percentages are not possible in most fee-shifting cases, however. The courts must use the lodestar method: the reasonable number of hours billed times a reasonable hourly rate. *City of Burlington v. Dague*, __ U.S. __, 112 S. Ct. 2638 (1992). A fee petition based on the lodestar thus must be fairly detailed. The court should develop uniform standards for lawyers to follow in preparing fee petitions.

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[77]*Report* of the Advisory Group for the District Court of the Eastern District of New York 108 (1991).

Local General Rule 46 should be amended to include these standards. This should give lawyers and judges a framework within which to view the attorneys' services, streamline both preparation and review, and increase consistency and predictability in fee awards.

Judicial scrutiny of a fee petition can absorb a tremendous amount of time and result in delays not only for the attorneys awaiting their fee but also for other litigants whose matters await the judge's attention. The Seventh Circuit has approved a sampling method, whereby the judge examines the petition for the hours claimed with respect to particular tasks. The judge's conclusion regarding the reasonableness of those hours may then be applied to the entire petition. If, for example, the judge concludes that ninety percent of the hours claimed with respect to the particular tasks is reasonable, that ninety percent figure may be projected to the total number of hours asserted. *Evans v. City of Evanston*, 941 F.2d 473 (7th Cir. 1991). This would reduce the time a judge spends examining an entire petition, while encouraging attorneys to be circumspect in their requests.

PART FOUR: THE PROPOSED PLAN.

The CJRA requires each advisory group to recommend that the district court either develop its own delay and expense reduction plan or choose a model plan developed by the Judicial Conference. 28 U.S.C. § 472(b)(2). We have reviewed the model plan. It is not an integrated set of rules, but rather presents a selection of two or three methods that varying courts have adopted in response to each of the provisions of the Act. Other courts can pick and choose from this selection according to their needs, but each court must still adopt its own plan for reducing delay and expense in its district.

Based upon the particular circumstances of litigation in this district and consistent with the recommendations in our Report, we propose that the court adopt the following plan.

PERSONNEL.

1. The number of district judgeships should be increased from twenty-two to at least twenty-five.

2. The number of magistrate judgeships should be increased so that the ratio of district to magistrate judges is two to one. There are currently twenty-two authorized district judgeships and nine magistrate judgeships. Thus the number of magistrate judgeships should be increased to eleven immediately and further increased as the number of district judges increases.

RESOURCES.

3. A new facility should be built or leased for the Western Division.

CASE MANAGEMENT.

Judicial Participation.

4. The court's current system of exempting specific classes of cases from the pretrial requirements of F. R. Civ. P. 16, having specialized procedures for prisoner litigation, and treating other cases individually, constitutes differentiated case management within the meaning of the CJRA.

5. For those cases that are not exempt from Rule 16 pretrial requirements, judges should strive to become involved early in the case and assist the parties in shaping the litigation through status hearings or pretrial conferences. All participants, judge and counsel, should prepare for these conferences. Judges and litigants should take cost into account in this process. While some

conferences should be conducted face-to-face, telephone conferences should be used when possible.

Discovery.

6. The court's Standing Order Establishing Pretrial Procedures should be amended as follows:

   - to provide that discovery proceed in phases in all cases for which discovery is appropriate. The first phase should address information necessary to evaluate the case, lay the foundation for a motion to dismiss or transfer, and explore settlement. The next phase or phases should concentrate on other motions and preparation for trial.

   - to provide that if the litigants cannot agree on a joint written discovery plan, each side should submit its own proposed discovery schedule at the pretrial conference. Lawyers should, however, cooperate in agreeing to a phased discovery schedule, to the extent possible.

7. Judges and litigants should take cost into account in planning discovery and in ruling on discovery motions. If a party seeks discovery that appears to be out of proportion to the issues or amounts in controversy, the judge should consider ordering that party to pay the costs of the requested discovery.

8. The court should adopt specific guidelines governing conduct at depositions, including: procedures for establishing where depositions are to be taken, who may attend, how to handle documents, what objections are allowed, and the propriety of instructions not to answer. These guidelines should be incorporated into every pretrial order governing discovery, with violations subject to sanctions. The court should ask the bar associations to draft these guidelines.

9. Judges should make themselves reasonably available during depositions to resolve disputes and, at the least, should inform the parties of their policy on availability at the first pretrial conference.

Motions

10. The court should establish uniform procedures governing motion calls and required notice of motions or, at the least, amend the local rules to state that the judges have varying requirements for motions.

11. A judge presented with a motion should give the parties a time frame within which the judge expects to rule.

12. The Clerk should develop a form request by which the parties can obtain information on the status of an undecided motion or bench trial.

13. Judges should issue oral rulings on motions or bench trials when possible.

Complex Cases

14. Judges and litigants in complex cases (those with multiple parties or claims or unusually difficult legal or factual issues) should use the *Manual on Complex Litigation 2d* as a guide.

15. Special masters should be used in complicated cases involving technical areas with which the district and magistrate judges are not familiar or in cases involving continuing and contentious discovery disputes.

The Final Pretrial Order.

16. The court should revise its standard pretrial order form as follows:

- delete sections (a) and (b), which call for the parties to meet face to face and agree on a list of uncontested facts and contested issues of fact and law.

- require that the parties automatically disclose the qualifications of any experts to be called at trial before the final pretrial conference. Judges should enforce the current provision that allows one expert witness per side per issue unless otherwise warranted.

- revise paragraph 6 to require that each party be represented at each pretrial conference by an attorney with authority to bind the party with respect to all matters previously identified by the court for discussion at the conference, and all reasonably related matters. An exception must be made for the United States government as a party.

- revise paragraph 6 to state that the judge may require a party representative with authority to bind be present at a settlement conference, in person or by telephone. An exception must again be made for the United States government.

17. All judges should use the revised standard pretrial order in cases for which a final pretrial order is appropriate.

Trial Date.

18. Judges should set an early, but realistic, trial date, recognizing that "hurry up and wait" can be wasteful of time and money for the litigants.

19. Judges should make use of the "short civil trial rule," Local General Rule 2.30(J), to expedite cases that are ready for trial.

ALTERNATIVE DISPUTE RESOLUTION.

20. The court should establish a procedure by which the parties can request that a magistrate judge preside over mediation or confidential settlement talks with them.

21. Prior to trial, judges should offer to preside over settlement talks. After trial, judges should not become involved in settlement talks unless the parties request it.

22. District and magistrate judges should obtain training in settlement techniques. Magistrate judges should also obtain training in mediation.

23. Judges and litigants should consider summary jury trial in complex cases that are expected to result in an extremely long trial and for which more traditional settlement techniques have proved futile. Minitrials should be considered in commercial cases with large amounts in controversy.

24. The court should ask the bar associations to prepare a pamphlet listing the various ADR methods available, and a general description of private dispute resolution options.

MAGISTRATE JUDGES.

25. Local General Rule 1.72(B) should be amended to provide that magistrate judges can decide and enter judgment on dispositive motions, upon consent of the parties. District judges should routinely advise parties that they may consent to reassignment of their case by the district judge to the magistrate judge either for the entire proceeding or for a dispositive motion. The district judges may not, however, pressure the parties to consent.

26. District judges should generally not refer dispositive motions to the magistrate judges for report and recommendation, subject to *de novo* review, unless all pretrial matters in the case have also been referred to the magistrate judge.

STANDING ORDERS

27. The practices in the judges' courtrooms that are governed by standing orders should conform to the local rules or, in the alternative, the local rules should be amended to state that the judges vary in their requirements. Standing orders should be published to the bar. The judges should also advise litigants who appear before them of all applicable standing orders, and any revisions as they are issued.

PRISONER AND OTHER *PRO SE* LITIGATION.

28. The court should authorize the staff attorneys responsible for prisoner litigation to hold settlement conferences, via telephone, in appropriate prisoner cases.

29. The court should ask bar associations or other interested groups to prepare a Title VII *Handbook*, which should include information of both a practical and a legal nature for use by attorneys appointed to represent *pro se* Title VII plaintiffs.

30. The complaint forms for *pro se* Title VII plaintiffs should be revised and a staff law clerk assigned to review *pro se* Title VII complaints.

SPECIAL TYPES OF CIVIL LITIGATION.

31. The court should remove the economic advantage to bringing mortgage foreclosures in federal court or place them on a special calendar, assigned to a rotating district judge.

32. The court should assign actions to collect employer contributions to employee benefit plans to a special calendar.

33. The court should ask the Judicial Conference of the Seventh Circuit to establish an appellate panel of bankruptcy judges that would be available to hear appeals from bankruptcy cases on consent of the parties.

COURT AWARDED FEES AND FEE PETITIONS.

34. The court should adopt uniform standards for lawyers to follow in preparing fee petitions and amend Local General Rule 46 to include these standards.

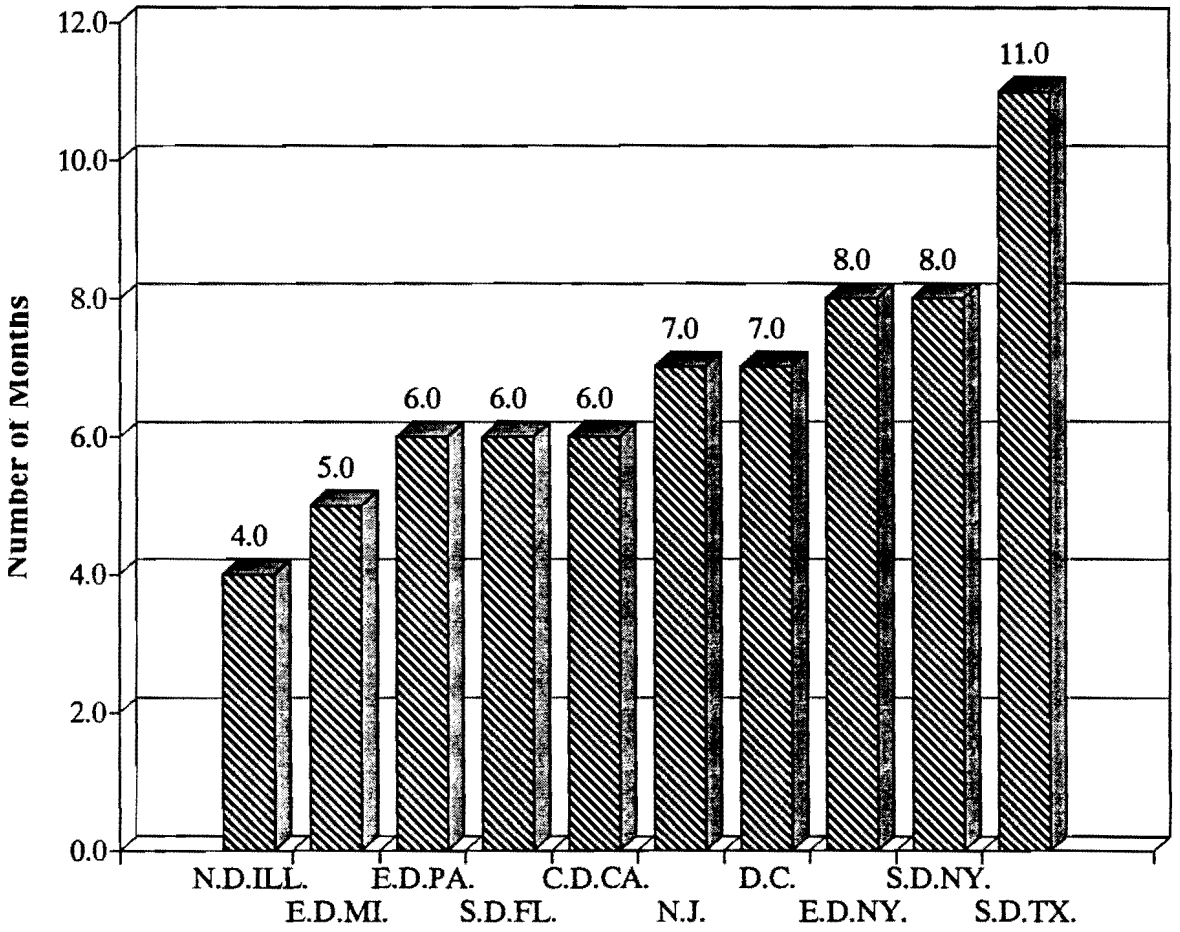
35. The judges should explore ways to reduce the amount of time needed to review fee petitions, including: (a) an "audit" of the petition; and (b) the use of percentage fees in appropriate cases.

ASSESSMENT OF IMPACT UPON THE FEDERAL COURTS.

36. Congress should establish an Office of Judicial Impact Assessment to evaluate the impact of proposed legislation, both civil and criminal, on the federal courts.

CHARTS

Chart 1
Median Disposition Times
Civil Cases Closed - Year Ending 30 June 1992



Ten Largest District Courts

Chart 2

Disposition Times

Civil Cases Closed - Year Ending 30 June 1992

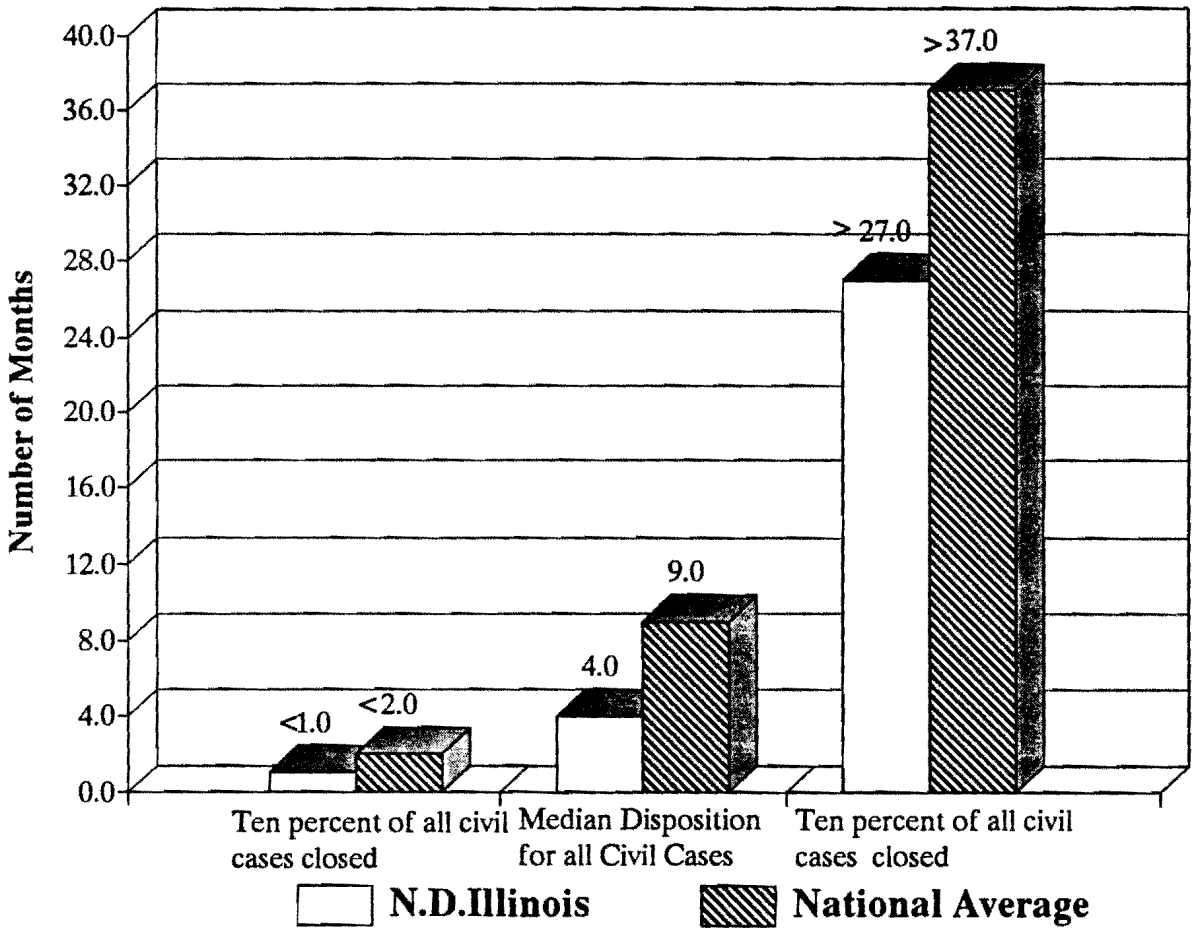


Chart 3
Weighted Civil Cases Per Judgeship
Civil Cases Closed - Year Ending 30 June 1992

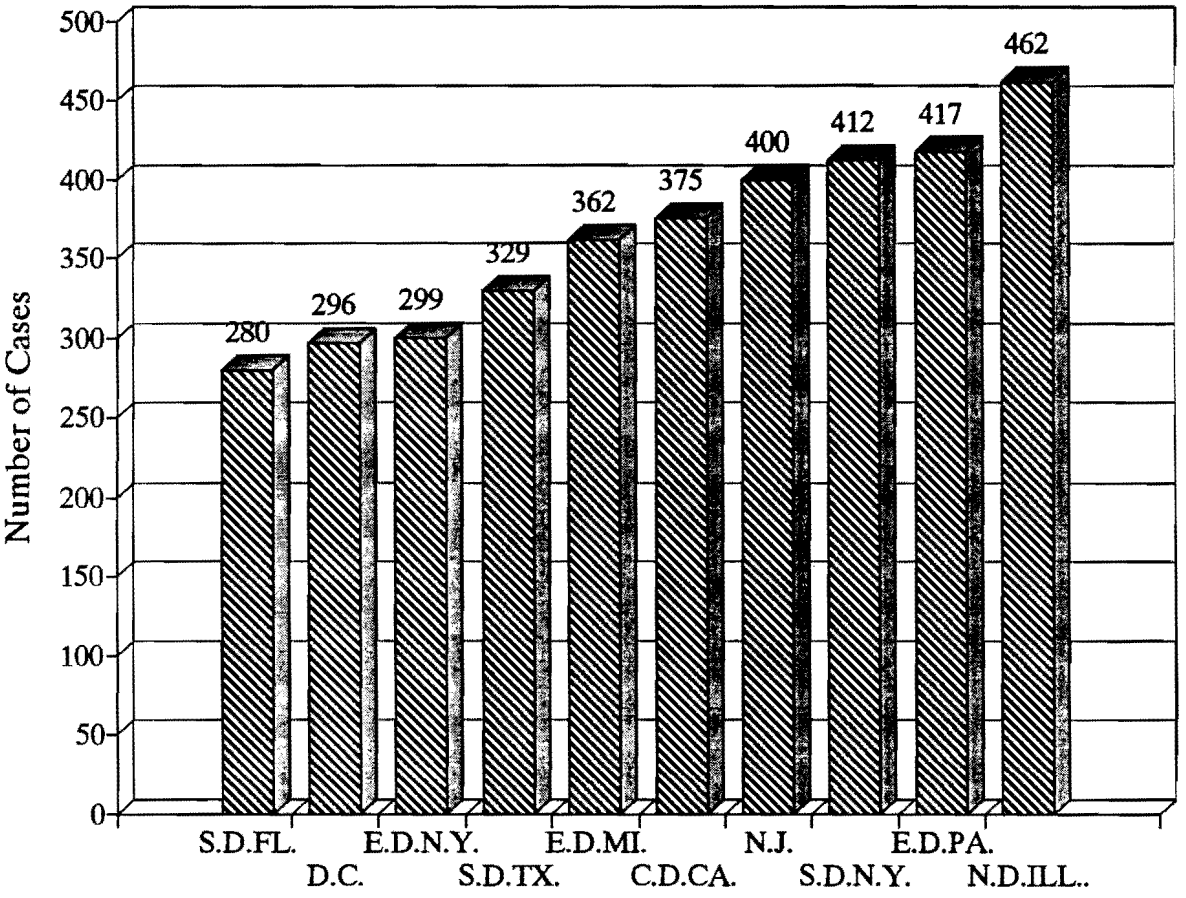
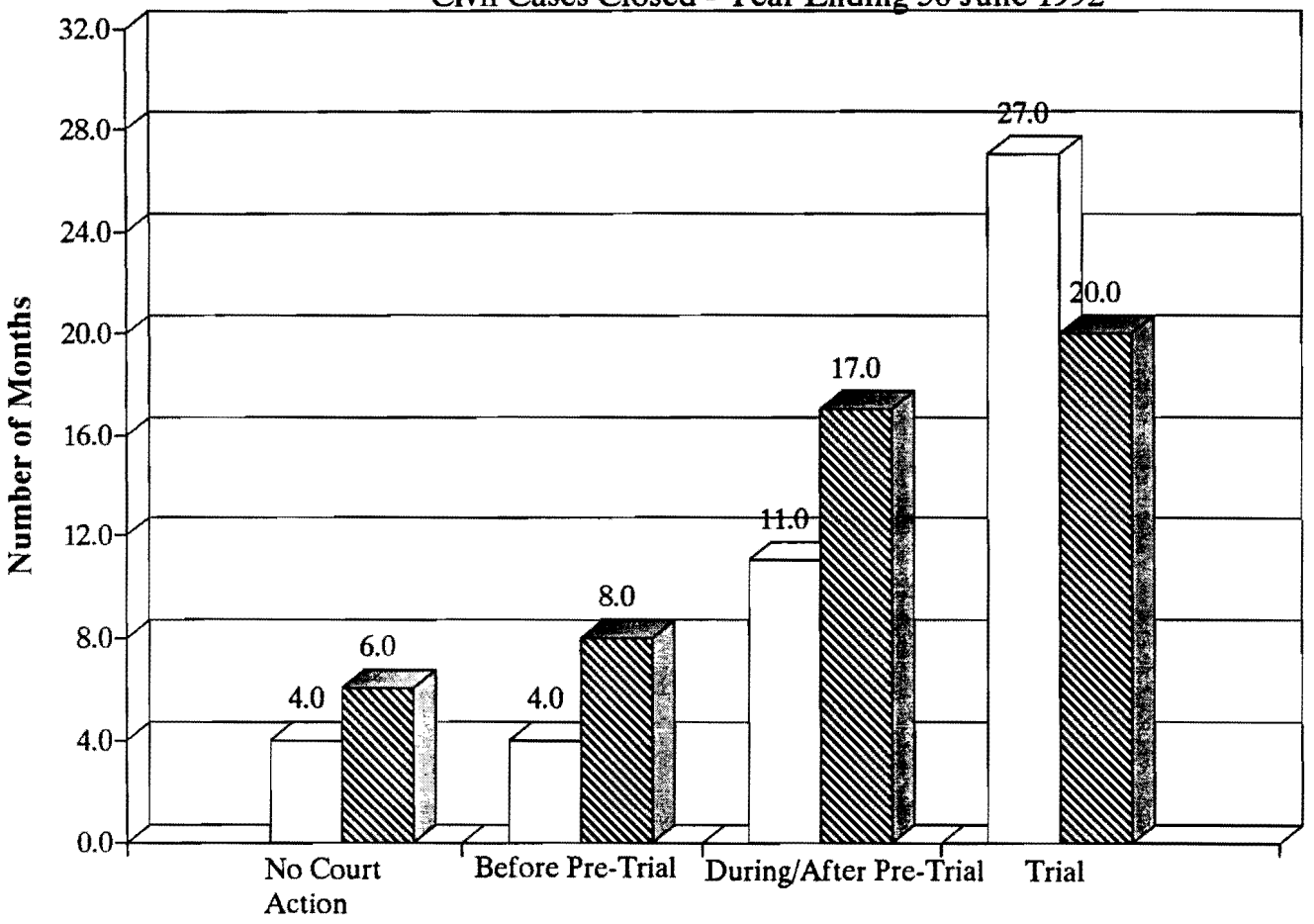


Chart 4
Median Disposition Times

Civil Cases Closed - Year Ending 30 June 1992



Four Defined Stages of Case Disposition

N.D. Illinois **National Average**

Chart 5

Median Disposition Time for Defendants

(Statistical Years 1971 - 1992)

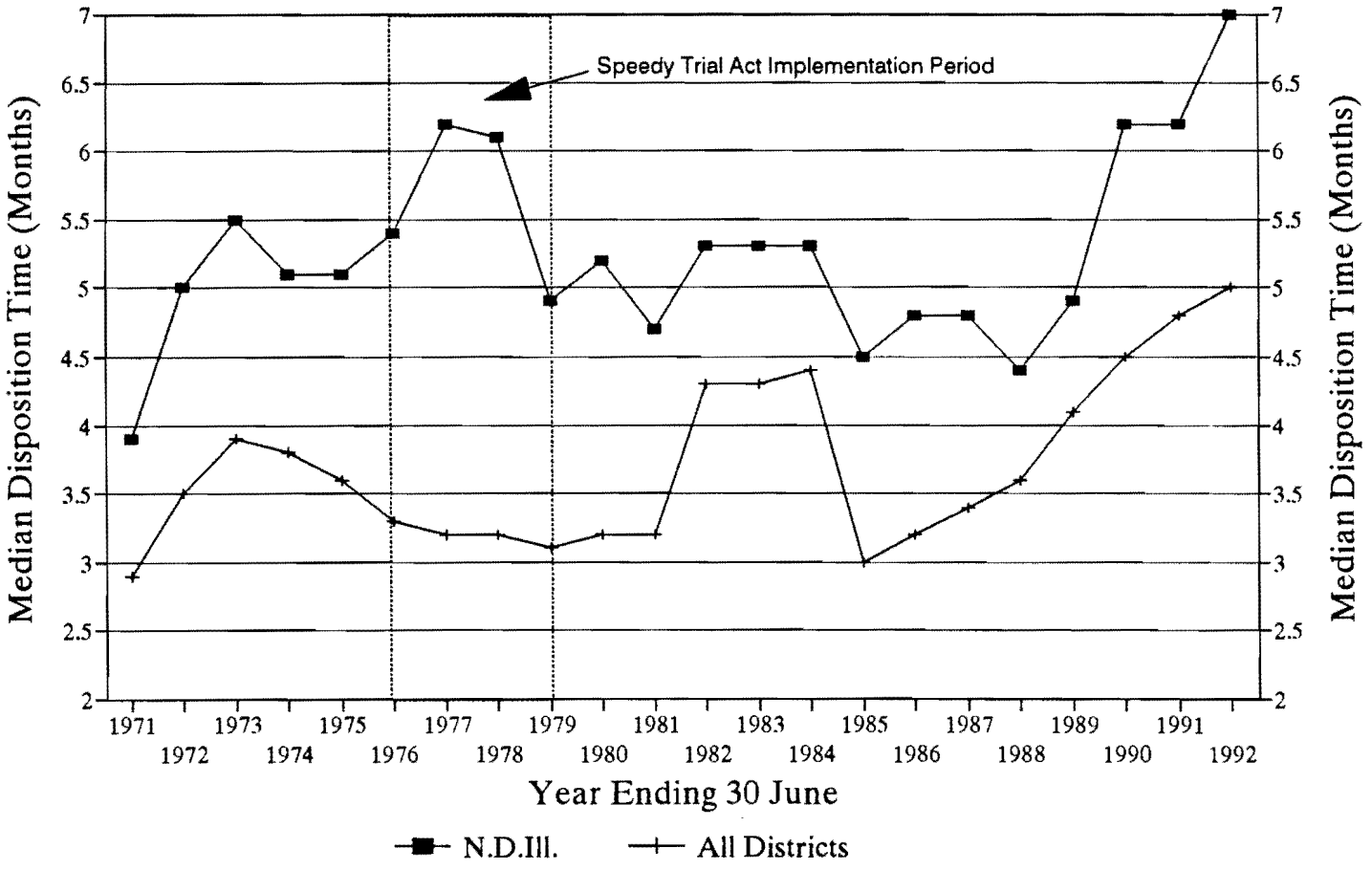


Chart 6
CJRA Survey Responses

On Unreasonable Delay and Excessive Costs

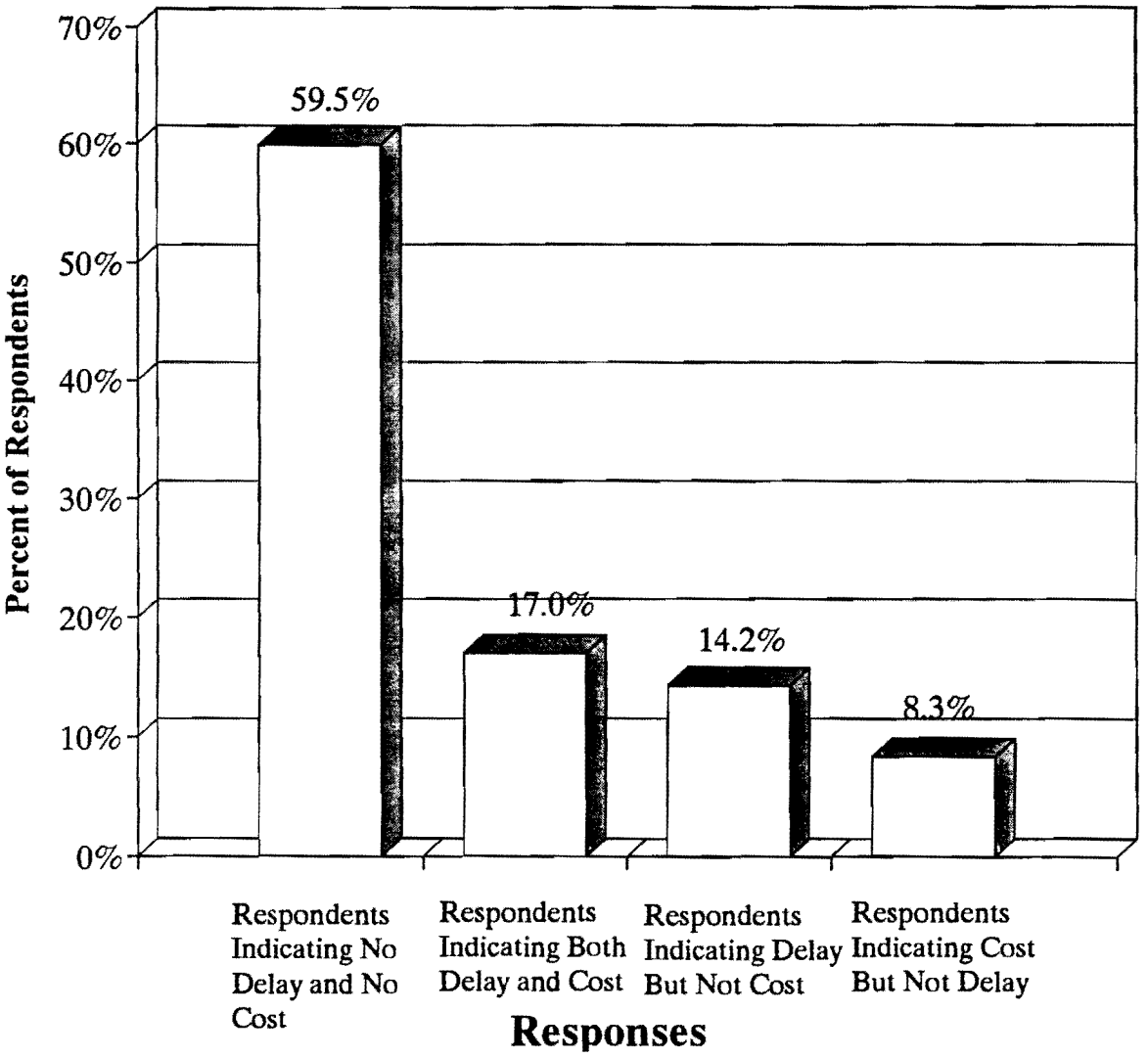
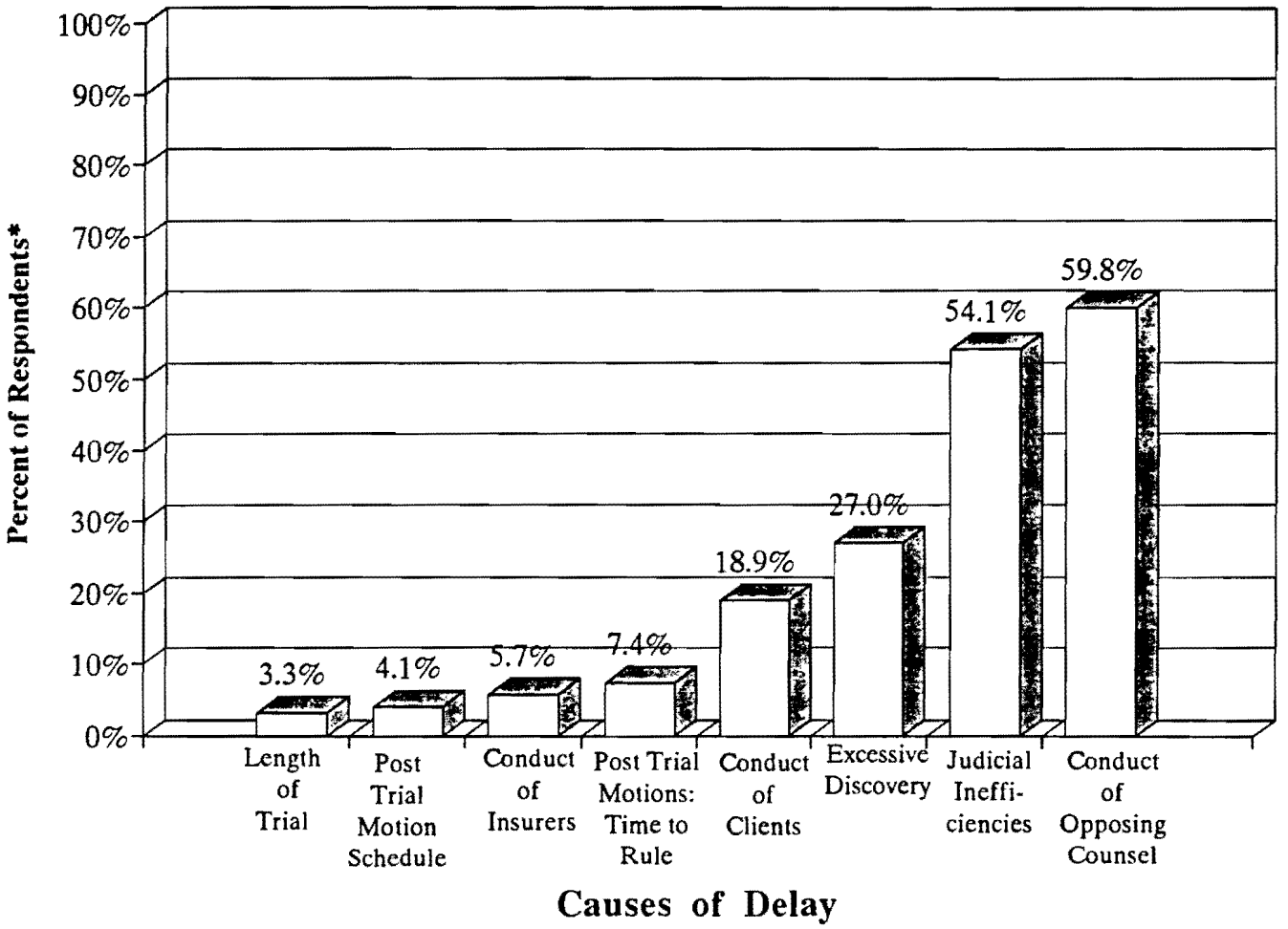


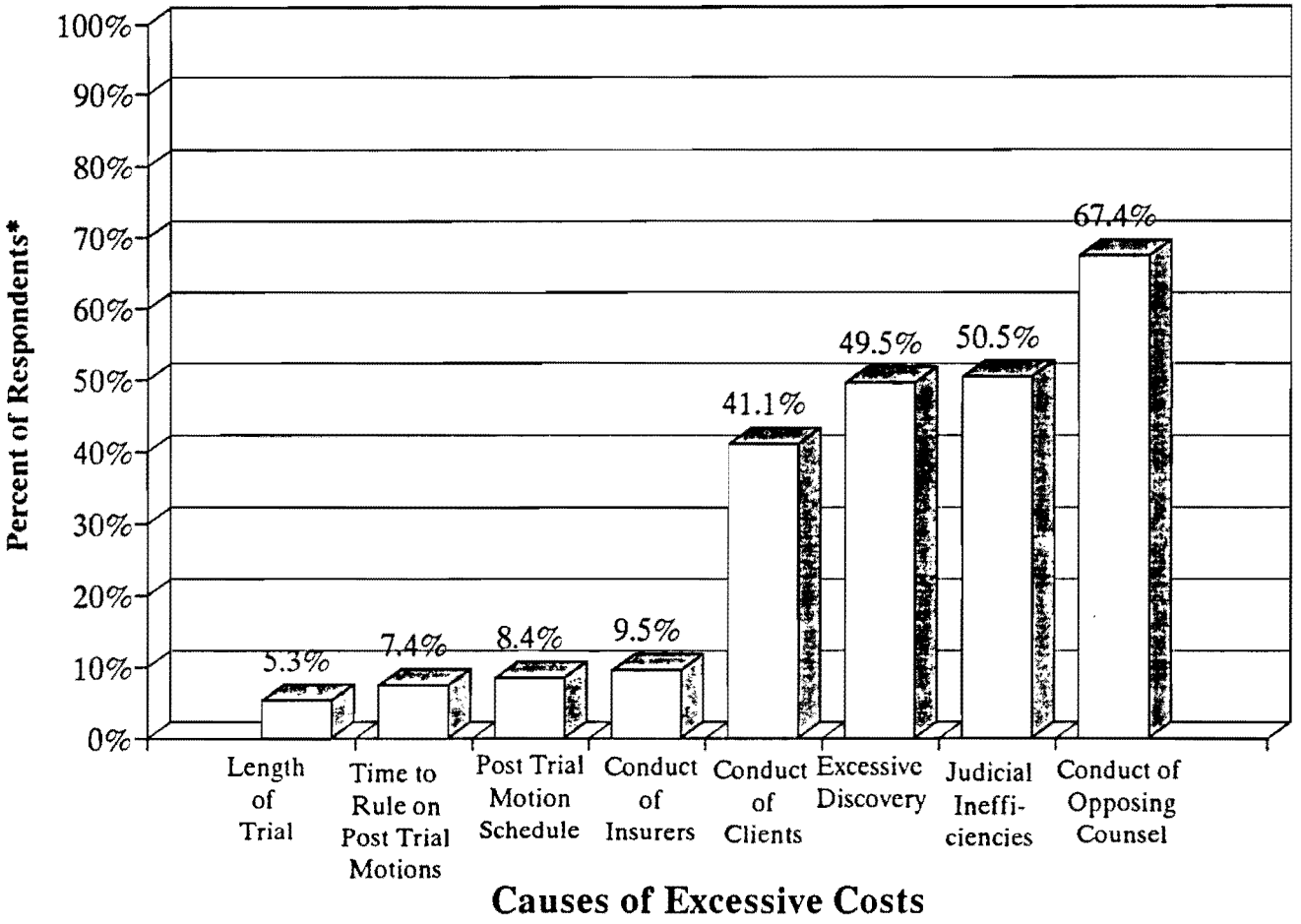
Chart 7
Moderate and Substantial Causes of Unreasonable Delay



*Based on 122 respondents who reported encountering unreasonable delay.

Chart 8

Moderate and Substantial Causes of Excessive Cost



*Based on 95 respondents who reported experiencing excessive cost.

APPENDIX I

CIVIL JUSTICE REFORM ACT
ADVISORY GROUP

MEMBERS:

Frank J. McGarr, Chairman. Of counsel, Pope & John, Ltd. Chief Judge of the United States District Court for the Northern District of Illinois from 1981 to 1986 and a member of the court from 1970 to 1988. Mr. McGarr served as First Assistant Attorney General, State of Illinois. He was also First Assistant United States Attorney, 1955-1958, and Chief of the Criminal Division. He was in private practice as a partner in Moses, McGarr, Gibbons, Abramson & Fox.

Gordon B. Nash, Jr., Vice-Chairman. Partner and chair of the Litigation Department at Gardner, Carton & Douglas. Mr. Nash is also former president of the Chicago Bar Association, Chief of the Special Prosecution Division of the United State's Attorney's Office and a Fellow of the American College of Trial Lawyers.

Clayton J. Adams. Industry affairs manager and counsel in Illinois for Aetna Life & Casualty. He directs the company's public affairs, lobbying and regulatory efforts. He has been Director of the Advisory Council to the Department of Human Resources for the State of Connecticut, Director of the Insurance Federation of Pennsylvania, and Chairperson of the Legal Committee of the New York Medical Malpractice Joint Underwriting Association.

Dean Robert W. Bennett. Dean of the School of Law, Northwestern University since 1985 and a member of the faculty since 1969. Dean Bennett is a scholar in the field of constitutional law and is the author of numerous articles and two books. He was a co-founder of the Chicago Council of Lawyers and has served as its president. He has a bachelor's degree in history and science, *summa cum laude*, and a law degree, *cum laude*, from Harvard University.

Paul P. Biebel, Jr.. Litigation partner at Winston & Strawn and Executive Attorney for the firm's Litigation Department. Mr. Biebel was First Assistant Attorney General, State of Illinois, 1981-1985, and Assistant State's Attorney for the Cook County State's Attorney's Office, including six years as Chief of the Civil Division. He is on the Advisory Board for the Illinois Supreme Court Planning Conference entitled "The Future and the Courts of Illinois."

Frederick H. Branding. Partner with Johnson & Bell, Ltd. Mr. Branding was an Assistant United States Attorney and Chief of the Civil Division. He also served with the United Nations International Narcotics Control Board in Austria. He is a registered pharmacist and has twice received the Food and Drug Administration Commissioner's Special Citation. He is Vice Chair of the American Bar Association Food and Drug Law Committee and has been appointed Special Assistant Attorney General for the State of Illinois.

James P. Chapman. Mr. Chapman specializes exclusively in civil trial work, primarily in the federal courts. He is a Fellow of the American College of Trial Lawyers and the International Academy of Trial Lawyers. He also does extensive public interest work, primarily dealing with prisoner litigation. He is a graduate of Harvard Law School.

Ruben Castillo. Litigation partner with Kirkland & Ellis. Mr. Castillo previously served as the Chicago Regional Counsel of the Mexican American Legal Defense and Educational Fund and as an Assistant United States Attorney in the Northern District of Illinois.

Susan Getzendanner. Trial lawyer, Skadden, Arps, Slate, Meagher & Flom. Ms. Getzendanner was a United States District Court judge in the Northern District of Illinois from 1980 to 1987.

Roy E. Hofer. Partner in Willian Brinks Olds Hofer Gilson & Lione in Chicago. Mr. Hofer specializes in patent and trade secret litigation. He is president-elect of the Federal Circuit Bar Association, President of the Center for Conflict Resolution in Chicago, and chair of the alternative dispute resolution committee of the American Intellectual Property Law Association. He was president of the Chicago Bar Association, 1988-1989.

Suzanne English Jones. President of The John Howard Association, a prison reform organization. Ms. Jones has also done considerable volunteer work in the criminal justice field, including the Cook County Court Watchers, of which she has been president. She serves on the Illinois Special Commission on the Administration of Justice, the Citizens Committee on the Juvenile Court and the Board of the Chicago Crime Commission. She is a consultant with The Calkins Group, a legal recruiting firm in Chicago.

Matthew R. Kipp. Associate, Skadden, Arps, Slate, Meagher & Flom. Law Clerk to Judge Bruce M. Selya (U.S. Court of Appeals for the Fifth Circuit) and Judge Barbara B. Crabb (W.D. Wis.). B.A., Yale University; J.D., Columbia University School of Law.

James D. Montgomery. James D. Montgomery & Associates, Ltd. Mr. Montgomery was named a Fellow of the International Academy of Trial Lawyers in 1983. He has served as Corporation Counsel for the City of Chicago and for the City of Harvey, Illinois. He was an Assistant United States Attorney and has served on the Illinois Parole and Pardon Board.

Thomas H. Morsch. Partner at Sidley & Austin in Chicago. Mr. Morsch is a Fellow of the American College of Trial Lawyers and an officer and director of the Chicago Lawyers Committee for Civil Rights Under Law, the Public Interest Law Initiative, and the Chicago Bar Foundation. He received his undergraduate degree from the University of Notre Dame in 1953 and his law degree from Northwestern University School of Law.

Nancy K. Needles. Executive Assistant United States Attorney, Northern District of Illinois, since 1991 and formerly Chief of the Civil Division. Instructor at the Attorney General's Advocacy Institute; senior evaluator and instructor in the Justice Department's peer review program. She has served with the Illinois Attorney Registration and Disciplinary Commission since 1983. B.S., with honors, Iowa State University; J.D., with honors, John Marshall Law School.

Frank A. Perrecone. The Law Firm of Lawrence J. Ferolie & Associates, Ltd., Rockford, Illinois. Mr. Perrecone has been a member of the Board of Managers of the Illinois Trial Lawyers Association, and received the 1989 Illinois State Bar Association Board of Governors' Award. Member of the Winnebago County Circuit Court Mandatory Arbitration Proceedings Panel of Arbitrators. B.A., Northern Illinois University; J. D. with honors, Drake University Law School.

Harvey M. Silets. Senior partner, Katten, Muchin & Zavis. Mr. Silets is a Fellow of the American College of Trial Lawyers, a Fellow of the International Academy of Trial Lawyers, whose membership

is limited to 500 worldwide, a Fellow of the American College of Tax Counsel, and a Fellow of the American Board of Criminal Lawyers. He is the only lawyer in the United States to be elected to all four of these colleges and boards concurrently.

Geraldine C. Simmons. Private practitioner in Salone, Simmons, Murray & Associates. Past President of the Cook County Bar Association.

EX-OFFICIO MEMBERS OF THE COMMITTEE:

Honorable Ilana Diamond Rovner. Judge Rovner was appointed to the Seventh Circuit Court of Appeals in August 1992. She was a judge of the U. S. District Court for the Northern District of Illinois from 1984 to 1992. She served as Deputy Governor and legal counsel to Governor James R. Thompson, and as an Assistant United States Attorney and Chief of the Public Protection Unit.

Honorable Marvin E. Aspen. Judge Aspen was appointed U. S. District Judge, Northern District of Illinois, in 1979. He serves on the Judicial Conference Committee on the Administration of the Bankruptcy System and the Federal Judicial Center District Judges' Education Committee. He is past Chairperson of the Conference of Federal Trial Judges and Chairperson of the Judicial Liaison Committee of the American Bar Association's Section on Litigation. Judge, Circuit Court of Cook County, 1971-1979. He has written or co-written five books and more than two dozen articles.

Honorable Brian Barnett Duff. Judge, U.S. District Court for the Northern District of Illinois. Appointed 1985. Served in the Circuit Court of Cook County, Il., 1976-1985. Felony Trials 1976-1979; Law Jury 1979-1981; Motions Judge Cook County Law Division 1982-1984; Chancery Court 1985. Judge Duff has reduced backlogs in every court assignment that he has been given. Court of Appeals for the Federal Circuit, January 1990, by designation. Illinois General Assembly 1971-1976; Chairman of the House Judiciary Committee in the 78th General Assembly.

Honorable Elaine E. Bucklo. Judge Bucklo has been a United States Magistrate Judge since 1985. She was in private practice from 1973 to 1985. She was law clerk to Judge Robert A. Sprecher of the United States Court of Appeals for the Seventh Circuit and received a J.D. from Northwestern University School of Law.

H. Stuart Cunningham, Court Administrator. Clerk of the Court since 1970. Mr. Cunningham has been affiliated with the United States District Court for the Northern District of Illinois since 1959. He has a B.A. in European History and an M.B.A. with a concentration in Economics from the University of Chicago.

REPORTER:

Anne Megan Davis. Ms. Davis was a partner with Friedman & Koven; law clerk to Judge Thomas R. McMillen, (N. D. Ill.); and staff attorney to the Review Panel on New Drug Regulation, U. S. Deparment of Health, Education & Welfare. J.D. with honors and M.Ed. from the University of Texas at Austin; B.A., St. Mary's College, Notre Dame, Indiana.

APPENDIX II

THE CIVIL JUSTICE REFORM ACT OF 1990

Public Law 101-650
101st Congress

An Act

To provide for the appointment of additional Federal circuit and district judges, and for other purposes.

Dec. 1, 1990
[H.R. 5316]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Judicial Improvements Act of 1990".

Judicial Improvements Act of 1990.
Courts.
28 USC 1 note.

TITLE I—CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

Civil Justice Reform Act of 1990.

SEC. 101. SHORT TITLE.

28 USC 1 note.

This title may be cited as the "Civil Justice Reform Act of 1990".

SEC. 102. FINDINGS.

28 USC 471 note.

The Congress makes the following findings:

(1) The problems of cost and delay in civil litigation in any United States district court must be addressed in the context of the full range of demands made on the district court's resources by both civil and criminal matters.

(2) 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.

(3) The solutions to problems of cost and delay must include significant contributions by the courts, the litigants, the litigants' attorneys, and by the Congress and the executive branch.

(4) In identifying, developing, and implementing solutions to problems of cost and delay in civil litigation, it is necessary to achieve a method of consultation so that individual judicial officers, litigants, and litigants' attorneys who have developed techniques for litigation management and cost and delay reduction can effectively and promptly communicate those techniques to all participants in the civil justice system.

(5) Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including—

(A) the differential treatment of cases that provides for individualized and specific management according to their needs, complexity, duration, and probable litigation careers;

(B) early involvement of a judicial officer in planning the progress of a case, controlling the discovery process, and scheduling hearings, trials, and other litigation events;

(C) regular communication between a judicial officer and attorneys during the pretrial process; and

(D) utilization of alternative dispute resolution programs in appropriate cases.

(6) Because the increasing volume and complexity of civil and criminal cases imposes increasingly heavy workload burdens on judicial officers, clerks of court, and other court personnel, it is necessary to create an effective administrative structure to ensure ongoing consultation and communication regarding effective litigation management and cost and delay reduction principles and techniques.

SEC. 103. AMENDMENTS TO TITLE 28, UNITED STATES CODE.

(a) CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS.—Title 28, United States Code, is amended by inserting after chapter 21 the following new chapter:

"CHAPTER 23—CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

"Sec.

"§ 471. Requirement for a district court civil justice expense and delay reduction plan

"There shall be implemented by each United States district court, in accordance with this title, a civil justice expense and delay reduction plan. The plan may be a plan developed by such district court or a model plan developed by the Judicial Conference of the United States. The purposes of each plan are 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.

"§ 472. Development and implementation of a civil justice expense and delay reduction plan

"(a) The civil justice expense and delay reduction plan implemented by a district court shall be developed or selected, as the case may be, after consideration of the recommendations of an advisory group appointed in accordance with section 478 of this title.

Reports.

"(b) The advisory group of a United States district court shall submit to the court a report, which shall be made available to the public and which shall include—

"(1) an assessment of the matters referred to in subsection (c)(1);

"(2) the basis for its recommendation that the district court develop a plan or select a model plan;

"(3) recommended measures, rules and programs; and

"(4) an explanation of the manner in which the recommended plan complies with section 473 of this title.

"(c)(1) In developing its recommendations, the advisory group of a district court shall promptly complete a thorough assessment of the state of the court's civil and criminal dockets. In performing the assessment for a district court, 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; and

"(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.

"(2) In developing its recommendations, the advisory group of a district court shall take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys.

"(3) The advisory group of a district court 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.

"(d) The chief judge of the district court shall transmit a copy of the plan implemented in accordance with subsection (a) and the report prepared in accordance with subsection (b) of this section to—

"(1) the Director of the Administrative Office of the United States Courts;

"(2) the judicial council of the circuit in which the district court is located; and

"(3) the chief judge of each of the other United States district courts located in such circuit.

"§ 473. Content of civil justice expense and delay reduction plans

"(a) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction:

"(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 after 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;

"(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, minitrial, and summary jury trial.

"(b) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include 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 referred to in section 472(a) of this title.

"(c) Nothing in a civil justice expense and delay reduction plan relating to the settlement authority provisions of this section 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.

"§ 474. Review of district court action

"(a)(1) The chief judges of each district court in a circuit and the chief judge of the court of appeals for such circuit shall, as a committee—

"(A) review each plan and report submitted pursuant to section 472(d) of this title; and

"(B) make such suggestions for additional actions or modified actions of that district court as the committee considers appropriate for reducing cost and delay in civil litigation in the district court.

"(2) The chief judge of a court of appeals and the chief judge of a district court may designate another judge of such court to perform the chief judge's responsibilities under paragraph (1) of this subsection.

"(b) The Judicial Conference of the United States—

"(1) shall review each plan and report submitted by a district court pursuant to section 472(d) of this title; and

"(2) may request the district court to take additional action if the Judicial Conference determines that such court has not adequately responded to the conditions relevant to the civil and criminal dockets of the court or to the recommendations of the district court's advisory group.

"§ 475. Periodic district court assessment

"After developing or selecting a civil justice expense and delay reduction plan, each United States district court shall assess annually the condition of the court's civil and criminal dockets with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court. In performing such assessment, the court shall consult with an advisory group appointed in accordance with section 478 of this title.

"§ 476. Enhancement of judicial information dissemination

"(a) The Director of the Administrative Office of the United States Courts shall prepare a semiannual report, available to the public, that discloses for each judicial officer— Reports.

"(1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending;

"(2) the number of bench trials that have been submitted for more than six months and the name of each case in which such trials are under submission; and

"(3) the number and names of cases that have not been terminated within three years after filing.

"(b) To ensure uniformity of reporting, the standards for categorization or characterization of judicial actions to be prescribed in accordance with section 481 of this title shall apply to the semiannual report prepared under subsection (a).

"§ 477. Model civil justice expense and delay reduction plan

"(a)(1) Based on the plans developed and implemented by the United States district courts designated as Early Implementation District Courts pursuant to section 103(c) of the Civil Justice Reform Act of 1990, the Judicial Conference of the United States may develop one or more model civil justice expense and delay reduction plans. Any such model plan shall be accompanied by a report explaining the manner in which the plan complies with section 473 of this title.

Reports.

"(2) The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations to the Judicial Conference regarding the development of any model civil justice expense and delay reduction plan.

"(b) The Director of the Administrative Office of the United States Courts shall transmit to the United States district courts and to the Committees on the Judiciary of the Senate and the House of Representatives copies of any model plan and accompanying report.

"§ 478. Advisory groups

"(a) Within ninety days after the date of the enactment of this chapter, the advisory group required in each United States district court in accordance with section 472 of this title shall be appointed by the chief judge of each district court, after consultation with the other judges of such court.

"(b) The advisory group of a district court shall be balanced and include attorneys and other persons who are representative of major categories of litigants in such court, as determined by the chief judge of such court.

"(c) Subject to subsection (d), in no event shall any member of the advisory group serve longer than four years.

"(d) Notwithstanding subsection (c), the United States Attorney for a judicial district, or his or her designee, shall be a permanent member of the advisory group for that district court.

"(e) The chief judge of a United States district court may designate a reporter for each advisory group, who may be compensated in accordance with guidelines established by the Judicial Conference of the United States.

"(f) The members of an advisory group of a United States district court and any person designated as a reporter for such group shall be considered as independent contractors of such court when in the performance of official duties of the advisory group and may not, solely by reason of service on or for the advisory group, be prohibited from practicing law before such court.

"§ 479. Information on litigation management and cost and delay reduction

"(a) Within four years after the date of the enactment of this chapter, the Judicial Conference of the United States shall prepare a comprehensive report on all plans received pursuant to section 472(d) of this title. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding such report to the Judicial Conference during the preparation of the report. The Judicial Conference shall transmit copies of the report to the United States district courts and to the Committees on the Judiciary of the Senate and the House of Representatives. Reports.

"(b) The Judicial Conference of the United States shall, on a continuing basis—

"(1) study ways to improve litigation management and dispute resolution services in the district courts; and

"(2) make recommendations to the district courts on ways to improve such services.

"(c)(1) The Judicial Conference of the United States shall prepare, periodically revise, and transmit to the United States district courts a Manual for Litigation Management and Cost and Delay Reduction. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding the preparation of and any subsequent revisions to the Manual. Government publications.

"(2) The Manual shall be developed after careful evaluation of the plans implemented under section 472 of this title, the demonstration program conducted under section 104 of the Civil Justice Reform Act of 1990, and the pilot program conducted under section 105 of the Civil Justice Reform Act of 1990.

"(3) The Manual shall contain a description and analysis of the litigation management, cost and delay reduction principles and techniques, and alternative dispute resolution programs considered most effective by the Judicial Conference, the Director of the Federal Judicial Center, and the Director of the Administrative Office of the United States Courts.

"§ 480. Training programs

"The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts shall develop and conduct comprehensive education and training programs to ensure that all judicial officers, clerks of court, courtroom deputies, and other appropriate court personnel are thoroughly familiar with the most recent available information and analyses about litigation management and other techniques for reducing cost and expediting the resolution of civil litigation. The curriculum of such training programs shall be periodically revised to reflect such information and analyses.

"§ 481. Automated case information

"(a) The Director of the Administrative Office of the United States Courts shall ensure that each United States district court has the automated capability readily to retrieve information about the status of each case in such court.

"(b)(1) In carrying out subsection (a), the Director shall prescribe—

"(A) the information to be recorded in district court automated systems; and

"(B) standards for uniform categorization or characterization of judicial actions for the purpose of recording information on judicial actions in the district court automated systems.

"(2) The uniform standards prescribed under paragraph (1)(B) of this subsection shall include a definition of what constitutes a dismissal of a case and standards for measuring the period for which a motion has been pending.

Records. "(c) Each United States district court shall record information as prescribed pursuant to subsection (b) of this section.

"§ 482. Definitions

"As used in this chapter, the term 'judicial officer' means a United States district court judge or a United States magistrate.".

28 USC 471 note. (b) IMPLEMENTATION.—(1) Except as provided in section 105 of this Act, each United States district court shall, within three years after the date of the enactment of this title, implement a civil justice expense and delay reduction plan under section 471 of title 28, United States Code, as added by subsection (a).

(2) The requirements set forth in sections 471 through 478 of title 28, United States Code, as added by subsection (a), shall remain in effect for seven years after the date of the enactment of this title.

28 USC 471 note. (c) EARLY IMPLEMENTATION DISTRICT COURTS.—

(1) Any United States district court that, no earlier than June 30, 1991, and no later than December 31, 1991, develops and implements a civil justice expense and delay reduction plan under chapter 23 of title 28, United States Code, as added by subsection (a), shall be designated by the Judicial Conference of the United States as an Early Implementation District Court.

(2) The chief judge of a district so designated may apply to the Judicial Conference for additional resources, including technological and personnel support and information systems, necessary to implement its civil justice expense and delay reduction plan. The Judicial Conference may provide such resources out of funds appropriated pursuant to section 106(a).

Reports. (3) Within 18 months after the date of the enactment of this title, the Judicial Conference shall prepare a report on the plans developed and implemented by the Early Implementation District Courts.

(4) The Director of the Administrative Office of the United States Courts shall transmit to the United States district courts and to the Committees on the Judiciary of the Senate and House of Representatives—

(A) copies of the plans developed and implemented by the Early Implementation District Courts;

(B) the reports submitted by such district courts pursuant to section 472(d) of title 28, United States Code, as added by subsection (a); and

(C) the report prepared in accordance with paragraph (3) of this subsection.

(d) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part I of title 28, United States Code, is amended by adding at the end thereof the following:

"23. Civil justice expense and delay reduction plans..... 471".

SEC. 104. DEMONSTRATION PROGRAM. 28 USC 471 note.

(a) IN GENERAL.—(1) During the 4-year period beginning on January 1, 1991, the Judicial Conference of the United States shall conduct a demonstration program in accordance with subsection (b).

(2) A district court participating in the demonstration program may also be an Early Implementation District Court under section 103(c).

(b) PROGRAM REQUIREMENT.—(1) The United States District Court for the Western District of Michigan and the United States District Court for the Northern District of Ohio shall experiment with systems of differentiated case management that provide specifically for the assignment of cases to appropriate processing tracks that operate under distinct and explicit rules, procedures, and timeframes for the completion of discovery and for trial.

(2) The United States District Court for the Northern District of California, the United States District Court for the Northern District of West Virginia, and the United States District Court for the Western District of Missouri shall experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution, that such district courts and the Judicial Conference of the United States shall select.

(c) STUDY OF RESULTS.—The Judicial Conference of the United States, in consultation with the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall study the experience of the district courts under the demonstration program.

(d) REPORT.—Not later than December 31, 1995, the Judicial Conference of the United States shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report of the results of the demonstration program.

SEC. 105. PILOT PROGRAM. 28 USC 471 note.

(a) IN GENERAL.—(1) During the 4-year period beginning on January 1, 1991, the Judicial Conference of the United States shall conduct a pilot program in accordance with subsection (b).

(2) A district court participating in the pilot program shall be designated as an Early Implementation District Court under section 103(c).

(b) PROGRAM REQUIREMENTS.—(1) Ten district courts (in this section referred to as "Pilot Districts") designated by the Judicial Conference of the United States shall implement expense and delay reduction plans under chapter 23 of title 28, United States Code (as added by section 103(a)), not later than December 31, 1991. 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.

(2) At least 5 of the Pilot Districts designated by the Judicial Conference shall be judicial districts encompassing metropolitan areas.

(3) 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).

(c) PROGRAM STUDY REPORT.—(1) Not later than December 31, 1995, the Judicial Conference shall submit to the Committees on the Judiciary of the Senate and House of Representatives a report on the results of the pilot program under this section that includes an assessment of the extent to which costs and delays were reduced as a result of the program. The report shall compare those results to the impact on costs and delays in ten comparable judicial districts for which the application of section 473(a) of title 28, United States Code, had been discretionary. That comparison shall be based on a study conducted by an independent organization with expertise in the area of Federal court management.

(2)(A) The Judicial Conference shall include in its report a recommendation as to whether some or all district courts should be required to include, in their expense and delay reduction plans, the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a) of title 28, United States Code.

(B) If the Judicial Conference recommends in its report that some or all district courts be required to include such principles and guidelines in their expense and delay reduction plans, the Judicial Conference shall initiate proceedings for the prescription of rules implementing its recommendation, pursuant to chapter 131 of title 28, United States Code.

(C) If in its report the Judicial Conference does not recommend an expansion of the pilot program under subparagraph (A), the Judicial Conference shall identify alternative, more effective cost and delay reduction programs that should be implemented in light of the findings of the Judicial Conference in its report, and the Judicial Conference may initiate proceedings for the prescription of rules implementing its recommendation, pursuant to chapter 131 of title 28, United States Code.

SEC. 106. AUTHORIZATION.

(a) EARLY IMPLEMENTATION DISTRICT COURTS.—There is authorized to be appropriated not more than $15,000,000 for fiscal year 1991 to carry out the resource and planning needs necessary for the implementation of section 103(c).

(b) IMPLEMENTATION OF CHAPTER 23.—There is authorized to be appropriated not more than $5,000,000 for fiscal year 1991 to implement chapter 23 of title 28, United States Code.

(c) DEMONSTRATION PROGRAM.—There is authorized to be appropriated not more than $5,000,000 for fiscal year 1991 to carry out the provisions of section 104.

TITLE II—FEDERAL JUDGESHIPS

Federal Judgeship Act of 1990.
28 USC 1 note.

SECTION 201. SHORT TITLE.

This title may be cited as the "Federal Judgeship Act of 1990".

SEC. 202. CIRCUIT JUDGES FOR THE CIRCUIT COURT OF APPEALS.

President.
28 USC 44 note.

(a) IN GENERAL.—The President shall appoint, by and with the advice and consent of the Senate—

(1) 2 additional circuit judges for the third circuit court of appeals;