REPORT OF THE ADVISORY GROUP ON THE REDUCTION OF COST AND DELAY IN CIVIL CASES

United States District Court
for the Northern District of Indiana

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REPORT OF THE ADVISORY GROUP ON THE REDUCTION OF COST AND DELAY IN CIVIL CASES

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INTRODUCTION

On December 1, 1990, the Civil Justice Reform Act of 1990, 28 U.S.C. § 471 *et seq.*, was enacted. Among the stated goals of the Act were the reduction of cost and delay in civil litigation in the federal district courts and the identification, development, and implementation of specific solutions to avoid unnecessary costs and delay. To accomplish these objectives, Congress mandated that each district appoint an advisory group to assess the problems of delay in the district and to recommend "measures, rules and programs" which might be useful in reducing cost and delay.[1] The advisory group was to fulfill three tasks. First, each group was required to investigate the present health of the district by examining the condition of its docket and the trends in case filings.[2] Second, the group was required to identify the principal causes of cost and delay.[3] Finally, the group was required to develop for the court a report which detailed its findings and recommended ways to reduce cost and delay.[4]

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[1] 28 U.S.C. § 472(b)(3).

[2] 28 U.S.C. § 472(c)(1)(A) and (B).

[3] 28 U.S.C. § 472(c)(1)(C).

[4] 28 U.S.C. § 472(b)(1). In developing its recommendations, Congress specifically stated that each advisory group should consider adoption of case management principles such as: (1) differential case management; (2) early judicial involvement in "assessing and planning the progress of a case"; (3) "early, firm trial dates"; (4) regulation of discovery practice through controls on "the extent of discovery and the time for completion of discovery," through encouragement of the "voluntary exchange of information," and through the attorney conferences prior to filing discovery motions; (5) the development of special procedures in complex cases; (6) deadlines for motions and a timetable for their disposition; and (7) authorization to refer appropriate cases to alternate methods of dispute resolution. 28 U.S.C. § 473(a). In addition, the advisory groups were asked to consider the value of specific case management techniques such as (1) a jointly-prepared discovery plan; (2) the presence at each pretrial conference of a person with authority to bind a party; (3) the presence (by telephone or otherwise) at each settlement conference of a person with authority to bind a party: (4) a requirement that any requests for extension of pretrial deadlines be signed by both the attorney *and* the party; and (5) the development of a early neutral evaluation program. 28 U.S.C. § 473(b). The groups were also required to examine the role which better assessment of the impact of new legislation on the courts might play in the reduction of cost and delay. 28 U.S.C. § 472(c)(1)(D). Recognizing the diversity among districts, Congress nonetheless left to each district the task of tailoring changes suited to that district. 28 U.S.C. § 472(b)(2).

This is the report of the advisory group for the Northern District of Indiana. The report is divided into three sections. The first part contains the advisory group's assessment of the present state of civil litigation in the Northern District of Indiana, including its findings on the present causes of cost and delay in the district. The second part provides the group's recommendations to the court on techniques to reduce cost and delay in individual cases; the focus is on those techniques which the group believes the court can implement without the need for additional funds or resources. The third part provides the group's recommendations on more systemic matters which cannot be accomplished by the court given its present resources.

While the report makes significant recommendations concerning the critical need for uniformity among judges on pretrial and trial matters, the need for timely disposition of motions, and the better use of alternate methods of dispute resolution, two recommendations lie at the heart of this report. The first is that the court adopt rules which assure both early mandatory disclosure of basic evidence and early firm trial dates, rules which together should significantly reduce the delays in many routine civil cases. The second is the need for additional magistrate judges and law clerks to assist the court in difficult problems of pretrial management, particularly in *pro se* litigation, and in the resolution of routinized cases, particularly Social Security appeals. The greatest present threat to the civil docket in this court lies in these two fields of litigation, and the dangers they pose are entirely curable with the use of additional non-Article III judicial resources.

I

AN ASSESSMENT OF CIVIL LITIGATION

The group assessed the present state of civil litigation in the Northern District of Indiana by examining three issues. First, the group evaluated the nature of the district's civil and criminal dockets to determine the extent of the problem of cost and delay and the nature of the cases which might be causing the problem. Next, since the district's local rules might also have an effect on cost and delay, the group examined the present state of those rules. Finally, the group used the evidence accumulated in these sections to identify the present causes of unnecessary cost and delay in the district.

The committee finds that the present state of civil litigation in the district is something of a "good news/bad news" situation. The good news is that, until the past year, civil filings have been declining; the docket is fairly current; the local rules are in the process of a beneficial revision; and the burden of the criminal docket is relatively light in relation to many districts. The bad news is that the future looks bleaker than the present: more complicated cases and fewer simple cases are being filed; the downward trend in case filing has stopped; cases are in general not being disposed of as quickly as they had been; and a lack of judicial resources makes more aggressive management of those cases likely to benefit from such management a near impossibility.

A. The Present State of the Docket

1. General Description. The Northern District of Indiana includes thirty-two counties, and covers approximately one-third of the state of Indiana. It has three full-time divisions (Hammond, South Bend, and Fort Wayne) and a fourth part-time division (Lafayette).[5] The four divisions correspond to the four largest population clusters in the district. Each division, and the district as a whole, is a mix of urban and rural areas.

At present, the Northern District of Indiana consists of five active district judges, three full-time magistrate judges, and one senior district judge. Two active judges and one magistrate sit in the Hammond Division; two active judges, one senior judge, and one magistrate sit in the South Bend Division; and an active judge and one magistrate sit in the Fort Wayne Division. One of the active judges in the South Bend Division, the district's Chief Judge, also handles the work in the Lafayette Division. Thus, one quarter of the court's present active judicial resources are located in the Fort Wayne division, three-eighths are in the Hammond division, and three-eighths are split time between the South Bend and Lafayette divisions.

In assessing the condition and trends of the district's docket, the advisory group has examined statistics from 1985 to 1991. The district's judicial manpower had not been uniform during that time. Until January 10, 1986, the district had only four active district judges. The district was down to four active district judges again between May 20, 1987 and February 26,

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[5] According to 28 U.S.C. § 94(a), there are only three divisions in the district, with court for the Hammond Division being held at both Hammond and Lafayette. Historically, however, Lafayette has been treated as a separate "division" of the district.

1988. One of the beneficial impacts of the Civil Justice Reform Act was to establish the fifth judgeship, which had been temporary, as permanent.[6] With respect to magistrates, the district had only two full-time magistrates until August 1, 1985, when a part-time (one-third) position was created; that position was upgraded to half-time status on October 1, 1986, and to a full-time position on December 19, 1989.

Finally, the nature of the attorneys practicing before the court varies among the divisions. Most of the lawyers are sole practitioners or belong to small firms. The attorneys regularly practicing in the Fort Wayne and Lafayette divisions are a fairly small group, who must regularly deal with one judge and one magistrate. The members of these bars do not practice frequently in the other divisions. The bar in South Bend is somewhat larger. The number of attorneys practicing in the Hammond Division is still larger; the reason is the number of attorneys from the geographically contiguous Chicago area who occasionally handle cases in Hammond. Based on anecdotal evidence, the group has found that lawyers in the latter two divisions more frequently practice in the different divisions of the court and routinely appear before two or more judges of the court. Consequently, variations in pretrial and courtroom procedure among the judges and magistrate judges in the South Bend and Hammond divisions have a daily impact on the practitioners in these divisions.

2. *Present Caseload.* The group's study of the statistical information on the court's docket has revealed some paradoxical conclusions. On the one hand, during the period ending June 30, 1990, the court ranked 92nd of the 94 district courts in terms of the number of cases (civil and criminal) filed, had the greatest percentage reduction in the number of cases filed

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[6] Sec. 203(b)(1).

(22%) of all district courts in the country, and was ranked sixth (of seven districts) in the circuit in terms of the average cases per judge and last in terms of a weighted filing indicating the complexity of cases.[7] In this period, the court terminated five cases for every four cases filed.[8] Furthermore, considered on a district-wide basis, criminal filings are relatively light; on a per-judge basis, the district ranked sixth of the seven districts in the Seventh Circuit during the period ending June 30, 1990. The statistics for the period ending June 30, 1991 tell a similar story: the district is 93rd of 94 districts in the percentage reduction of filings over the past five years, last in the Circuit in terms of total filings and civil filings per judge, and next to last in the Circuit in terms of criminal filings and civil filings weighted for complexity.

Viewed from a different perspective, however, the picture is not as rosy. According to the Administrative Office of the Judicial Conference, the district was essentially in the middle of the pack in terms of the speed with which cases are resolved. For the period ending June 30, 1990, the district ranked fifth among seven districts in the Circuit in terms of median time for filing-to-disposition of felony cases and fifth in filing-to-disposition time for civil cases.[9] For the period ending June 30, 1991, the court had fallen to sixth place in the Circuit (and 70th place in the country) in the median time from filing to disposition of felony cases, and remained in fifth place (56th in the country) in median filing-to-disposition time for civil cases.[10] As of

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[7] Unless otherwise noted, statistics for a given year are based on the year ending December 31. Some of the statistics set forth in this report are based on the report of Administrative Office, which bases its statistics on years ending on June 30; those statistics are so noted in this report.

[8] The actual statistic is 1.27 cases terminated to every 1 case filed. The circuit average was 1.04:1.

[9] The median time for disposition of felony cases was 6.0 months, and 12.0 months for disposition of civil cases.

[10] The median time for disposition of felony cases is now 6.8 months, and 11 months for disposition of civil cases.

June 30, 1990, for civil cases which resulted in trial, the district's median filing-to-trial time was 15 months, ranking it fourth among the districts in the Circuit; the court also ranked third in the circuit in terms of the number of trials completed. As of June 30, 1991, the median filing-to-trial time dropped to 14 months, with the court remaining in fourth place in the Circuit; during the same period, it ranked fourth in the Circuit in terms of the number of trials completed per judge. In each of the past two reporting years, the district was last in the Circuit in terms of the cases which were three or more years old, with its 1990 figure of 12% being more than double the number of old cases found in the next-to-last district in the Circuit.[11] In each of the past two reporting years, the Administrative Office has ranked the district in the lower half of the courts in terms of median time for disposition of civil cases (70th of 94 districts in 1990 and 56th in 1991), and in the middle of the courts in terms of median time from issue to trial (43rd of 94 districts in 1990 and 37th in 1991).

One of the primary tasks of the group was to determine the reasons that a district which has seen such a precipitous fall in terms of the number of cases filed was not also among the country's leaders in terms of the speed with which cases are terminated. The following sections analyze the question by looking particularly at the nature of the cases in the district, the impact of different types of resources and cases among the divisions, and the past and future trend of cases filed in the district.

a. General Nature of Cases Filed in the District. The bulk of the district's business today consists of civil rights cases. Of the cases pending at the end of 1990, two in five were prisoner cases or non-prisoner civil rights cases. Another quarter of the district's cases consist

[11] As of June 30, 1991, the number had dropped to 10.7%, which was 68th of the 94 districts.

of "other contract" and "personal injury" cases, which presumably reflect the court's diversity jurisdiction. Table 1 sets forth the district's principal caseload as of the end of 1990:

TABLE 1

Non-prisoner civil rights	17%
Prisoner civil rights	17%
Personal injury	16%
Other contract	11%
Other prisoner	7%
Social security appeals	7%
Real property	6%
Labor suits	5%
Personal property	2%
Bankruptcy appeals	2%
Property rights	1%
VA/Student loan	1%
Tax suits	1%
All others	7%

Statistics compiled by the Administrative Office demonstrate that, whether judged by filings or pending cases, the Northern District of Indiana has an atypical caseload composition, skewed heavily in favor of civil rights and prisoner actions. Such cases comprised 28% of the filings, and 24.9% of the year-end pending cases, of the average five-judge district court,[12] but 43.8% of the filings, and 38.8% of the year-end pending cases, of the Northern District of Indiana. Table 2 compares the average caseload for a five-judge United States District Court to the district's caseload.[13]

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[12] These figures were produced by dividing the national total figures by 575 (reflecting the number of district judgeships before the Civil Justice Reform Act of 1990) and multiplying by five, to reflect the number of active judges on the Northern District of Indiana.

[13] The district figures vary somewhat from those set forth in Table 1, because the Administrative Office figures are based on the year ending June 30, 1990, while Table 1 is based on the year ending December 31, 1990.

TABLE 2

	Filings		Pending Cases	
	Avg.	N.D. IN	Avg.	N.D. IN
Contract	21.1%	24.3%	17.9%	13.4%
Real Property	4.4%	8.0%	3.7%	5.0%
Tort (all kinds)	20.2%	15.2%	30.1%	19.9%
Non-prisoner civil rights	8.7%	12.9%	9.9%	16.4%
Prisoner civil rights	12.3%	16.0%	10.0%	17.2%
Habeas corpus	7.0%	14.9%	5.0%	5.2%
U.S. Forfeiture, penalties	2.8%	1.2%	2.0%	0.7%
Labor suits	6.3%	4.5%	5.1%	4.7%
Social security	3.4%	1.7%	3.3%	7.4%
Tax suits	1.2%	0.6%	1.1%	0.7%
Copyright, patent, trademark	2.6%	1.6%	2.3%	1.8%
All other	9.5%	6.4%	9.2%	6.9%
Total U.S. Civil	25.8%	22.7%	20.0%	20.7%
Total Private Civil	74.1%	77.2%	79.9%	79.3%

On the criminal side, the district's criminal caseload is well below the national average. The district had 125 cases, with a total of 208 defendants, pending at the end of 1990. In the twelve months ending June 30, 1990, the district saw 221 criminal cases filed, a reduction of 11.6% from the previous year; those cases involved 322 defendants. Based on the Administrative Office's June 30, 1990 statistics, an average five-judge court would have had 417 criminal cases filed, involving 564 defendants. A more accurate regional barometer might be the Seventh Circuit, which seems to have fewer criminal cases than do other circuits: five average district judges in the circuit would have had 273 criminal cases, involving 387 defendants, filed in the twelve months ending June 30, 1990. The twelve months ending June 30, 1991 reveal a significant drop in the number of criminal cases filed; 147 cases involving

approximately 206 defendants were filed. Overall, the district was sixth of the seven district courts in the Circuit in terms of per-judge criminal filings in reporting years 1990 and 1991.

On the other hand, three factors indicate that the burden of criminal cases has, and will continue to have, an effect on civil cases in the district. First, the Northern District of Indiana had more criminal trials than national statistics would lead one to expect. According to the Administrative Office report, this district conducted 97 criminal trials during the twelve months ending on June 30, 1990, while the average five-judge court would have tried 78 criminal cases. Second, the United States Attorney has recently added personnel in South Bend and Fort Wayne to handle criminal litigation. Third, the United States Attorney reports that the decline in the number of criminal filings is deceptive. In the past year the office has pursued increasingly complex criminal litigation whose motion practice has required significant court time; this fact undoubtedly also explains the increase in median filing-to-disposition time noted in the past year for felony cases.[14] The United States Attorney also indicates that the number of trial days for criminal prosecutions has increased significantly. In addition, the United States Attorney points out that the sentencing guidelines often require judicial involvement even in cases which result in a plea agreement. The United States Attorney's "perception is that the time which Judges and Magistrates throughout the District have had to devote to criminal matters in the last two years has significantly increased over prior years."[15]

b. Divisional Caseload. Notwithstanding the abolition of divisional venue requirements, the allotment of judicial personnel between the district's divisions roughly reflects the allotment

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[14] The median time rose from 6.0 months to 6.8 months during the twelve months ending June 30, 1991.

[15] Letter of September 19, 1991.

of cases between the divisions. The Hammond Division, with two active district judges and one magistrate judge, had 39% of the district's pending civil cases; but it also has, as will be discussed below, two-thirds of the district's pending criminal cases. The South Bend Division, with two active district judges (one of whom, the district's Chief Judge, also has principal responsibility for another division), one senior district judge, and one magistrate judge, had 42% of the district's pending cases. The Fort Wayne Division, with one active district judge and one magistrate judge, had 15% of the district's pending cases. The Lafayette Division, which is manned on a part-time basis by the Chief Judge, had 5% of the district's pending cases.

The nature of the caseload differs from division to division. For example, the Fort Wayne Division, with 15% of the district's overall caseload, had 27% of the non-prisoner civil rights cases pending in the district at the close of 1990. The South Bend Division, with 42% of the district's overall caseload, had 88% of the district's prisoner cases at the close of 1990. The Hammond Division had 57% of the pending personal injury cases and 95% of the district's social security appeals. Accordingly, the nature of the workload of each division differs significantly. Table 3 sets forth statistics reflecting the principal nature of each division's pending caseload at the end of 1990:

TABLE 3

Fort Wayne	
Non-prisoner civil rights	30%
Other contract	17%
Personal injury	14%
Hammond	
Personal injury	24%
Non-prisoner civil rights	18%
Social security appeals	15%
South Bend	
Prisoner (civ. rts. & other)	38%
Non-prisoner civil rights	12%
Other contract	10%

The criminal caseload likewise varied among the divisions. Table 4 reflects the divisional breakdown, with the district-wide percentage in parentheses:

TABLE 4

	Cases	Defendants
Fort Wayne	13 (10%)	18 (9%)
Hammond	84 (67%)	135 (65%)
South Bend	27 (22%)	45 (22%)
Lafayette	1 (.8%)	10 (.5%)

Those statistics indicate that each division faces its own unique problems in confronting its civil caseload:

i. Fort Wayne. The Fort Wayne Division feels a lesser impact from the criminal caseload than do the district's other principal divisions. While two of the district's eight full-time judicial personnel are assigned to that division, only 10% of the district's criminal cases pend in that division. Nonetheless, the bulk of the division's civil

caseload consists of non-prisoner civil rights cases and cases presenting contract or personal injury claims, cases which seem to have the greatest likelihood of going to trial.

ii. Hammond. The Hammond Division faces the enormous difficulty of addressing a civil docket while at the same time bearing responsibility for two-thirds of the district's criminal cases with three of the district's eight full-time judicial officers. The litigants have taken their own approach: 27% of the division's civil cases are assigned to the magistrate judge, reflecting both the magistrate's ability and the magistrate's lack of a felony caseload. Further, 42% of the division's civil cases consist of personal injury and non-prisoner civil rights cases which, again, are among the cases most likely to go to trial. Finally, social security appeals, which require considerable out-of-court judicial time, comprise a significant portion of the division's docket.

iii. South Bend. The principal challenge of the South Bend Division is the handling of nearly all of the district's prisoner litigation. Because prisoner filings have increased in recent years while filings in other categories have decreased, the division's proportion of the district's caseload has increased. In 1990, the South Bend Division's filings increased by 4%, while the district as a whole experienced a 7% decrease in filings. Prisoner cases are less likely than others to go to trial, and invariably include one or more dispositive motions, requiring extensive investment of out-of-court judicial time. If prisoner cases are removed from consideration, the remainder of the division's docket is similar to that of Fort Wayne: of the non-prisoner cases, 25% are civil rights

cases, 23% are "other contract", and 21% are personal injury. The district also faces a significant, though less than proportional, criminal docket.

iv. Lafayette. At the end of 1990, the Lafayette Division had only one criminal case (albeit one with ten defendants). More than half of its small caseload consists of the sort of case classifications (non-prisoner civil rights, contract, and personal injury) most likely to go to trial. Most significantly, the division reflects 23% of the caseload of the judge with principal responsibility for the division.

A significant statistic is the currency of each of the four division's dockets. As Table 5 shows, the Fort Wayne Division, with its 1:1 ratio between district judge and magistrate judge, may be viewed as the most current division as of January 31, 1991: it had resolved the most cases within two years and had the fewest cases older than three years among all of the divisions of the court.

TABLE 5

	0-2 yrs old	2-3 yrs old	3+ yrs old
NATIONAL AVERAGE (6 /30 90)	78.2%	11.5%	10.4%
N.D. IN (6/30/90)	77.2%	10.8%	12.0%
N.D. IN (1/31/91)	81.4%	8.5%	10.1%[16]
Fort Wayne	88.4%	6.0%	5.5%
Hammond	77.1%	8.7%	14.2%
South Bend	82.7%	9.2%	8.0%
Lafayette	84.1%	7.2%	8.7%

[16] As of June 30, 1991, this figure had risen to 10.7%.

While it is always difficult to assign precise causes for the relative currency of the Fort Wayne Division, the group believes that four factors are primarily responsible. First, the division has fewer criminal cases. Second, among its civil cases, it has relatively few prisoner cases and Social Security appeals. Third, the district judge holds early pretrial conferences at which he encourages early discovery and assesses cases for inclusion in his alternate dispute resolution programs of early neutral evaluation and mediation. Finally, Fort Wayne is the only division to enjoy a 1:1 ratio of district judge to magistrate judge, and is successful in obtaining from the practicing bar a high percentage of consents to trial before the magistrate.

c. Caseload Trends. On the whole, the district's caseload has dropped precipitously since 1985. Between 1985 and 1990, filings fell 49%, from 2,658 in 1985 to 1,357 in 1990. The most dramatic drop in the district's filings occurred in 1989 and 1990: the district's filings dropped by 26% between 1985 and 1988, then fell by another 31% in 1989 and 1990. The court's year-end pending caseload is down 42%, from 2,391 cases pending at the end of 1985 to 1,378 cases pending at the end of 1990. Table 6 sets forth the annual filings and year-end caseload since 1985:

TABLE 6

	1985	1986	1987	1988	1989	1990
FILINGS	2,658	2,328	2,005	1,962	1,458	1,357
PENDING, YEAR-END	2,391	2,369	2,306	2,137	1,662	1,378

The decline in the district's overall filings -- civil and criminal -- is even more dramatic. The 22.6% decline in filings recorded by the Administrative Office during the period ending

June 30, 1990 was greater than all but two districts in the nation; the overall decline between June 30, 1986 and June 30, 1991 was the second largest in the entire nation. The decline, however, is not wholly inconsistent with the experience of other districts in the Seventh Circuit. Table 7 sets forth the reductions in overall filings experienced by the circuit's district courts (years refer to the twelve months ending on June 30):

TABLE 7

Court	'89-90	'88-89'	87-88'	86-87'	85-86'	Since 1985
IL, N	-19.0%	- 3.9%	-5.9%	+12.4%	-16.5%	-27.2%
IL, C	- 5.2%	- 4.2%	-11.1%	+21.7%	-32.2%	-33.5%
IL, S	-11.0%	- 7.9%-	-11.5%	+ 9.9%	-16.5%	-33.4%
IN, N	-22.6%	- 5.8%	- 7.0%	-12.2%	- 3.8%	-38.3%
IN, S	+37.5%	- 1.1%	- 5.6%	-14.2%	0.0	+10.0%
WI, E	- 1.4%	+12.1%	- 7.9%	+ 6.5%	-36.3%	-10.4%
WI,W	-19.0%	+ 3.9%	+14.2	-2.0%	- 2.2%	- 8.0%

In terms of backlog, the district appears to have a modest backlog that is in the process of reduction. As of January 31, 1991, the district had 1,346 civil cases pending. Of those cases, 83.4% were less than two years old and 89.8% were less than three years old. By comparison, 10.4% of the civil cases pending in all district courts were more than three years old.[17]

Again by way of comparison, the Northern District of Indiana had 1,357 civil filings in 1990, producing a year-end ratio of pending cases to new filings of 1.02, compared to the

[17] According to statistics from the Administrative Office, 24,050 of the nation's 242,346 pending cases (10.2%) were more than three years old as of June 30, 1990. Review of the cases pending in this district on January 31, 1991, indicates that 136 of the 1,346 pending cases (10.4%) were more than three years old. This represents a significant drop in just seven months; as of June 30, 1990, 12% of the court's cases were three or more years old.

national average of 1.11.[18] On January 1, 1990, 1,662 civil cases were pending in the district, and the court disposed of 1,639 cases in 1990, a ratio of .99 dispositions for every pending case, compared to the national average of .90.[19] Table 8 sets forth the ratios of pending cases to new filings and dispositions to pending cases since 1986:

TABLE 8

	1986	1987	1988	1989	1990
Pending Cases (12/31) to Filings	1.02	1.15	1.09	1.14	1.02
Dispositions to Pending Cases (1/1)	0.97	0.87	0.92	0.89	0.99

[18] According to the Administrative Office report, the nation's courts had 217,879 filings between July 1, 1989 and June 30, 1990, when 242,346 cases were pending. The Northern District of Indiana had a lower (better) ratio than the national average in the following categories of cases: contracts (0.55 ro 0.95); real property (0.66 to 0.93); torts (1.34 to 1.66); habeas corpus and motions to vacate federal sentences (0.38 to 0.80); forfeiture and penalty cases (0.62 to 0.80). The district had a higher (poorer) ratio than the national average in the following categories of cases: non-prisoner civil rights (1.36 to 1.27); prisoner civil rights (1.16 to 0.88); labor suits (1.13 to 0.89); social security cases (4.58 to 1.08); and copyright/patent/trademark cases (1.28 to 0.96).

In the five largest categories of cases in the district's filings -- contract, prisoner civil rights, tort, habeas corpus, and non-prisoner civil rights (which comprised 83.3% of the district's filings for the twelve months ending June 30, 1990) -- the district reported 0.92 pending cases for each new filing, compared to a national average of 1.17 for those categories.

[19] The Administrative Office statistics reveal that 238, 389 cases were pending at the end of the previous reporting period, and 213,922 cases were terminated by June 30, 1990. The Northern District of Indiana had a higher (better) ratio than the national average in the following categories of cases: contracts (1.44 to 1.18); real property (3.24 to 1.05); torts (0.95 to 0.53); non-prisoner civil rights (0.89 to 0.25); prisoner civil rights (1.11 to 1.05); habeas corpus and motions to vacate federal sentences (2.54 to 1.1); and forfeiture and penalty cases (2.60 to 1.09). The district had a lower (poorer) ratio than the national average in the following categories of cases: labor suits (0.93 to 1.07); social security cases (0.65 to 1.23); and copyright/patent/trademark cases (0.89 to 1.04).

In the five largest categories of cases in the district's filings -- contract, prisoner civil rights, tort, habeas corpus, and non-prisoner civil rights (which comprised 83.3% of the district's filings for the twelve months ending June 30, 1990) -- the district reported 1.19 dispositions for each pending case, compared to a national average of 0.88 for those categories.

Unfortunately, there is little reason for comfort or optimism in these statistics. First, downward trend in filings ended during the past reporting year; while there were 1,385 civil cases filed during the twelve-month period ending on June 30, 1990, there were 1,399 civil cases filed during the twelve-month period ending on June 30, 1991. Second, the cases responsible for the five-year reduction in filings were simple cases typically requiring little court time. The overall reduction in cases masks a more ominous trend in the district: the filing of more complicated cases which consume significant judicial resources. As the following discussion shows, these two factors mean that, without adequate planning for the management of cases and the development of new resources, the district is likely to be in a worse position in five years than it is in today.

i. Categories Responsible for Reduction. While filings are down since 1985 in nearly every category of case, four types of cases are principally responsible for this dramatic reduction in filings over the past six years. Table 9 sets forth the reductions in those categories of cases.

TABLE 9

FILINGS

	1985	1990	%age
Veterans Administration/ Student Loan	765	59	92%
Real Property	495	99	80%
Other Contract	272	124	54%
Personal Injury	303	200	34%

Together, these four categories of cases reflect a reduction in filings of 1,353 cases since 1985. It is worth noting that the district's overall filings fell by 1,301 cases during that time, meaning

that, with the exception of these four categories, there was actually a small increase in the number of filings since 1985.

Numerous factors have influenced the reduction in the first category.[20] The bulk of the reduction in government loan cases occurred in 1985-1987, a period in which annual filings in that category dropped from 765 to 123, or 642 cases; in the same period, the district's overall filings fell by 696 cases. The increase in jurisdictional amount-in-controversy requirements from $10,000 to $50,000, which was effective November 19, 1988, may be largely responsible for the reductions in the other three categories.[21] Table 10 reflects the reductions in filings in the three categories of cases generally based on diversity jurisdiction, first from 1985 to 1988, and then to 1990. Filings in these categories fell by 423 cases in those years, while the overall filings fell by 605.

TABLE 10

	1985-88			1988-90	
	1985	1988	Change	1990	Change
Real Property Filings	495	488	- 3%	99	-80%
Other Contract Filings	272	205	-25%	124	-40%
Personal Injury Filings	303	253	-17%	200	-21%

[20] The United States Attorney points out that the reduction of student loans, the more aggressive pre-litigation collection efforts by agencies, the pre-litigation attempt to weed out uncollectibe cases, and a temporary backlog in the referral of cases for collection have contributed to the decline in collection cases.

[21] Other reasons cited for the recent decrease was the relative simplicity of state court procedures in comparison to the procedures required by the various pretrial orders of the federal court, the passage of the Agriculture Credit Act of 1987, and the United States Attorney's decision in 1988 not to remove all § 2410 foreclosure actions to federal court.

Conversely, the period from 1985 to 1990 saw dramatic increases in prisoner case filings. Prisoner civil rights case filings have increased by 144%, from 95 in 1985 to 232 in 1990. Other prisoner case filings (principally habeas corpus petitions) have increased by 130%, from 87 in 1985 to 200 in 1990.

ii. Change in Types of Cases Filed. These changes have altered the profile of the district's case filings. Six years ago, government loan and real property cases constituted nearly half the district's filings. Table 11 sets forth the top five categories of filings in 1985:

TABLE 11

VA/Student Loan	765 (29% of all filings)
Real Property	495 (19%)
Personal Injury	303 (11%)
Other Contract	272 (10%)
Non-prisoner Civil Rights	241 (9%)

By 1990, nearly half the district's filings were based on constitutional claims, most brought by prisoners. Table 12 sets forth the top five categories of filings in 1990:

TABLE 12

Prisoner Civil Rights	232 (17% of all filings)
Other Prisoner	200 (15%)
Personal Injury	200 (15%)
Non-prisoner Civil Rights	188 (14%)
Other Contract	124 (9%)

iii. Complexity of Cases. The sheer number of cases is not the only measure of the court's workload; equally important is the complexity of the caseload. A court can process

thousands of simple cases requiring little judicial involvement far more efficiently than several hundred cases which involve significant motions practice, case management, and factual disputes likely to be resolved only through trial. According to the Administrative Office, the complexity of the district's caseload, measured by a weighted filing, was the lowest in the Seventh Circuit during the period ending June 30, 1990.

While recognizing that the court does not have an overabundance of securities, antitrust, patent, or mass tort litigation which might be weighted more heavily in the Administrative Office's report, the group believes that this statistic for weighted filings is grossly misleading. The district has a large number of Social Security appeals, which always require significant out-of-court time for a record review; since most of these appeals are pending in the division with the bulk of the criminal docket, it is often difficult to handle these appeals as expeditiously as desirable.[22] Likewise, another division handles an extraordinarily high percentage of prisoner cases, which often do not require trial time but do require considerable out-of-court effort when ruling on dispositive motions. Chief Judge Sharp has provided the group with an extensive analysis of the difficult and time-consuming challenges which prisoner civil rights litigation (including habeas corpus petitions) presents to the court; the group agrees with his assessment that these cases demand far more court attention than many cases which are, in theory at least, more complex.[23] Furthermore, the high percentage of civil rights and personal injury cases

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[22] Chief Judge Sharp has advised the group that, through administrative re-assignment of some Social Security appeals to Senior Judge Grant, the court hopes to reduce the Social Security backlog within a year. Reliance on a senior judge is not, however, a long-term solution to the problem, especially in view of the United States Attorney's prediction that there is likely to be an increase in Social Security appeals in the near future.

[23] Chief Judge Sharp correctly cautioned that prisoner litigation does not necessarily lack merit, and thus requires painstaking attention to detail. *See, e.g., Hendrix v. Faulkner*, 525 F. Supp. 435 (N.D. Ind. 1981), *aff'd in part, rev'd*

(continued...)

district-wide typically involve factual issues difficult to resolve without trial. Indeed, Judge Lee has observed that these cases, which usually do not involve multi-million dollar claims for relief, are often more difficult to resolve than the high-stakes, large-scale litigation which usually merits a greater weight in the Administrative Office's filing statistics.

The available evidence also suggests that, while the total number of filings in the district has fallen during the past five years, the number of more complicated cases has risen. Rule 16(b) of the Federal Rules of Civil Procedure mandates early judicial involvement in civil cases, but allows courts to exempt types of cases in which the burdens of scheduling orders exceed the administrative efficiencies that would be gained. District Rule 21(b) exempts social security, habeas corpus, civil forfeiture, summary IRS proceedings, bankruptcy appeals, land condemnation, interpleader, pro se prisoner cases, VA and HUD overpayment, and student loan cases.[24] If it is assumed that this rule reflects the type of cases in which little judicial involve-

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[23](...continued)
in part and rem. sub nom. Wellman v. Faulkner, 715 F.2d 269 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); *Musgrove v. Broglin*, 651 F. Supp. 769 (N.D. Ind. 1986); *Burris v. Kirkpatrick*, 649 F. Supp. 740 (N.D. Ind. 1986).

[24] District Rule 21(b) provides:

> The following types of cases will be exempted from the scheduling order requirement of Rule 16(b) of the Federal Rules of Civil Procedure:
>
> (1) social security cases filed under 42 U.S.C. § 405(g);
> (2) applications for writs of habeas corpus under 28 U.S.C. § 2254;
> (3) motions to vacate sentence under 28 U.S.C. § 2255;
> (4) civil forfeiture cases;
> (5) IRS summons cases and summary proceedings;
> (6) bankruptcy matters;
> (7) land condemnation cases;
> (8) naturalization proceedings filed as civil cases;
> (9) interpleader cases;
> (10) cases under 42 U.S.C. § 1983 filed by prisoners proceeding pro se;
> (11) VA overpayment cases;
> (12) student loan cases;
> (13) out-of-district subpoena cases;

(continued...)

ment ordinarily is required,[25] it may be useful to examine the court's filings and caseload in terms of the number of cases exempt from Rule 16(b).

Table 13 sets forth a breakdown, necessarily inexact because the case categories used for statistical purposes do not parallel the categories used by District Rule 21(b):

TABLE 13

	1985	1986	1987	1988	1989	1990
Filings						
Exempt	1104	669	801	654	575	550
Non-exempt	1554	1659	1204	1308	883	807
Pending						
Exempt	632	603	772	706	590	476
Non-exempt	1759	1766	1534	1431	1072	902

This analysis should be refined, however, by recognition that although real property cases are not exempt from Rule 16(b) under District Rule 21(b), they generally consist of mortgage foreclosure cases that require little judicial attention. In contrast, prisoner civil rights cases,

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[24](...continued)

(14) HUD overpayment cases; and

(15) any other case where the judge finds that the ends of justice would not be served by using the scheduling order procedure of Rule 16(b).

The Advisory Committee on the Local Rules has recommended some minor amendments by removing interpleader actions from the exempt list and adding mortgage foreclosure actions to the list of exempt cases.

[25] The Advisory Committee's Notes to the 1983 amendment to Rule 16, which added Rule 16(b), provide:

> Although a mandatory scheduling order encourages the court to become involved in case management early in the litigation, it represents a degree of judicial involvement that is not warranted in many cases. Thus, subdivision (b) permits each district court to promulgate a local rule under Rule 83 exempting certain categories of cases in which the burdens of scheduling orders exceed the administrative efficiencies that would be gained. . . . Logical candidates for this treatment include social security disability matters, habeas corpus petitions, forfeitures, and reviews of certain administrative actions.

while exempt under District Rule 21(b), generally do not settle or result in default judgments and involve one or more dispositive motions, requiring considerably more judicial attention. Real property cases have seen a dramatic reduction since 1985, while prisoner civil rights filings have increased by 144%. Table 14 reflects the "adjusted" statistics, with prisoner civil rights cases being considered "more complex" and other exempt cases and real property cases being considered "less complex":

TABLE 14

	1985	1986	1987	1988	1989	990
Filings						
Less complex	1504	1106	1018	853	630	417
More complex	1154	1222	987	1109	828	940
Pending						
Less complex	715	717	727	676	441	328
More complex	1676	1652	1579	1461	1221	1050

Table 14 indicates that the greatest reduction in filings has been seen in the less complex cases. While 57% of the filings in 1985 were in less complex cases, only 31% of the 1990 filings were in those categories of cases. By contrast, and predictably, more complex cases outnumbered exempt cases on the year-end docket in each year, ranging from 70% in 1985 and 1986, to 68% in 1987 and 1988, to 76% in 1990.

The same story was told when the group compared the major categories of filings in 1985 to those in 1990. For example, in 1985, when 29% of the district's new filings were VA and student loan cases, by year's end only 7% of the court's pending civil cases fell into that category. The top five categories of cases pending at the end of 1985 are set forth in Table 15:

TABLE 15

Personal Injury	441 (18% of all pending)
Non-prisoner Civil Rights	404 (17%)
Real Property	316 (13%)
Other Contract	293 (12%)
Prisoner Civil Rights	233 (10%)

The top five categories of cases pending at the end of 1990, set forth in Table 16, reflect the impact of the change in diversity requirements and the sharp rise in prisoner litigation.

TABLE 16

Non-prisoner Civil Rights	233 (17% of all pending)
Prisoner Civil Rights	232 (17%)
Personal Injury	224 (16%)
Other Contract	154 (11%)
Other Prisoner	94 (7%)

Although the profiles are similar, it is obvious that relatively simple foreclosure actions are no longer a large part of the court's docket, while more time-intensive prisoner civil rights cases are. Thus, the drop in overall filings is a deceiving statistic with respect to the court's workload. While the district's annual civil filings have nearly been halved in the past six years, the drop has been most significant among cases rarely requiring significant judicial attention, cases which are less demanding than distracting. Among the types of cases which often involve dispositive motions and trial, the court's workload has somewhat decreased, but not at the same rate as the court's overall filings.

Therefore, a significant caseload remains that requires judicial attention and management. In this regard, the group particularly notes a small and perhaps foreboding increase in the

weighted filings, which rose from 306 to 327 weighted filings per judge in the twelve months ending June 30, 1991. In addition, the group has observed a recent increase in asbestos filings in the court. The complexity of asbestos cases, and the problems which they pose for the civil docket of the court, are well-documented.[26]

iv. Speed of Resolution. The final piece of the docket puzzle is the speed with which the court resolves its cases. Although it is true that more complicated cases occupy a larger percentage of the court's docket in 1990 than in 1985, Tables 15 and 16 also show that the absolute number of these more difficult cases is nonetheless less than in 1985. Since the court has seen an expansion in the number of district judges and magistrate judges during this five-year period, the group hoped to find that the speed of resolution had improved during this period.

Unfortunately, this finding was only partially confirmed. During the past six years, the district has reduced by six months the median time needed for a case which ends up being tried to reach the trial stage: 14 months rather than 20. Paradoxically, however, the district's median time for a case to reach disposition has increased: 11 months in 1991 as opposed to 10 months in 1985. Under both measures of speed of disposition, the district ranked in the middle range of the districts in the Seventh Circuit; its 14-month figure was fourth of seven in median filing-to-trial time, while its 11-month median filing-to-disposition time was fifth. Table 17 reflects the disposition rates of cases in the districts of the Seventh Circuit over the years 1985 to 1990:

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[26] *See* REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION (1991). At the present time in is too early to tell what effect, if any, the recent decision of the Judicial Panel on Multidistrict Litigtion to consolidate the cases for pretrial purposes in the Eastern District of Pennsylvania will have on these cases.

TABLE 17

MEDIAN TIME FROM FILING TO DISPOSITION

Court	1990	1989	1988	1987	1986	1985	Since 1985
IL, N	5	4	4	4	5	5	NC
IL, C	12	10	13	10	9	10	+20%
IL, S	10	13	15	10	10	10	NC
IN, N	12	10	10	8	9	10	+20%
IN, S	9	14	13	11	12	12	-25%
WI, E	7	8	10	11	10	13	-46%
WI, W	5	5	6	5	5	6	-16%

MEDIAN TIME FROM ISSUE TO TRIAL

Court	1990	1989	1988	1987	1986	1985	Since 1985
IL, N	12	15	16	18	19	16	-25%
IL, C	17	19	23	20	21	16	+ 6%
IL, S	10	15	12	14	14	12	-17%
IN, N	15	15	19	17	19	20	-25%
IN, S	19	21	21	19	22	18	+ 6%
WI, E	20	19	22	18	19	19	- 5%
WI, W	7	7	7	8	6	9	-22%

Another indication that cases are not resolved as quickly as in other districts is the fact that judges in this district try more cases than average (35 trials completed in 1990 compared to a circuit average of 34 trials). Indeed, civil cases in this district appear to be more likely to go to trial than in other districts. For the twelve month period ending on June 30, 1990, 4.3% of civil cases nationwide were disposed of during or after trial; in the Northern District of Indiana, 5.9% of all civil cases were disposed of during or after trial.

The mid-range performance of the court in disposition of cases indicates to the group that the court cannot simply continue with its present management of cases. The court must find

solutions which speed up the resolution of the 94% of the cases which do not go to trial, and which ensure that the every avenue for the voluntary resolution of the cases which are likely to go to trial is explored. In particular, the court must assure that adequate resources are available to resolve in an expeditious fashion the dispositive motions filed in Social Security and prisoner civil rights cases, since the quicker resolution of these two significant areas of the court's civil docket would likely have a large impact on the speed of resolution district-wide. Moreover, it is imperative that the court act quickly. As the following section shows, the court cannot count on a continued decline in the number of cases filed. Therefore, unless a solution is found, the continued filing of more time-intensive cases is likely to result in even longer median times for disposition of civil cases.

v. Future Filings. Future filings cannot, of course, be predicted with any degree of certainty. In his 1990 Year-End Report of the Federal Judiciary, the Chief Justice reported that civil non-bankruptcy filings fell 7% in 1990, a figure matched by the 1990 reduction of filings in the Northern District of Indiana. The Chief Justice attributed the national decline "in part to downward trends in filings by the United States to collect overpayments of benefits and filings against the United States for denials of Social Security claims. The increase from $10,000 to $50,000 in the amount required for federal jurisdiction in diversity of citizenship cases . . . helped to reduce diversity filings by 15 percent . . . " Table 18 indicates that, with the exception of personal injury cases, the Northern District of Indiana may have seen a reduction in filings in those categories in excess of that reported nationally:

TABLE 18

	1989	1990	Change
Overall filings	1458	1357	- 7%
Government loan	116	59	-49%
Social security appeals	31	13	-58%
Diversity:			
Real property	230	99	-57%
Other contract	156	124	-21%
Personal injury	148	200	+35%

Thus, the categories cited in the Chief Justice's report produced 176 fewer filings in this district in 1990 than in 1989, while the district's overall filings fell by only 101.

If these analyses of the recent reduction in the district's case filings are correct, it seems reasonable to predict that the annual case filings have bottomed out and will slowly increase. Table 19 indicates that filings over the past eighteen months have been remarkably steady, suggesting that the downward trend may have ended.

TABLE 19

	July-December 1989	January-June 1990	July-December 1990
ALL CIVIL FILINGS	677	685	672

The same conclusion is suggested by the filings during the twelve month period ending on June 30, 1991. Filings in the district rose modestly from the previous year, up to 1,431 in 1990-91 from 1,385 in 1989-90.

Even in those areas which caused the recent decline in filing, diversity cases not meeting the amount in-controversy prerequisite and government collection cases, filings are likely to increase, although perhaps only gradually. Inflation will erode the impact of the greater amount-in-controversy requirement for diversity cases. Whether there will be a need to resume aggressive prosecution of government loan cases cannot be predicted, but with only 59 such filings in 1990, any effect necessarily would be either neutral or increase the court's caseload. In this respect, the United States Attorney notes that the advent of the Federal Debt Collection Procedures Act, as well as procedures now being developed for the collection of criminal fines, make some small increase in collection cases likely.[27]

B. The Status of the Local Rules

At the present time, the Local Rules for the Northern District of Indiana are undergoing a significant revision. Although many of the rules do not bear on the advisory group's task, the group has identified several rules which already facilitate the type speedier and less costly dispute resolution envisioned by the Civil Justice Reform Act and several which need revision in order to reduce cost and delay even further. The group has also found several significant gaps in the rules.

1. Rules Which Facilitate Early Resolution. Three Local Rules already address three of the matters which the Civil Justice Reform Act has recommended that the group consider.

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[27] The United States Attorney also notes that Social Security appeals tend to increase in times of economic downturn. In view of the present economic situation, it is not unlikely that there will be a short-term increase in these appeals.

The first is differential case management. Present Local Rule 21 exempts some cases from the initial pretrial conference because they are sufficiently routine to not warrant the expenditure of judicial resources.[28] Among the exempted cases are *pro se* prisoner civil rights cases, social security appeals, interpleader proceedings, and student loan cases, and bankruptcy appeals. Together these cases comprise 23% or more of the court's civil docket.[29]

The group believes that little is accomplished by requiring pretrial conferences in social security, bankruptcy, or student loan cases, since the matters are relatively well-defined at the time of filing. In addition, the group notes that Local Rule 21 will be amended to exempt mortgage foreclosure actions but to require conferences in the now exempt category of interpleader actions. In view of the relative complexity of these types of cases, the changes are warranted.

The group has serious reservations, however, about the treatment of prisoner *pro se* litigation. Even with the establishment of standard forms for *pro se* cases, issues in prisoner cases are rarely well-defined. The group could not determine a reason that these cases, which comprise the fastest-growing portion of the court's docket, were exempt from the initial pretrial conference. Indeed, these cases might well benefit from more aggressive case management which defines issues and establishes firm pretrial deadlines in an expeditious fashion. In this type of litigation, the magistrate or judge must take a firm stand in establishing deadlines and schedules.

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[28] *See* n. 24, *supra*.

[29] The latter four types of cases comprise about 14% of the court's docket. While the group does not have precise figures on the number of *pro se* cases among the 17% of total prisoner rights cases pending, it assumes that the number is about half, or 9% of the total prisoner cases.

Second, Congress requested the group to consider the advisability of using alternate dispute resolution (ADR) methods. N.D. Ind. LR 32 already gives discretion to the court to adopt appropriate ADR mechanisms in specific cases.[30] At present, the primary methods of ADR in use are early neutral evaluation (in which local members of the bar volunteer four hours of time to assist in the evaluation), magistrate-led mediation, summary jury trial, and settlement conferences. Early neutral evaluation is used only in the Fort Wayne Division. Summary jury trial was apparently used on only a few occasions in the Fort Wayne Division.

The group notes that Local Rule 32 gives the court no guidelines for circumstances under which various ADR methods might be adopted. It has also heard anecdotal evidence that, with admittedly limited experience, summary jury trials simply add to the expense, and that early neutral evaluation is not useful until the parties possess sufficient information about the case.

The third rule, N.D. Ind. LR 13, also requires another case management principle recommended by the Civil Justice Reform Act: the requirement that a party bringing a discovery motion first confer with the opposing party. The group believes that the rule is beneficial. The costs of the conference requirement in terms of attorney time do not even begin to approach its benefits in reduced judicial and attorney time spent on needless motions practice.

The court's general orders also contain another cost reduction measure not specifically mentioned by Congress: The ability of parties to agree to an initial 30-day extension for the

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[30] N.D.Ind. LR 32 reads in full:

> A judge may, in his or her discretion, set any appropriate civil case for advisory summary jury trial or other advisory alternative methods of dispute resolution, as he or she may choose.

The Advisory Committee on the Local Rules is presently recommending an amendment to this rule which will clarify its scope, but not change its sense. Of course, the rule does not supersede *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1987), which held that a court cannot compel an unwilling party to participate in a summary jury trial.

filing of certain pleadings and discovery responses without the necessity of obtaining a court order. That general order, developed by Judge Lee, will be incorporated into the revisions of the Local Rules. *See* proposed N.D. Ind. LR 6.1. The group hopes that this rule will save the time of both attorneys, who need not file *pro forma* motions, and the court, which need not rule on the motions.

2. *Rules Which Create Unnecessary Delay*. The group discovered two local rules which appeared to contribute to unnecessary cost and delay. The first rule, N.D. Ind. LR 11, requires that findings of fact and conclusions of law be filed with each motion for summary judgment, and further requires that separate documents detailing the undisputed facts (filed by the movant) and the genuine issues (filed by the opponent) be submitted. The findings of fact and conclusions of law were routinely criticized as cumbersome and costly to develop; the United States Attorney also suggested that the filing of separate statements of undisputed facts or genuine issues was unduly expensive for routine social security appeals. Furthermore, the courts of appeal have typically frowned on the wholesale adoption of a party's findings of fact. *See, e.g., Andre v. Bendix Corp.*, 774 F.2d 786 (7th Cir. 1985). The group discovered that the judges of the court rarely use the findings or conclusions in practice.

Second, the clerk's office indicated that N.D. Ind. LR 12, which requires court approval for briefs in excess of 25 pages, creates significant paperwork for a motion routinely granted by the court.

Coincidentally, the Advisory Committee on the Local Rules had previously recommended changes to enlarge the page limitation and to allow statements of undisputed fact or genuine issues to be incorporated into the brief. Subsequently the Local Rules Committee recommended

deletion of the requirement that finding of fact and conclusions of law be filed. Thus, the group hopes that the delay caused by these rules should soon be remedied.

3. Matters Not Addressed in Local Rules. The group has identified two potential sources of delay caused by matters on which the local rules are presently silent, but which might be curable by rule or understanding. The first is the length of time which Social Security appeals routinely require before they are ready for decision by the court. As an appeal of an administrative agency's final decision, the record in Social Security cases is already a closed universe. Nonetheless, plaintiffs do not always prosecute the appeal (presently done by way of motion for summary judgment) as quickly as possible. While we consider the recommendation of the United States Attorney to shorten the process later in the report, the group notes that speedier resolution of these cases could increase the disposition rate of a legally simple yet statistically significant portion of the court's docket.[31]

A second procedural difficulty noted by the group was the difficulty of obtaining timely rulings on pretrial motions. While the group appreciates the many demands placed on the judges and magistrates in the district, delay in ruling on motions (especially dispositive motions) forces the parties to continue the costly process of preparing cases for trial in the face of uncertainty. Tardy rulings also may require one or more extensions of the discovery cut-off and the trial date. Obviously it is difficult to establish by local rule a timetable for the court's rulings on motions. As we later discuss, however, the court should consider adopting informal guidelines

[31] In the Hammond Division, Social Security cases are the third largest category of civil cases, comprising 15% of the division's civil docket. Obviously, the speed with which these cases will be resolved is also tied to the speed with which the court rules on the motions, a matter which the group discusses *infra*.

concerning the length of time within which motions of various types (*e.g.*, dispositive, discovery, amendment, and so forth) should be ruled upon.

4. Concerns Regarding Pretrial and Trail Orders. A final procedural problem concerns pretrial preparation of cases likely to go to trial. The group has identified several interrelated problems in this regard. The first is the questionable utility of requiring the parties to file status reports or preliminary pretrial reports. On this matter, the group heard conflicting evidence. The feeling of several practitioners is that these reports increase the cost of litigation without any significant benefit (at least to the parties) in terms of clarifying issues. On the other hand, Magistrate Pierce indicated that the status reports are extremely valuable in *pro se* prisoner litigation, since they facilitate pretrial scheduling while dispensing with the need for a more formal conference that is likely to delay the disposition of the case.[32] Moreover, the group discovered that some judges require written status reports, while others find them unnecessary. In many ways, this lack of uniformity among the judges was as significant a concern as the wisdom of the reports themselves.

The problem of uniformity becomes critical, however, in the court's Orders Controlling Trial. The group has examined the orders used by the various judges, and notes some significant differences among judges.[33] Some of the pretrial orders are far more onerous to comply with than others; one example mentioned by some (but not all) practitioners was the

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[32] The delay arises because formal conferences require the magistrate or judge to go to the prison facility. Necessarily the number of days which the judicial officer can devote to prison conferences is limited; thus, the cases would tend to backlog until the judge or magistrate had enough cases to make attendance worthwhile.

[33] The group notes that the judges of the court also vary in terms of when they hold the final pretrial conference: some do so a month or more before trial and some do so on the eve of trial. The anecdotal evidence available to the group suggests that some midpoint -- the final conference held approximately two weeks before trial -- is most workable.

questionable need to red-line deposition transcripts. The marking of deposition transcripts is extremely time consuming for the attorneys and consequently very expensive to clients. The more onerous orders also require parties to submit pleadings which dramatically increase the cost of litigating small cases. The group also believes that the Order Controlling Trial should be uniform among all the judges of the court. For practitioners who practice in more than one division or before more than one judge, the failure to remember that Judge X requires one thing in his pretrial statements while Judge Y requires something else can be a costly, perhaps even fatal mistake. The need to be familiar with five different forms of order and to ensure that the order meets all of Judge X's requirements also increase the expense of all civil cases. As the group later discusses, it is imperative that the court create pretrial orders and procedures which are uniform.

A final pretrial problem which was almost universally recognized was the placement of civil cases on a trailing calendar. Although the trailing calendar in theory allows a court to reach all the cases set on the calendar within the period of the calendar, the reality of the priority of criminal cases and the length of other cases on the calendar means that many of the lower-set cases on the trailing calendar are not tried during the calendar period. Aside from the inconvenience which this result can cause to members of the bar, their clients, and the witnesses, the trailing calendar concept generates both delay and extra expense. The delay results partly from the human tendency not to consider the possibility of settlement until the eve of trial. Since the trailing calendar fosters the belief that the case is unlikely to be heard on the date originally assigned for trial, parties often fail to settle cases as expeditiously as possible or, when the case is unexpectedly called for trial, simply fail to settle the case at all. Moreover, because

they do not know when their case will be heard, attorneys must keep a week or two of time open, thus causing a domino effect which keeps attorneys from preparing other cases. The cost of the trailing calendar is also obvious: attorneys and parties might need to gear up for the same trial more than once, thus causing needless repetition of preparation and duplication of costs for witnesses. The problems of the trailing calendar are exacerbated as the length of the calendar increases: a one-week calendar creates far fewer problems than a one-month calendar. Consequently, the trailing calendar creates more difficulties in the Hammond Division, which uses trailing calendars as long as a month, than in other divisions in which week-long calendars with multiple settings are used.[34] The trailing calendar may be beneficial to the court, but it creates near catastrophic problems of scheduling for attorneys, parties, and witnesses (especially expert witnesses). The trailing calendar causes expense to litigants and is enormously inconvenient.

C. Discovery

Because discovery is often thought to lie at the heart of cost and delay in civil litigation, the group has examined the issue in the Northern District of Indiana. The group found two sets of opinion on the issue. On the one hand, some practitioners believed that cases were being unnecessarily discovered to death; one lawyer analogized the situation to the practice of "defensive medicine," since the reality of legal malpractice required that no stone be left

[34] The Hammond Division is forced to resort to longer trailing calendars in part because of the heavy criminal docket.

unturned. On the other hand, some practitioners find little, if any, abuse in the discovery process. The group debated the issue for some time, and was unable to conclude that excessive discovery was a cause of unnecessary cost or delay in the Northern District of Indiana.

The group nonetheless believes that discovery could be expedited. The group heard Judge Lee discuss his method to ensure early and cost-effective discovery: an early pretrial conference at which he makes the attorneys explain to their clients the costs of litigation. The group has also considered Judge Miller's proposed order for early mandatory disclosure of basic relevant information such as the identity of witnesses and the location of documents. These concepts will play a large role in the group's ultimate recommendations to reduce cost and delay.

D. Causes of Excessive Cost and Delay

When the entire picture of civil litigation in the Northern District of Indiana is considered, the group does not believe that the problems of cost and delay are as troublesome as in many other districts. Filing rates are low and are roughly equivalent to disposition rates; most cases proceed through pretrial to trial in a relatively expeditious manner; the criminal docket is not all-consuming; and the bar generally handles cases with restraint and professionalism. Nonetheless, the group has noted the increased recent filing of relatively more complicated cases, and doubts that the criminal docket will continue to remain static. Moreover, the group has discovered numerous ways in which the present practices in the district have led to problems of excessive cost and delay. Among the group's key findings are:

1. Judicial resources are not adequate to accomplish the task of significantly reducing in the cost or delays in civil litigation. The simple reality is that the parties, left to their own devices, rarely have a mutual incentive to speed a case along to trial. Nor are devices which push a case quickly through the pretrial phase effective when a trial is likely to be months off. Therefore, without sufficient judicial resources to manage and try cases, other devices to reduce cost and delay are unlikely to succeed. On a related point, the group believes that the judicial resources presently allocated to the Hammond and South Bend Divisions are inadequate. The Fort Wayne Division, which is the only division to enjoy a 1:1 ratio between district judges and magistrate judges, has the most current docket. The other divisions lack magistrate judges who can turn their energies to the prisoner civil rights cases and Social Security appeals which account for a large portion of their divisional dockets.

2. The process of discovery is not unduly costly or contentious, but it is taking too long. Given the low number of filings in the district, the disposition rate of cases should be better. Since discovery is the lengthiest component in most civil litigation, new mechanisms to speed the receipt of information to the parties are essential if case management and alternate dispute resolution processes are to have any realistic hope of success.

3. The present pretrial process is costly and not uniform. Differences among judges on matters of pretrial orders suggest that some of the orders may be leading to an inappropriate and inefficient level of preparation. In simple cases, the more comprehensive pretrial orders are simply too expensive. In all cases, a uniform pretrial order would significantly reduce costs and reduce technical mistakes which frustrate resolutions on the merits.

4. The trailing calendar concept increases costs to the parties and fosters delay. When parties do not believe that they are going to trial, the salutary effect that a trial date has on settlement discussions is often lost.

5. The court does not aggressively pursue alternate methods of dispute resolution. Only the Fort Wayne Division has a formal dispute resolution program. As an apparent consequence, more civil cases come to trial in this district than in other districts. But the court must be careful in its selection of ADR methods. Unless they are calibrated to those cases in which settlement is likely, alternate dispute resolution mechanisms simply add to the cost of litigation. Moreover, even among those cases which might benefit from ADR, a party's claimed lack of information has frustrated the ADR process, the court has not insured that the parties obtain the necessary information in a cost-effective and timely fashion. Finally, the admittedly limited experience with summary jury trials suggests that its costs outweigh its usefulness as a general tool for dispute resolution.

6. The court's tardiness in ruling on motions creates uncertainty which forces parties to expect the worst and prepare the case in ways which might ultimately prove unnecessary.

7. The local rules add extra layers of expense in several ways. The most significant are the unnecessary documents which must be filed with motions for summary judgment and the lack of an expeditious process for the handling of Social Security appeals.

8. Several substantive categories clog the court docket. *Pro se* prisoner cases are a large consumer of judicial time. Social Security appeals, which are ready for quick resolution, often sit in the court system for months. As the drop in case filings after the increase in jurisdictional amount attests, diversity jurisdiction has a significant impact on the court's caseload and its

ability to process cases expeditiously. There is every reason to believe that these time-intensive cases will continue to be filed in ever-increasing numbers in future years.

9. The causes of delay are not uniform throughout the district. In the Hammond Division, the leading causes of civil delay are a heavy criminal docket, a consequent trailing civil calendar, and a backlog of Social Security appeals. In the Lafayette Division, the delay is caused by the lack of a full-time judicial officer. In the South Bend Division, the leading cause of delay is a docket laden with prisoner civil rights cases; the prospect of more criminal filings in the division is also a concern. The Fort Wayne Division, which has the most current docket, appears to have no immediately ascertainable problem with delay. Significantly, it also is the only division with the optimal ratio of one district judge to one magistrate judge.

II

RECOMMENDATIONS FOR IMMEDIATE IMPLEMENTATION

A. Introduction

The group recognizes that some of the causes of delay (such as the changing nature of the legal profession, liberal discovery, and recent changes in substantive or jurisdictional law) are beyond the possibility of a district-wide cure. Other matters, such as additional resources for magistrates or masters, require funding approval outside of the district. The group also recognizes that, to a certain extent, any improvement in the delivery of legal services will be self-defeating, since available evidence suggests that a more efficient court system simply will induce more people to file suit, thus eventually returning the system to an equilibrium of delay.[35] Nonetheless, the group believes that several measures could have a significant impact on delay in at least the short term and on the cost of individual litigation even in the long term. Therefore, in this section, the group makes a series of nine recommendations which the court *can* immediately implement on a district-wide basis.

The group begins its recommendations with the first of its two linchpins in its plan to reduce cost and delay: a change in the existing method of discovery. If information can be shared by the parties quickly and cheaply, then parties can appreciate the wisdom of settlement sooner and can extract more benefit from ADR processes. Similarly, once it knows about the number of possible witnesses and the size of the remaining discovery, the court can tailor

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

appropriate case management strategies at the initial pretrial conference. Thus, the group proposes that the court adopt an experimental program in which the parties are required by court order to disclose basic factual information already in that party's possession. The mandated information exchange must occur at the outset of the suit, and must be completed by both sides within 30 days of the filing of the answer. The initial pretrial conference would be conducted shortly after the end of the information exchange.

The other linchpin of the group's plan is the establishment of an early, firm trial date. The completion of the initial phase of discovery within thirty days of the answer should reduce the time needed to finish the pretrial process. But early completion of pretrial proceedings will have only a marginal effect on delay unless the trial date follows closely after completion of discovery, and the litigants know that the trial date is firm. Consequently, the group recommends that the court abolish its present trailing calendar system and devise a method by which early, firm trial dates for civil cases can be assured.

Next, the group considers the role which ADR methods should play in helping to resolve disputes expeditiously. The key will be to develop ADR methods which correspond to the group's prior recommendations on early mandated discovery and early firm trial date. The district's experience with summary jury trial and the future availability of early trial dates suggests that summary jury trials should become an exception rather than a rule. On the other hand, early neutral evaluation and mediation both hold forth the promise of being able to make effective use of the information developed in an early mandated exchange. The group recommends that the court tailor these ADR devices to the discovery and trial plans it is recommending.

The group then turns to several other matters which might incrementally reduce costs and delay. The central focus of these recommendations is the court's Order Controlling Trial. The group strongly recommends that the court adopt a uniform and simple order. Among the matters which should be included in the order are firm deadlines for accomplishment of certain pretrial matters, and the court should also routinely consider the possibility of bifurcating proceedings. Other than the pretrial order, the court should also consider the abolition of some of the present "paperwork" filing requirements of the local rules, the establishment of presumptive 30-day deadlines for the court to rule on motions, the stringent screening of pauper cases, and the development of streamlined procedures in Social Security appeals. The group believes that this final group of recommendations, while certainly not striking at the root of the problems facing the district, nonetheless will result in some marginal savings and reductions in delay with no appreciable cost to the court.

B. Early Mandated Disclosure

RECOMMENDATION: The court should develop a discovery program in which parties are required to exchange basic factual information shortly after the answer is filed.

In Part I, the group noted that, for the relatively low number of filings, the Northern District of Indiana does not bring cases to resolution as quickly as it should. The group also recognizes that the most time-consuming element in a typical civil case is the discovery process. Delays in beginning discovery can cause tardy preparation for trial, lack of willingness or ability to consider settlement until late in the pretrial phase, and last-minute motion practice over

compliance with discovery requests. Therefore, if any significant progress is to be made in speeding up the disposition of cases, prompt discovery by the parties must be encouraged.

Indeed, there is no reason to wait several months for the disclosure of such basic information as the identity of fact or expert witnesses and the identity of relevant documents. This information, which will inevitably be obtained by competent attorneys, lays the groundwork for later discovery and for the narrowing of issues. If that information were available at the outset of the litigation, the attorneys and the court could more intelligently decide on the appropriate case management techniques, if any, required for a case. They could also better assess the likelihood of success for alternate methods of dispute resolution, and the court could perhaps ferret out cases which lack significant merit.

An early disclosure of basic facts must be accomplished by court mandate. While the type of voluntary information exchange the Civil Justice Reform Act discusses might be a more desirable option in theory,[36] it is not realistic to expect that attorneys will voluntarily engage in these types of information exchanges; after all, attorneys do not presently do so. At the same time, the group realizes that a court mandate -- in essence, a court rule -- also creates certain difficulties, especially in the area of enforcing compliance. Moreover, the group does not believe that there is necessarily a "best" way for the court to accomplish early mandatory disclosure. In order to provide the court with a concrete proposal against which it can measure the advantages and disadvantages of early mandatory disclosure, however, the group has decided to describe one possible system of early disclosure.

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[36] *See* 28 U.S.C. § 473(a)(4).

The first key issue in such a proposal must be the type of information which would need to be disclosed. The group recognizes the impossibility of drafting a rule which forces *all* relevant information and documents to be disclosed at the outset. Nor would such a rule necessarily be desirable. Litigants in a large case might wish to tailor discovery around certain claims, while litigants in small cases likely to settle might have no need of sending or receiving every piece of information known to an opposing party. Moreover, the court does not need complete factual information on a case in order to draw up an initial discovery plan; indeed, complete disclosure would defeat the Civil Justice Reform Act's goal of increasing efficiency through stylized discovery plans. *See also* FED. R. CIV. P. 26(f). Finally, complete mandatory disclosure might raise serious questions about the legitimacy of an essentially inquisitorial, rather than adversarial, method of proceeding.[37]

Therefore, the mandatory disclosure should be limited to the following categories of information: (1) the identity (name, home or business address, and telephone number) of each person known or reasonably believed to have information regarding the facts underlying any claim, defense, or entitlement to relief; (2) a short statement of the nature of that witness's information (*e.g.*, "Ms. Smith saw Mr. Jones's car run through the red light"); (3) the identity of each expert witness to be called at trial, together with a statement of the information required under FED. R. CIV. P. 26(b)(4); (4) the production of all documents which bear upon any claim, defense, or entitlement to relief; and (5) the existence and content of all contracts for insurance.[38] In the event that any of this information is allegedly privileged, the party claiming

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[37] *See, e.g.*, Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

[38] As with present F.R.Civ.P. 34, parties would have the option of copying records for their opponents or making them available for copying.

privilege should be required to describe the nature of the material well enough that other litigants can contest the claim.[39]

The group believes that this information will undoubtedly be discovered in due course by competent attorneys. It is also likely to provide the court with at least a rough sense of the needs of the case and the length of time the remainder of discovery will take. Since nothing is gained by the present lag time before the information is disclosed, the information should be obtained at the earliest opportunity.

The "earliest opportunity" is not, however, self-defining. Thus, the second crucial question in any mandatory disclosure plan is the precise timing of the disclosure. Again, the group does not wish to suggest a specific timetable for disclosure. It does, however, believe that four principles should guide the court's selection. First, for greatest utility, the information should be disclosed in advance of the initial pretrial conference, which is required to be held within 120 days of the filing of the complaint. *See* FED. R. CIV. P. 16(b). Second, it is probably unrealistic to expect that defendants in many cases will be able to obtain the information they must disclose as quickly as the plaintiffs, who have presumably conducted a Rule 11 investigation. Indeed, knowledge of the plaintiff's basic information, especially witnesses, may even assist the defendant in putting together the information he or she is required to disclose. Thus, staggered disclosure of information may be a useful way of making the disclosure by defendants more meaningful. Third, the expense of disclosing the information

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[39] A similar proposal to require that allegedly privileged information be identified was made by the Advisory Committee on the Federal Rules of Civil Procedure, and was forwarded to the Supreme Court for inclusion in F.R.Civ.P. 26. The Supreme Court declined to forward this amendment when it forwarded its rules changes on April 30, 1991. The group does not believe, however, that such a requirement is inconsistent with present F.R.Civ.P. 26, so that the Supreme Court's failure to require further specification of a claim of privilege should not doom our proposal.

makes little sense for either party if a motion to dismiss is likely to resolve the case. Thus, no one should be required to disclose information regarding claims subject to a motion to dismiss; rather, the disclosure should be timed to occur only after the filing of the answer. Finally, the local rule should require parties to examine the relevant documents in advance of the pretrial conference. Thus, the pretrial conference should presumptively not be held until approximately 15-30 days after the defendant's disclosure.[40]

The combination of these four principles means that the window for disclosure is a narrow one.[41] Because of the critical timing of disclosure, the court should permit the parties to extend the time for disclosure for only the most compelling reasons.

Several other matters must be addressed in the rule. Obviously the rule will need to make some provision for cases which are so large or complex that full disclosure within the time period is impossible or, due to the likelihood of bifurcation, unnecessary. The sense of the group is that complexity should not excuse these cases from the requirements of the rule, but that parties with compelling cases of burdensomeness (or bifurcation) should be allowed an initial opportunity to request a more limited initial disclosure. Perhaps the best solution is to require

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[40] Magistrate Coseby has indicated that this requirement would slow down the pretrial conference process in the Fort Wayne Division; at present, initial conferences are usually held in the Division within 15 days of the defendant's appearance. Magistrate Coseby further points out that this early conference has been quite useful, and he is therefore understandably reluctant to move the pretrial conference further into the proceedings. Fitting early mandatory disclosure into existing pretrial procedures and deciding on its proper timing are difficult matters. As Magistrate Coseby suggests, a certain amount of experimentation, with early conferences in some cases and post-disclosure conferences in others, will be necessary before deciding on the proper incorporation of mandatory disclosure into the existing pretrial process.

[41] An example of a timeline which would fit all three criteria is this: the plaintiff will have 10 days from the date of service of the answer to make his or her disclosure, and the defendant will have 30 days from date of service of the answer to make the disclosure of any additional information. Even this rule creates some problems. For instance, the 120-day rule for service of process (FED. R. CIV. P. 4(j)) and the automatic extensions of time to answer which will be allowed under the revised Local Rules may make it difficult to accomplish disclosure before the pretrial conference. To remedy this problem, the Local Rules should perhaps require disclosure even if the parties agree for an extension and exempt delayed-service cases from the pretrial conference requirements until an answer has been filed and disclosure has occurred.

a party to at least disclose the information which is not burdensome (or which is directed at the bifurcated issue) in conjunction with a motion for a protective order on the remainder.[42] In any event, the court may wish to consider some absolute minimums (say, 30 fact witnesses or 1000 documents) below which no party can be excused from full disclosure even if the case is complicated.

The court will also need to be sensitive to tactical abuse of the new rule. On the one side, parties who file suits simply to harass or to obtain information will have a new license. On the other side, parties who wish to resist disclosure may file meritless motions to dismiss or to strike defenses. Similarly, the court can anticipate a rash of sanctions motions when subsequent discovery reveals that a party did not disclose a witness or document in the mandated disclosure.

Although the first two concerns are real, they already exist in litigation, and present sanctions seem sufficient to handle the problem. But the group recognizes the danger of a new spate of sanctions motions for failure to comply with the terms of the early mandatory disclosure -- especially given the reality that few cases permit the attorneys to have a complete command of available information within the first few weeks of a lawsuit. With regard to potential sanctions, the group believes that, especially in the early phases of implementation, non-disclosure should be sanctioned only in egregious cases; the time deadlines are too stringent to assume that each party will have searched every file cabinet for every document, or that the parties will fully understand their opponent's theory of the case from often vague pleadings. On

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[42] The motion for a protective order could be ruled on at the initial pretrial conference. Thus, forcing the party to move to protect information would serve as a "red flag" to the court at the outset that this may be a case requiring special handling or management.

the other hand, the new disclosure rule should clearly impress upon the parties the need to supplement the initial responses as soon as possible.[43]

Finally, if the court adopts the mandatory discovery program, it may need to consider revisions of the local rules to further limit the number of interrogatories and document requests.

The group recognizes that this program is a radical departure from the existing adversarial assumption of the Federal Rules. At least one group member has raised significant and valid objections about the efficacy of these proposals in dealing with the problems of cost and delay, and foresees a spate of new motions being filed over the parties' compliance with the new rules. Other voices have also recently questioned the wisdom of mandatory informal disclosure. *See* Mullinex, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N. Car. L.Rev. 795 (1991) (pointing to a lack of information on the use, abuse, and avoidance of informal discovery, and questioning the long-term effect of such politically charged rules on the rule-making process).[44]

Nonetheless, the group believes that the time has come to consider this step.[45] A well-functioning disclosure program should reduce the pretrial proceedings in an average case by two

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[43] The Advisory Committee on the Rules of Practice and Procedure, which is presently considering a similar rule requiring mandatory disclosure, provided two sets of sanctions for non-disclosure or "false or misleading" disclosure: exclusion of evidence at trial, and imposition of sanctions available under F.R.Civ.P. 37(b)(2)(A)-(C). *See* F.R.Civ.P. 37(a) and (c) (Proposed Draft, August, 1991).

[44] The article's author points out that public interest groups have been especially concerned with informal discovery rules. Since our group does not contain any practitioners regularly involved in public interest cases, it would certainly be advisable to obtain the views of such practitioners prior to implementing the rule.

[45] The Advisory Commitee on the Rules of Practice and Procedure is presently in the process of holding hearings on a similar disclosure proposal. For other approaches, *see* Schwarzer, *Slaying the monsters of cost and delay: would disclosure be more effective than discovery?*, 74 JUDICATURE 178 (Dec.-Jan. 1991), Rules 7.05 and 7.06 of the United States District Court for the District of South Carolina, and Judge Miller's proposed Pretrial Order supplied to the group. *See also* Mullinex, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking,* 69 N. CAR. L.REV. 795, 813-20, 858-861 (1991) (citing numerous local rules requiring some form of informal discovery).

to three months. At the very least, the local rule will save the parties the expense of drafting stock discovery requests in each case.

Because the program is new, however, the group does not recommend its wholesale adoption in the district. Rather, the plan should be discretionary with each judge, and should be implemented in cases in which the judge believes that the benefits will outweigh the costs.[46] After study of the efficiency of the pretrial process with the new rules over a period of time, the court would be in a position to assess the value of the program.[47]

C. Establishment of Early Firm Trial Dates

RECOMMENDATIONS: At the initial pretrial conference, the court should establish a trial date of between six to sixteen months (depending on the needs of the case) from the date of the pretrial conference. The trial date should be changed only for compelling reasons. The district court's present practice of using trailing calendars should be abolished.

The shortening of the period for discovery is unlikely by itself to have a significant impact on the problem of civil delay. Instead, the parties must also realize that a certain trial date awaits them at the end of the pretrial process. A firm trial date will reduce the tendency

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[46] Of course, the judge will need to issue the mandatory disclosure order almost immediately after the complaint is filed in order to give the parties sufficient time to make a meaningful disclosure.

[47] The court's power to enact a rule of mandatory disclosure likely already exists under F.R.Civ.P. 16(b) and 26(c) and (f). To the extent that any doubt exists, the power has been granted by 28 U.S.C. § 473(b)(6), which allows courts to implement any techniques which effectuate the goals of the Civil Justice Reform Act. Moreover, the group notes that the experience of the district could prove a valuable research tool for the Advisory Committee on the Federal Rules, and answer some of the questions raised by Mullinex, *supra* n. 45, regarding the effectiveness of mandatory disclosure.

to procrastinate, will force attorneys to focus on key issues in a case even at its outset, will ensure more realistic settlement discussions, and will enhance the court's reputation for swift but fair justice.

The establishment of an early, firm trial date requires two things: that the date be early and that it be firm. An "early" date does not necessarily mean the same time in all cases; eighteen months after filing might be early for an antitrust case but very tardy for a car accident. Nonetheless, the group believes that, barring unusual complications, the court should aim to try "simple" cases within three to four months of the initial pretrial conference, with "standard" and "complicated" cases being given somewhat longer pretrial periods of nine to fifteen months from the date of the pretrial conference.[48] In cases which are not simple, discovery cutoffs will need to be established in order to account for dispositive motions, which should be ruled on well in advance of the final pretrial conference; the group recommends that discovery be cut off approximately three months before the trial date.

In addition, the trial date must be firm. Resources are wasted, rescheduling is difficult, and opportunities for settlement are squandered when a case is "bumped" from a trial setting because discovery is not completed or because the court must hear other cases. Consequently, the court must not grant attorneys' requests for continuances of the trial date except in the most compelling circumstances. Conversely, the court must avoid the use of trial calendars which make it unlikely that a trial setting will be honored.

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[48] These deadlines assume the existence of early mandatory disclosure, which should shave two to three months off the discovery time for most cases. If that plan is not implemented, then the presumptive times may need to be somewhat longer.

The group recognizes that the priority of the court's criminal docket makes this last point a difficult one to administer. In the Hammond Division, which has a heavy criminal docket that can never be anticipated at the initial pretrial conference in civil cases, the trailing calendar might initially appear to be a necessary evil. In the long run, however, early and firm trial dates lead to more settlements and less court congestion. During the interim adjustment period, the court may need to consider some intermediate methods to deal with the crowding on the docket. One method suggested by a member of the group was to keep certain uncomplicated cases (cases without experts and *pro se* cases were mentioned, but others might be considered) on a trailing calendar, and try criminal matters only during the weeks allotted to these uncomplicated cases. The remaining civil cases would receive a firm setting. Under this method, certain weeks of the court's trial calendar would be reserved exclusively for the trial of civil cases.[49]

Another method is to adopt a "first choice - second choice" system in which every case is scheduled to be the second case tried on a given day, and is guaranteed to be the first case tried on a later date. In this system, the parties know that trial will begin on one of two days, and will develop their strategies accordingly. In order to avoid duplicative preparation for trial, the parties with a "second choice" setting should be released from the "second choice" trial date if the "first choice" case has not been disposed of within a specified period in advance of trial.[50] Since Judge Miller has persuasively pointed out certain disadvantages of this method

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[49] Chief Judge Sharp submitted documentation and a thorough discussion of the need for a trailing calendar in the Lafayette Division, in which he sits on only a part-time basis. As long as the period of the trailing calendar remains short (two weeks or less) and the court allows later-set cases to be taken off the calendar reasonably in advance of the start of the calendar when earlier-set cases seem destined for trial, the peculiar circumstances of the Lafayette Division may require some relaxation of the group's present recommendation.

[50] The time at which the later settings would be released from the initial trial date might vary, depending on the

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(infeasibility with heavy caseloads, the difficulties and delay of switching over to a new calendaring method, and gamesmanship are three), it should be regarded as a stopgap measure on the way to assuring a single firm trial date.[51]

The concept of a firm trial date raises three final points. First, firm trial dates do not mean dates chiseled in stone. Although mandatory disclosure should help to eliminate some of the inherent uncertainties of the initial pretrial conference, discovery may still uncover additional parties, reveal more issues, or disclose information which makes a dispositive motion suddenly meritorious. Thus, the court should be able to move the trial date in appropriate cases.[52]

Second, the judicial officer should not be required to make any certification to avoid setting a trial date at the initial pretrial conference. Numerous and varied impediments may exist to establishing a firm trial setting at the initial conference. For example, discovery may be needed to determine whether joinder of additional parties, or the filing of a dispositive motion, is appropriate. To set a trial date in such a case either builds in delay that might prove to be unnecessary or establishes a deadline that will have to be modified for foreseeable reasons; neither approach reduces cost or delay. Accordingly, while the court should set a firm trial date

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[50](...continued)
complexity of the case. Thus, should the case set before it not have settled, a simple car accident, which does not require extensive trial preparation, might not be released until the final pretrial conference held a few days before the trial date. A factually complicated case involving numerous witnesses and out-of-town experts might need to be released from its second setting several weeks before the trial date if the higher set case has not settled by then.

[51] The group considered as well the use of a unitary docket. This concept received unanimous criticism from the judges and practitioners who considered it. Moreover, the small number of judges in each division makes it unlikely that there is the critical mass of judicial resources to make the concept workable.

[52] To reduce this problem, the group also recommends that the court establish presumptive deadlines for amending pleadings joining parties, and filing dispositive motion. *See infra*, Section II.E.

at the initial conference whenever it is reasonable to do so, the court should have the discretion, without a requirement of certification of reasons, to decline to do so, in appropriate cases.[53]

Third, this concept of early firm trial dates can work only as long as trials take approximately as long to try as the parties estimated in the initial pretrial conference. The group did not spend a great deal of time considering this issue, but it is obvious that a trial for which the court has allocated three days but which actually takes two weeks creates ripple effects of delay throughout the court's calendar. The group is aware of numerous available techniques to avoid the problem of unnecessarily long trials, such as limiting each side to a certain amount of time for evidence presentation, use of narrative statements for experts, use of summaries of evidence for the jury, and greater use of stipulations.[54] Hopefully, early mandatory disclosure will help the court make a more realistic assessment of the time needed for trial and thus deflect the need to use these techniques. Nonetheless, the group appreciates that early disclosure is only a partial solution. Ultimately the problem is one of individual trial management which the court will need to address. Because the group did not investigate the matter closely, it makes no specific recommendations to the court. Nonetheless, the group observes that management of the court's calendar should not be focused solely on the problem of moving cases along, but it must

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[53] This inability to set a firm trial date at the outset is a particular problem in certain complex cases. The group believes that such cases should be exceedingly rare, and their existence does not justify rejection of the firm trial date concept for the far more numerous mine-run cases. In any event, these cases should undoubtedly be closely monitored in subsequent pretrial conferences, and a firm trial date should be set as soon as feasible.

[54] *See generally* MANUAL FOR COMPLEX LITIGATION SECOND §§ 22.2-.3 (1985). The Seventh Circuit has approved the imposition of time limits on the presentation of each party's case in the context of a complicated products liability suit, but has expressed reservations of the technique's routine practice. *Flaminio v. American Honda Motor Co.*, 733 F.2d 463 (7th Cir 1984).

also consider the problems, cost, and expense encountered by attorneys, parties, and witnesses in conforming to the court's calendar.

D. Alternate Methods of Dispute Resolution

RECOMMENDATION: ADR methods such as early neutral evaluation and magistrate-led mediation should be expanded. Summary jury trial should be used sparingly.

At present, civil cases in this district are more likely to go to trial than civil cases in the rest of the country, and judges in the district spend more time trying cases than judges elsewhere. The median time between filing and disposition of cases is slow for a district with as few cases as the Northern District of Indiana. In addition, only the Fort Wayne Division, which has the most current docket in the district, has developed a formal program for mediation and early neutral evaluation of cases; the remainder of the district relies on already burdened district and magistrate judges to hold settlement conferences. Taken together, these facts suggest that the court may not be as aggressive in pursuing alternate methods of dispute resolution as it should be.

The use of ADR methods presents a difficult balance. If costs of litigation are to be reduced and the docket cleared more quickly, ADR methods will need to be encouraged and expanded on a district-wide basis. At the same time, alternate methods of dispute resolution should not be used to deny parties a legitimate day in court. In order to assist the court in

developing a comprehensive and beneficial ADR program, the group therefore investigated some of the problems and pitfalls of ADR methods and considered potential solutions to the issue.

There appear to be four primary objections to ADR methods. The first concerns the futility of using early neutral evaluation at a point when the parties are still unfamiliar with the case. Obviously parties are ill-equipped to settle a dispute when basic information remains unknown. The group believes that early mandatory disclosure will reduce the informational problems. Moreover, mandatory disclosure will also provide the court with more information at the initial pretrial conference, with the hopeful result that the court can better assess whether a particular ADR method will be beneficial in a given case. Equally as important, the information will help the court decide *when* ADR will be useful, *how much* discovery will be needed in order to talk settlement, and *what* case management techniques will bring the parties to the table with the least amount of extraneous cost and delay.

Second, although the expense to the court of early neutral evaluation is minimal because volunteer attorneys conduct the sessions, the program's overall cost is not minimal. Even an enthusiastic reviewer of the early neutral evaluation program in the Northern District of California believes that the program's success depends on the training given the evaluators, the quality of the presentations made to the evaluators, and the detail with which the evaluators explain their decisions. D. Levine, *Northern District of California Adopts Early Neutral Evaluation to Expedite Dispute Resolution*, 72 JUDICATURE 235 (Dec.-Jan., 1989); D. Levine, *Early Neutral Evaluation: A Follow-Up Report*, 70 JUDICATURE 236 (Dec.-Jan. 1987). The need to attend the mediation or evaluation session also poses some additional expense to litigants. On the whole, however, evaluation and mediation programs appear to be considerably less expensive

than minitrials and summary jury trials; therefore, evaluation and mediation should be the primary techniques considered by the court.

Next, ADR methods can simply delay cases unlikely to settle; one example noted by the group was prisoner civil rights litigation, which, for institutional reasons, is rarely settled by the state.[55] Again, the information disclosed by early mandatory disclosure should help the court to time the use of ADR to ensure that no untoward delays occur. In any event, other than assistance in negotiation, the court should be reluctant to submit a case for neutral evaluation or mediation just before a trial date, since the ADR process might simply delay preparation for trial.

Finally, some members of the bar have suggested that summary jury trial is not a useful ADR device. Apparently the district's experience with summary jury trial is quite limited, but the group generally endorses this view. The difficulty with summary jury trial is that it can be effective only after the discovery of all relevant evidence. Thus, it does not reduce the expense or the delay of the discovery process, which is the key issue in most cases, and it may lengthen the time before trial. In addition, experienced practitioners can often assess the strengths and weaknesses of a case without an advisory jury; an equally effective method of breaking any impasse in negotiation would be mediation by court personnel. Therefore, unless a case involves discrete evidence or testimony about whose jury impact the parties legitimately disagree, summary jury trial appears to be of limited utility.

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[55] The group notes that settlement conferences in prisoner cases are held only at the request of the attorney general's office, a result which seems a wise conservation of judicial resources.

Overall, the group believes that the court should develop devices which attempt to have the parties resolve their difference before the expenditure of significant resources on discovery. Early neutral evaluation is an excellent mechanism when both parties have the incentive to settle. When they do not, however, the offices of the court must intervene. Ideally, court intervention should occur before the end of the discovery process, at least in those cases in which the parties do not appear to need complete discovery on all issues to discuss settlement intelligently. Thus, for those cases which seem likely to settle, the court should consider the following strategy: identify at the initial pretrial conference the parties' sticking points, order that the parties direct their initial discovery to those points, and then set a settlement conference well in advance of the close of discovery. If the parties are still unwilling to settle at that time, sufficient opportunity exists for the completion of remaining discovery.

This "mini-bifurcation" concept obviously commits the court to as many as three pretrial conferences, a result which requires additional resources. The group thus believes that either magistrate judges or settlement masters will be needed to carry out these additional functions. Moreover, the concept will work only if the court, through early mandated discovery, can identify the cases in which discovery on discrete issues is likely to result in early settlement.[56]

A final issue regarding ADR methods remains. With respect to the conduct of settlement conferences, the group believes that the presence, or at least telephonic availability, of a person with full authority to bind the party is crucial. The Seventh Circuit has held that the trial courts

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[56] The members of the group held divided opinions on the utility of numerous settlement conferences. While there was some sentiment that at least two conferences should be held in each case, Magistrate Pierce believed that the first conference would usually be a meaningless exercise if the parties were aware that another conference would be held. The members of the group who commented on the point agreed that a final settlement conference should be held slightly before trial, and could perhaps be run in conjunction with the final pretrial conference.

have such authority. *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc). Absent persons with settlement authority, a settlement conference cannot achieve its purpose at the time scheduled. The court should consider requiring personal attendance rather than telephonic availability, so that the responsible person may have the full benefit of discussions at the settlement conference. Presence of the parties' representatives also may foster full preparation by counsel.[57]

E. Uniform Pretrial Orders

RECOMMENDATIONS: The court must establish a simple and uniform Order Controlling Trial. In the initial pretrial order, the court should establish firm dates for the filing of amendments to pleading joinder of parties, completion of discovery, and the filing of dispositive motions.

The group's investigation into the pretrial practices of the judges on the court revealed that the judges or magistrate judges use different forms for their final pretrial order and Order Controlling Trial. Some of the orders are lengthy, requiring litigants to incur significant expense in their preparation, while others are relatively short. After lengthy discussion on the point, the group strongly recommends that the court adopt a uniform final pretrial order which roughly corresponds to this simple yet informative model order attached to N.D. Ind. Rule 21; additional burdensome requirements of Orders Controlling Trial should be eliminated. In the group's view,

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[57] The group does not intend to suggest that this recommendation affects litigation involving the federal government, whose settlement authority structure would make it difficult if not impossible for the appropriate official to attend every settlement conference. *See* 28 U.S.C. § 473(c) (exempting the Attorney General from compliance with any settlement authority provision of an expense and delay reduction plan). The United States should be expected, however, to communicate with appropriate officials in order to determine the maximum amount of a settlement which would be recommended to the official with settlement authority.

the purpose of a final pretrial order should be to establish realistic and firm deadlines for the accomplishment of certain tasks remaining before trial, to identify witnesses and documents to be used at trial, to explain the basic factual, legal and jurisdictions disputes, and to advise the court and jury of matters to which the parties have stipulated. Some of the Orders Controlling Trial used by the court add complications which do not further these purposes. Members of the bar who frequently practice before more than one member of the court find that the differences among orders add unnecessary complications and cost to their practice. Moreover, the more onerous orders add significant expense to the trial of all suits, but especially to small-scale litigation; one estimate was that cost of complying with some Orders Controlling Trial might be $1,000 or more per case. In the group's view, there is simply no reason that a relatively small district should have widely varying orders.

The group does not wish to prescribe the precise order which the court should use. Such an effort would be presumptuous, both because of the court's prerogative to design the order initially and because of the interest of many members of the bar who should also be consulted about any changes. It does, however, suggest that the model order attached to Local Rule 21 and the less burdensome Orders Controlling Trial should serve as the starting point, and any changes from those orders should be for reasons satisfactory both to the members of the court and the members of bar.

The same need for uniformity also exists in the initial pretrial order. The group has discovered that some judges and magistrate judges require written submissions in advance of the initial pretrial conference, others require them in cases exempt from pretrial conferences, and others do not require them at all. As a general matter, the group is not certain that the

advantages to the litigants is sufficient to justify the costs of written submissions. Should the court adopt a system of early mandatory disclosure, however, there may be sufficient information available for the court to request written submissions on at least some issues such as the remaining discovery contemplated, the time needed to complete that discovery, and the advantages of issue bifurcation. The need for these submissions might be critical in cases exempt from the initial pretrial conference.

The court should also generate a uniform pretrial order which either comes out of the initial pretrial conference or out of the written submissions in cases exempt from the conference. The order's function should simply be to record the dates established at the conference for the completion of discovery and other deadlines. Late amendments, new parties, and last-minute discovery or tardy motions are leading causes of continuances of a trial date. As the group has already recommended, however, firm trial dates are absolutely essential to the reduction of cost and delay in the district. Therefore, in order to protect an early firm trial date, the initial pretrial order should set firm deadlines for any amendments to pleadings; joinder of additional parties; completion of discovery; naming of expert witnesses; filing of discovery motions; and filing of dispositive motions.[58]

Obviously, these deadlines must be set with sufficient time to ensure that discovery can be completed on amended complaints or newly joined parties before the discovery cutoff, and that motions can be filed sufficiently in advance of trial that the court can rule on the motion well before the trial date. The group recommends that deadlines for dispositive motions not be

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[58] The group notes the Local Rules Advisory Committee has proposed adding a section to the local rule governing pretrial conferences, which provides: "Deadlines established at the pretrial conference shall not be altered except by agreement of the parties and the court, for good cause shown." *See* proposed N.D.Ind. LR 16.1(j). If stringently interpreted, this provision should ensure that the deadlines remain firm.

set until after the expiration of the time for amendments, and further recommends that all discovery motions be brought within a period of time (say, 15 days) of the opposing party's allegedly objectionable conduct.

The group also recommends that the attorneys for the parties be given the initial opportunity to establish the deadlines for these matters. At the same time, the court might wish to develop some presumptive dates for the handling of simple, standard, and complex cases. These guidelines would help the court ensure that the dates selected by the attorneys are not so distant that they will impinge on a speedy resolution of the case.

F. Prompt Rulings on Motions

RECOMMENDATION: The court should adopt an internal presumption that all motions will be ruled on within thirty days of the close of the briefing schedule.

The group has also noted the expense and delay which results from the court's failure to rule on motions promptly. Just as the parties must adhere to more rigorous deadlines in order to increase the efficiency and fairness of the docket, so must the court itself adhere to time limits when it rules on motions presented to it. Of course, the demands upon the court are enormous, and not all motions are of equal complexity. Moreover, any hard-and-fast local rule which required rulings within a certain number of days would vault efficiency over the far more significant goal of justice.

Accordingly, while judges should not be limited as to the number of days or weeks within which a motion may be under advisement, the judges should make every effort to rule on such

motions as soon as possible, preferably within thirty days of submission.[59] Should the court determine that it cannot rule on a case-dispositive or case-determinative motion within several weeks, the group also urges that the court consider the entry of an order suspending proceedings until the motion has been resolved. In making its decision, the court should balance the delay if the motion is denied against the savings to the parties if the motion is granted. Under no circumstances should a judge permit a case to go to trial by jury when dispositive motions remain under advisement.

Attorneys, too, should consider the impact their motions and responses have, not only on the progress of their own cases, but also upon other cases from which judicial attention may be averted. Therefore, attorneys should give careful consideration to the presumptive page limit on briefs established by the district rules and recognize that longer briefs may produce greater delays in ruling.

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[59] The Brookings Institution Report recommended a different approach:

> To alleviate this situation, the task force recommends that standard periods be developed and implemented for the disposition of motions. These periods would be designed to allow the parties to meet the trial dates and discovery deadlines.
>
> The task force also recommends that each plan include a method of redressing the court's failure to decide pending motions. For example, a procedure might be developed whereby judges are obliged to report to counsel at a status conference, or otherwise, concerning such delays. We also believe that each district planning group should consider mechanisms by which the chief judge can better monitor the periods within which motions are decided.

JUSTICE FOR ALL 22 (1989).

G. Other Case Management Techniques

RECOMMENDATIONS: Except to the extent already discussed, the group does not recommend differential case management. The court should consider the use of bifurcation in appropriate cases. It should also require the attendance at every pretrial conference of a person with authority to bind a party.

One of the techniques mentioned by the Civil Justice Reform Act is differential case management, which places cases of various complexity along different discovery and trial tracks. Numerous courts have recently experimented with the concept, with varying success.[60] As the foregoing discussion indicates, the group believes that some form of differential case management is advisable; simple cases should be given shorter discovery periods and earlier trial dates than complex cases. The group does not endorse the view that a more formal case differentiation system is presently necessary. Rather, assuming a properly functioning mandatory system of disclosure and no change in the types or numbers of cases filed in the district, the court and the parties should be able to assess the individual needs of a case early in the litigation, and should not need to engage in the arbitrary compartmentalization of cases and the use of inflexible deadlines to accomplish the task of case management.[61] Indeed, such

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[60] *See* Bakke & Solomon, *Case Differentiation: An Approach to Individualized Case Management*, 73 JUDICATURE 17 (June-July, 1989); Ohio Common Pleas Superintendence Rule 8.01; California Rules of Court 831-1001 (West 1991) (accumulating differential case management rules in California counties).

[61] The original "Biden bill," S. 2027, § 471(b), guided by the report of the Brookings Institution, would have required each district court to develop a plan for "tracking" cases, that is, placing them in "tracks" that had pre-set periods in which events (such as the completion of discovery) were to occur. When a case was filed, a person in the clerk's office would have been responsible for assigning the case to one of the "tracks"; the parties would have had a right of appeal of that decision to the district judge. This process seems well designed for a high-volume urban court, *see* Somerlot, Solomon & Mahoney, *"Straightening Out Delay in Civil Litigation,"* 28 JUDGE'S' JOURNAL 11 (continued...)

a system would ignore, or at least make more difficult, the recommendations of those most familiar with the case and its likely time demands upon the time of counsel and the court.

The same logic applies to the handling of complex cases. As mentioned above, complex cases might require special consideration under the mandatory disclosure program, and might also need an exemption from the requirement that an early firm trial date be set at the outset of the litigation. They certainly will require more extensive and aggressive judicial involvement than a typical case. Therefore, the group believes that management decisions in these intractable and unique cases are poorly suited to the pronouncement of broad rules and principles. They are better left to the discretion of the judge and attorneys involved in each case.

Another case management technique, which has already been alluded to, is bifurcation of issues. *See* FED. R. CIV. P. 42(b). As the group has repeatedly noted, a key to reduction of cost and delay is to focus the case on the issues which are likely to resolve a dispute. Obviously bifurcation of issues for discovery and trial focuses the parties on a crucial and potentially dispositive issue which might be a short-cut through a great deal of unnecessary discovery on peripheral issues.[62] While useful in these situations, routine bifurcation of all cases will probably slow cases down rather than speed them up, and may also have an impact

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[61](...continued)
(Fall, 1989); Baake & Solomon, *supra* n. 60, but poorly suited to a court with sufficient time to address each case and its needs and constraints individually.

[62] For instance, the United States Attorney has urged greater use of bifurcation when the government possesses a strong jurisdictional argument. Other courts have used "reverse bifurcation" to try a dispositive but logically subsidiary issue (like causation or damages) on which there is the greatest disagreement or which is particularly weak for one side. *See, e.g., In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); Mullinex, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475 (1991).

on the substantive outcome of a case.[63] Thus, the device should be used sparingly, only when the strength of one side on a dispositive issue seems obvious or the parties are likely to resolve the case once the bifurcation is resolved.

The Civil Justice Reform Act specifically requests that the group also consider three additional case management techniques: joint signing of pretrial statements, a requirement that each party be represented at each pretrial conference by a person with authority to bind the party, and party signature on requests for extension.[64] A requirement that counsel submit a joint discovery or case management plan early in the litigation may reduce expense and delay in some cases. In other cases, however, such a requirement would cause unnecessary expenditure of attorney time, causing unjustifiable expense. Such a requirement would be inappropriate in a simple, two-party case in which three or four depositions, a few interrogatories, and a modest document production are contemplated. Attorneys' schedules might accommodate such discovery processes easily, yet prevent identification of available days at the litigation's outset. "Cadillac-style procedures are not needed to process bicycle-size lawsuits . . ." Rosenberg, *The Federal Civil Rules After Half a Century*, 36 Me. L. Rev. 243, 247 (1984). Accordingly, the court should pause before adopting such a requirement for all civil cases.

The court should, however, consider requiring such a joint plan in an appropriate case, once the case is identified. The appropriate case may be identified by the attorneys themselves, or by reference to the amount of time anticipated for discovery, or at the initial pretrial

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[63] *See* Bordens and Horowitz, *Mass tort civil litigation: the impact of procedural change on jury decisions*, 73 JUDICATURE 22 (June-July 1989).

[64] 28 U.S.C. §§ 473(b)(1)-(3).

conference. In such cases, the court should consider directing the attorneys to agree upon, and submit, a reasonably firm schedule for the accomplishment of various discovery procedures, such as the depositions of parties and other witnesses, submission of interrogatories and requests for production, identification of experts, and exchange of expert's reports.

With regard to the attendance of representatives who can bind the party, the court should require that each pretrial conference be attended either in person or, if necessary, by telephone, by an individual with authority to bind the client with respect to matters that the court has identified for discussion. If the initial pretrial conference is to be used to determine such matters as jurisdiction, venue, the time reasonably required to accomplish discovery, whether alternative dispute resolutions programs are to be utilized, whether a jury demand will be made or challenged, whether consent to trial by a magistrate exists, and whether settlement is possible or likely, absence of one with authority to bind a party on such issues inevitably causes delay.[65]

Third, parties' signatures should not be required in addition to the signatures of attorneys on motions for extensions of deadlines or trial continuances. Such a requirement would increase expense in several categories of cases. The party may be located a considerable distance from moving counsel, a common situation in diversity cases. In personal injury cases, a party's concurrence may be less pertinent than that of the party's insurer. A party may be unavailable

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[65] As the Brookings Institution Report explained its similar recommendation:

> Based on its collective litigation experience, the task force believes that cases are more likely to be settled when the clients themselves are present, in person or by telephone, during any court-sponsored settlement conference. The presence of the client makes it impossible for the attorneys to delay settlement discussions, often for weeks or months, with the time-honored excuse, "Let me get back to you after I've discussed this with my client."

JUSTICE FOR ALL, at 25-26 (1989). 28 U.S.C. § 473(c), might preclude implementation of this recommendation with respect to the United States.

at the scheduled close of discovery, a date frequently not marked by an event that otherwise would require the party's presence. Therefore, although rare cases may arise in which a judge may conclude it is reasonable to require the parties' concurrences in motions that will delay final resolution, the court typically should view the attorney's signature as sufficient and rely on counsel to answer to the client.

Finally, the group recommends that the court routinely conduct preliminary pretrial and discovery conferences by telephone. Unless an unusual circumstance requires personal attendance by the attorneys, personal attendance adds unnecessary cost to a case with little discernible benefit to the parties.[66]

H. Changes in the Local Rules

RECOMMENDATIONS: The Local Rules' requirements of filing findings of fact and conclusions of law in motions for summary judgment, and the requirement of filing motions for simple initial extensions should be abolished.

The group has found that Local Rule 11's requirement that findings of fact and conclusions of law be filed on motions for summary judgment is both costly to litigants and limited in utility to the court. Consequently, the group recommends that the requirement be

[66] The group notes that Judge Lee has ordered attendance of parties at initial conferences in order to impress upon the parties the costs and uncertainties of litigation. The group does not wish to discourage this practice. Among judges who do not require client attendance, however, personal appearances of attorneys are less valuable.

deleted. The group understands that the district's Local Rules Committee has accepted the recommendation, and is in the process of revising the rule.[67]

Likewise, the group finds an unnecessary waste of litigant and court resources when parties agree to short initial extensions on the filing of pleadings or discovery requests. The Local Rules Committee is also drafting a rule which will give parties the power to agree to initial thirty-day extensions without court order. The group notes, however, that this rule should not apply to early mandatory disclosure if it results in the pretrial conference being scheduled in advance of disclosure and review of documents.

Finally, the group noted some dissatisfaction with the paperwork required when an oversized brief (more than 25 pages) is to be filed. The Local Rules Committee is again developing a proposal to extend the page limitation (to 35 pages) and to make it more difficult to obtain leave to file oversized briefs. Together, these matters should reduce that paperwork problem as well.

I. Substance-Specific Changes

Until now, the group's recommendations have focused on procedural changes which might reduce costs and delay. The group has discovered that prime causes of cost and delay in the district are prisoner civil rights litigation and Social Security appeals. In this section, the group makes recommendations specifically geared to these areas.

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[67] The revision of the rule will also allow parties, at their option, to include the statement of material facts or statement of genuine issues in the body of the brief, thus reducing the number of documents for filing even further.

1. Social Security Appeals

RECOMMENDATION: The process for appeal of Social Security cases should be streamlined.

The United States Attorney has sensibly suggested that the process of appeal for Social Security cases be streamlined. As an appeal from an agency finding, the case is ready for briefing and decision as soon as the administrative record is filed, but it may be several months before the mater is actually briefed by way of summary judgment. The United States Attorney has provided a copy of a standing order of the Central District of Illinois in which the plaintiff is required to file a memorandum of law within 30 days of the filing of the record, and the United States has 45 days to respond.

The concept of the rule seems well-founded. The group questions the apparent inability of the plaintiff to file a reply brief (a right ordinarily available with other motions).[68] It also believes that the rule should make clear that other pleadings, such as a formal motion for summary judgment and the filings associated with it, need not be filed; instead, the matter should be treated as a true appeal in which only briefs need to be filed. With those modifications, the group recommends that the Local Rules Committee develop a rule to encompass Social Security appeals.

[68] The United States Attorney believes that the reply brief slows down the resolution and rarely adds significant new information or argument.

2. *Prisoner Civil Rights Litigation*

RECOMMENDATIONS: The court should not exempt prisoner civil rights cases from the initial pretrial conference requirement. The court should also investigate whether its screening process for *in forma pauperis* is allowing too many meritless cases to be filed, and should actively manage *pro se* cases on the docket.

With regard to prisoner civil rights litigation, the group believes that two changes should be considered. First, contrary to present N.D. Ind. L.R. 21(b)(10), the court should not exempt *pro se* prisoner cases from the requirements of an initial pretrial conference. Since many of these cases involve ambiguous pleadings which ultimately turn out to be meritless, the court must be aggressive in defining issues and stripping away frivolous claims at the outset of the litigation. Obviously, the needs of security might require that the conference be held by telephone, but the group does not believe that a court order requiring the submission of papers about the nature of the lawsuit is effective enough in eliminating meritless issues. Early mandatory disclosure should be an especially useful technique for the court in these cases; the court should also consider the creation of a fast-track briefing schedule on legal or other issues subject to summary judgment.

Another matter which contributes to the number of prisoner civil rights cases is the granting of *in forma pauperis* petitions. The desirability of allowing pauper cases is unquestioned. Nonetheless, pauper cases, especially those filed *pro se*, often lack merit. One way in which to reduce the delay caused by these groundless cases is obviously to prevent their filing in the first instance.

The group has discovered that the Southern District of Indiana has routinely granted a much lower percentage of pauper petitions than this district. The group is also aware that the court is presently investigating whether the difference is due to the types of cases filed or the guidelines used in each district. The group requests that it be informed of the outcome of the court's investigation, so that it might formulate subsequent recommendations if necessary.

On a related point, the group does not have any information on whether the court might be aided by more personnel or other resources for pauper screening. The group urges the court to consider this matter in the development of its final plan..

3. Federal Debt Collection Procedures Act

The Federal Debt Collection Procedures Act, 28 U.S.C. § 3001 *et seq.*, now provides for greater potential for hearings and court proceedings on federal debt collection actions. Many of the procedures require expedited hearings. The court should consider, to the full extent allowable under 28 U.S.C. § 636, blanket reference of these matters to the magistrate judges.

4. Bankruptcy Appeals

The United States Attorney states that most bankruptcy appeals involve case-dispositive matters. He recommends that an informal deadline of six months be established for decision on these appeals, and that a priority for any additional magistrate resources obtained in the district should be the resolution of these appeals. The group supports the first recommendation, but

notes the danger of adding another level of appeal should a magistrate be routinely assigned to bankruptcy matters.

III

RECOMMENDATIONS REQUIRING OUTSIDE ASSISTANCE

In the final section of the recommendations, the group examines two "intractable" problems which require changes that cannot be unilaterally made in the district. The principal recommendation, on which many of the group's prior recommendations have been premised, is that the court immediately secure budgetary authority for two additional magistrate judges and two additional law clerks in the district. Second, the group recommends that its views on changes of substantive and jurisdictional law, such as increases in jurisdictional amount to keep pace with inflation, be communicated to Congress through the appropriate channels.

A. Additional Court Resources

A review of the conclusions and recommendations of the advisory group demonstrates that it will be nearly impossible to implement any of the significant case-specific reforms previously suggested in this report with the court's present resources. The district and magistrate judges of this court are already working at full capacity. The likelihood of more criminal filings in future years, the leveling off of civil filings, and the increased complexity of the civil docket all suggest that the demands on the court will not decline. It is easy to suggest that the court must hold meaningful pretrial conferences after review of material developed in the early mandatory disclosure; it is easy to tell the court to rule on motions, including Social

Security appeals, within thirty days of the close of the briefing schedule; it is easy to recommend that the court become more aggressive in exploring case-specific alternate means of dispute resolution; and it is easy to say that trial dates must be early and firm, and that the court cannot employ a trailing calendar. It is very hard, however, to find other places where the court can cut its workload in order to make room for these innovations.

The simple reality is that the court cannot shirk its other obligations. Therefore, the group has concluded that, if the reforms suggested by the group are to be meaningful, the court must obtain additional judicial resources.

Additional resources do not necessarily mean the creation of an additional position for an Article III judge. At a practical level, the Civil Justice Reform Act in essence gave the district an additional judge when it converted a temporary appointment to a permanent one. Given the nature of the district's caseload, it is also unlikely that Congress will allot another judge to the Northern District of Indiana in the near future.

At another level, the district does not really need an additional Article III judge. The types of cases which present peculiar problems to the court -- Social Security cases in the Hammond Division and prisoner civil rights cases in the South Bend Division -- do not necessarily require the attention of another Article III judge. Similarly, the review of early mandatory disclosure with an eye toward the application of case management and alternate dispute resolution techniques and the handling of initial pretrial conferences are not matters for which an Article III judge is absolutely essential. Rather, these are duties ideally suited to a magistrate judge.

At present, however, the three magistrate judges in the district are as busy as the district judges. Not only do they perform the other functions required of them by the district judges, but, by national standards, they are also responsible for an enormously high percentage of fully consented cases. Therefore, if the court is to implement this group's recommendations, it must obtain funding for additional magistrate judges.

The experience of the Fort Wayne Division presents a powerful argument for the greater use of magistrate judges. This division of the court is the only one which presently enjoys an equal number of district and magistrate judges. The statistics in the division are impressive. It is by far the most current division of the court, exceeding by 10% the national average of the number of cases resolved within the first two years and having only half the average number of cases more than three years old. Judge Lee and Magistrate Coseby are able to hold pretrial conferences within three weeks of the defendant's appearance, immediately obtain an early feel for cases which require special management or which might benefit from early neutral evaluation, and facilitate the start of the discovery process. Judge Lee relates that, in most cases, he can set a trial date within ten or eleven months of the conference, a period which is significantly less than the district's average. The group detected no substantial complaints from the Fort Wayne bar about the speed or quality of justice received. Although the experience in the Fort Wayne Division cannot entirely be explained by the 1:1 ratio of judge to magistrate judge, the group has concluded that this ratio plays a significant enough role that it should serve as the model for the rest of the district.

Indeed, the available empirical evidence suggests that magistrate judges are especially useful in pretrial matters and in resolving the type of small-scale litigation which would be the

main diet of new magistrate judges in this district.[69] The evidence also strongly suggests that the relationship of the magistrate judges to the district judges should be well-defined, that the duties and expectations of the position should be clearly spelled out, and that the magistrate judges should be committed to the tasks assigned them. In particular, the magistrate judges should never view their job as simply to clear as many cases off the calendar as possible. The group does not desire speedier but more inexact justice; it wishes to speed up the docket while still maintaining the level of individual attention which the court presently gives to cases.

Hence, the group does not envision that the new magistrate judges will simply perform the wide range of tasks presently assigned to the magistrate judges. Instead, the court should clearly establish the priorities for any new magistrate judges; for instance, the top priority might be to have more pretrial management and supervision of the mandatory disclosure process, or it might be to mediate cases, or it might be to provide the court with reports and recommendations on dispositive motions in Social Security and bankruptcy appeals and prisoner cases. Whatever the priorities, the court must confine the new magistrate judges to these tasks, and consequently must seek to find persons with a particular commitment to their accomplishment.

Because of this functional use of magistrates, the group recommends that the court obtain budgetary authority for two more magistrates. Although the group recognizes the court's pre-

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[69] For generally favorable reports on the role of magistrate judges in pretrial proceedings and in certain types of litigation such as Social Security appeals and prisoner cases, see Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 366 (1976); C. SERON, THE ROLE OF MAGISTRATES: NINE CASE STUDIES (1985); and C. SERON, THE ROLE OF MAGISTRATES IN FEDERAL DISTRICT COURTS (1983). For less favorable reports of the use of magistrate judges, see C. SMITH, UNITED STATES MAGISTRATES IN THE FEDERAL COURT (1990) (questioning whether routine assignment of Social Security and prisoner cases leads to cynicism); *Report on Magistrates by the Committee on the Federal Courts of the New York County Lawyers' Association*, 136 F.R.D. 193 (1991) (recommending use of magistrates as general pretrial officers, but discouraging their use in other matters like sanctions motions and attorney fee requests).

eminent role in establishing its priorities, our review of the state of the docket suggests to us that one magistrate will be necessary to accomplish the pretrial, dispute resolution, and case management functions we recommend, and another should be used to handle either Social Security, bankruptcy, or prisoner matters which clog the docket.

Aside from new magistrate judges, additional funding for new law clerks may be necessary. For instance, career law clerks might be assigned to do the initial examination of Social Security and bankruptcy appeals. These appeals would then typically be transferred by the chief judge to the district or magistrate judge for whom the law clerk works, in much the same manner as Chief Judge Sharp is now starting to transfer Social Security appeals to Senior Judge Grant. Indeed, the use of law clerks in this fashion may assist the court in establishing the priorities for the additional magistrate judges it should seek; the magistrate would work in areas other than the areas to which the law clerk was assigned.

On a final matter of resources, the group has discovered that the Clerk's office may need additional funding. Budgetary measures put into place by the Administrative Office will not let the Clerk's office replace personnel as they leave until the size of the office is reduced to 29 persons. At present, there are 32 employees in the office, and the Clerk was unable to replace a 33rd employee who recently left the office. The functions of the Clerk's office in the timely docketing of filings, mailing of orders, and development of statistical analyses are critical to the efficient operation of the court. Reductions of staff in the Clerk's office will foster further delay in litigation. Consequently, the group urges the court to take steps to ensure that the Clerk has the resources available to replace departing employees and also to return the office to its full complement of 33 employees.

B. Legislative Matters

Finally, the group turns to the relationship between legislation and the problem of civil cost and delay. The group recommends that the court make known to the Judicial Conference and to other interested persons its views on the following legislative issues:

1. *Criminal Cases.* Criminal cases, of course, compete with civil cases for courtroom time and preclude the setting of any truly "firm" trial date on a district judge's calendar at the time of the initial pretrial conference. It cannot be predicted, months in advance, whether the grand jury will present the judge with cases that will need to be tried during the same time as civil trials are set. Because the Speedy Trial Act commands that criminal cases be tried within seventy days, the apprehension of a criminal defendant may jeopardize even trials set ninety days in advance. A multiple defendant, multiple count criminal case may threaten several civil trial settings. Finally, criminal cases, with quite limited discovery, are even more susceptible to unnecessarily prolonged trials than are civil cases.

With the advent of the Sentencing Guidelines, sentencing proceedings may interrupt ongoing civil trials. Judges have too little information and too little experience under the Guidelines to know whether a guideline sentencing hearing will take thirty minutes or two hours. A lengthy sentencing hearing may be costly to waiting witnesses and are costly to litigants, whose attorneys must stand ready to resume trial upon completion of the criminal proceeding. A civil trial that could be completed in two full days may spill over to a third day as a result.

The group should not be understood to oppose the Speedy Trial Act or the use of the sentencing guidelines. But from the perspective of the civil case, the priority on courtroom time

demanded by criminal cases is a serious problem. Congress must be made aware that the problem of civil delay is in large measure actually a problem of increasing criminal activity and increasing criminal prosecutions, issues over which no court or legislature has significant control in the short term. Civil delay is another hidden, and indirect, cost of crime.

2. *Assessment of Impact of New Legislation.*[70] A single district court has little influence upon congressional enactment of legislation, and the group does not recommend that this court seek to exert such influence on a regular basis. Instead, the group recommends that Congress consider the Federal Courts Study Committee's recommendation that an Office of Judicial Impact Assessment be created in the judicial branch to advise Congress on the effect of proposed legislation on the judicial branch. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 89, 160 (1990).[71]

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[70] 28 U.S.C. § 472(c) provides in part:

> (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 --
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> * * *
>
> (D) examine the extent to which costs and delays could be reduced by 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 circumstances of the district court, litigants in such court, and the litigants' attorneys.

[71] The Report's full recommendations are as follows: "An Office of Judicial Impact Assessment should be created in the judicial branch to advise Congress on, inter alia, the effect of proposed legislation on the judicial branch and legislative drafting matters likely to lead to unnecessary litigation" (p. 89), and, "The Office of Judicial Impact Assessment should analyze the resource implications of proposed legislation." (p. 160).

A recent matter called to the attention of the group provides an excellent example of the need for such an assessment. Sen. D'Amato (R-N.Y.) has apparently proposed legislation which would make any crime committed with a gun a federal offense. The effect of this legislation, if enacted and vigorously enforced, on the timely resolution of civil cases would be catastrophic.

CONCLUSION

For all of the foregoing reasons, the Advisory Group concludes that the district's caseload, composition, geography and demography justify the development and adoption of a civil justice expense and delay reduction plan tailored specifically to the Northern District of Indiana, rather than the adoption of some model plan still in development.

In an effort to develop a comprehensive and cogent set of recommendations, the group has not presented its recommendations in the precise order listed in Civil Justice Reform Act.[72] But the group believes that this report complies with 28 U.S.C. §473. As required by 28 U.S.C. §473(a), this report addresses the desirability of differential case management (parts II-E, II-G); early and ongoing control by a judicial officer (parts I-B-1, II-C, II-E), including the setting of early, firm trial dates (part II-C) and the topic of certifying reasons for failure to set a trial within eighteen months of filing (part II-C); the propriety of a series of case management conferences in complex cases (part II-G), together with the advisability of staged discovery and/or resolution of issues (parts II-B, II-D, II-G); the issue of establishing time frameworks for ruling on motions (parts I-B-3, I-D, II-F); methods of cost-effective discovery, whether voluntary or mandatory (part II-B); prohibition of discovery motions unless the parties have attempted informal resolution (part I-B-1); and the appropriate use of alternate dispute resolution mechanisms (parts I-B-1, I-D, II-D).

As required by 28 U.S.C. §473(b), the report addresses the group's views on mandatory attorney submission of joint discovery-case management plans (part II-G); presence of attorneys

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[72] *See supra* note 4.

authorized to bind the party (part II-G); the propriety of requiring parties' signatures on all motions for continuance or extension of deadlines (part II-G); the use of court-sponsored early neutral evaluation programs (parts I-B-1, II-D); and the propriety of requiring, in settlement conferences, the presence or availability of persons with settlement authority (part II-D).

Consistent with 28 U.S.C. §473(b)(6), the report also addresses various other topics, such as agreed extensions of time to respond to a complaint or a discovery request (parts I-B-1, II-H); district rules concerning the filing of summary judgment motions and page limits on briefs (parts I-B-2, I-D, II-H); the handling of social security appeals (parts I-B-3 and II-I-1), *pro se* prisoner litigation (part II-I-2), case under the Federal Debt Collection Act (part II-I-3), and bankruptcy appeals (part II-I-4); the judges' various orders concerning the conduct of, and preparation for, trial (parts I-B-4, I-D, II-E); calendaring of cases for trial (parts I-B-4, II-C); the adequacy of existing resources (parts I-D and III-A); and group's preference for the use of telephone conferencing (part II-G).

The Advisory Group wishes to thank the court, and particularly Judge William Lee, Judge Robert Miller, and Magistrate Judge Robin Pierce, for the time and effort which have been spent in responding to our requests for information and in providing input on our earlier drafts of this report. Judge Miller's preliminary draft discussing the state of the court and identifying the relevant issues for the group's consideration was an invaluable source of ideas and information. Should the court wish, the group would be pleased to assist in the development of the court's plan for the reduction of cost and delay in civil cases. The group would also be willing to meet with the court to explain its findings and conclusions in greater detail.